

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. The first sentence of paragraph 3(c) of Canada’s Schedule states that Canada ‘shall allocate its TRQs each quota year to eligible applicants’. This prohibits Canada from allocating quota to entities that *do not* meet its eligibility requirements. In doing so, it prevents importers who have no involvement in the relevant industry from obtaining quota as a rent seeking exercise.¹
2. During the course of the hearing, Canada suggested that the use of the term ‘allocate’ in paragraph 3(c) means that it is *required* to administer its TRQs under an allocation mechanism.
3. The use of the term ‘allocate’ in paragraph 3(c) does not require Canada to use an allocation mechanism to allocate its TRQ quota. ‘Allocate’ means ‘to make a distribution or apportionment of (something) among several recipients, responsible parties, etc’.² It is simply a reference to the process of distributing TRQ quota, it does not impose any requirements on *how* that process has to be carried out.
4. Canada can choose to administer its CPTPP TRQs on a first-come first-served basis, or under an allocation mechanism. Both are systems used to ‘allocate’ quota.³ Under a first-come first-served system, quota is allocated to importers automatically at the border (provided there is quota remaining).⁴ Under an allocation mechanism, quota is allocated through a mechanism designed by the importing Party.⁵
5. This is supported by Article 2.30, which uses the heading ‘allocation’ to describe rules applying to *both* first-come first-served systems and allocation mechanisms. While Article 2.30(1) only applies to TRQs that are administered under an allocation mechanism,⁶ Articles 2.30(2), 2.30(3) and 2.30(4) set out allocation rules that apply irrespective of whether a TRQ is administered first-come first-served or under an allocation mechanism. This is clear from the absence of a chapeau (like that in Article 2.30(1)) limiting the application of these rules to TRQs administered under an allocation mechanism. It is also clear from the rules themselves. It wouldn’t make

¹ See discussion of paragraph 3(c) of Canada’s Schedule at para 95 of New Zealand’s Rebuttal Submission.

² Definition of ‘allocate’, Oxford English Dictionary Online, entry 2.a(a).

³ Opening Statement of New Zealand, at paras 204-206; Reply Statement of New Zealand, from para 58; and paras 132-133.

⁴ Canada accepted that first come, first served is a form of quota allocation in its First Written Submission, where it defined ‘TRQ quantities’ in Article 2.29(1) (which applies to both TRQs administered under an allocation mechanism and on a first-come, first-served basis) as the ‘specified amount *allocated* to individual importers’: First Written Submission of Canada, at para 91 (emphasis added). See also paras 92, 95 and 97.

⁵ Footnote 18 to Article 2.30 defines an allocation mechanism as ‘any system where access to the TRQ is granted on a basis other than first-come first-served.’

⁶ This is clear from its chapeau, which states: ‘In the event that access under a TRQ is subject to an allocation mechanism, each importing Party shall ensure that: ...’

sense, for example, for Article 2.30(2) (which provides a formula for calculating how much of a TRQ must be made available for allocation in the year CPTPP comes into force) to apply to TRQs administered under an allocation mechanism and not those administered on a first-come first-served basis.⁷ The description of all of these rules under the heading ‘allocation’ confirms that ‘allocation’ occurs under *both* first-come first-served systems and allocation mechanisms.

6. This is further supported by the express reference to ‘a quota allocation’ in Article 2.30(3). Article 2.30(3) states that ‘a Party ... shall not require the re-export of a good as a condition for application for, or utilisation of, a quota *allocation*’. Again, this obligation must apply to TRQs administered under an allocation mechanism *and* on a first-come first-served basis. It would not make sense to prohibit Parties from imposing re-export requirements on allocations granted under an allocation mechanism, but permit Parties to impose them on allocations granted on a first-come first-served basis. The express reference to ‘a quota allocation’ here makes it clear that ‘allocation’ occurs under *both* first-come first-served systems and allocation mechanisms.
7. It follows that the obligation in Canada’s Schedule to ‘*allocate* its TRQs each quota year to eligible applicants’ does not mean that it is required to administer its TRQs under an allocation mechanism within the meaning of footnote 18 to Article 2.30.

Question for New Zealand:

1. The Panel is seeking to understand whether New Zealand is making any claims under Article 2.30(1)(c) that are independent of its claims regarding the pooling system. Is New Zealand aware of any specific instances in which quota was granted to potential importers in amounts that were less than requested by the importers? Is New Zealand aware of any specific instances in which quota was allocated to potential importers in amounts less than the maximum possible?

8. New Zealand’s claims under Article 2.30(1)(c) are ‘as such’ claims. They are based on the design and operation of Canada’s quota pooling system.
9. Article 2.30(1)(c) obliges Canada to grant allocations, to the maximum extent possible, in the amounts that importers request. This is not about granting importers the maximum amount of quota possible, but granting allocations in the amount *that importers have requested*.
10. Article 2.30(1)(c) is trade facilitative. It recognises that more trade will occur if importers can obtain quota in amounts that fit their needs. Indeed, granting allocations in amounts that exceed what importers request can only contribute to underfill. If applicants receive more quota than they are prepared to use, that quota will not be utilised.

⁷ Indeed, this would create a bizarre (and inefficient) incentive for Parties to administer all their TRQs under an allocation mechanism for the first year, even if that meant they then had to revert to first-come first-served for later quota years.

11. In the course of the hearing, Canada disclosed that it:⁸
 - a. Does not 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.*
12. 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.⁹
13. Canada has acknowledged it does not provide importers with an opportunity to request the amount of quota that they want. This means that no allocations are made in the amounts that importers have requested.
14. Instead, some applicants - particularly those in the large processor pool - will receive more quota than they want and are prepared to use (resulting in underfill), while other applicants will have their allocations reduced, despite wanting and being able to use more quota.¹⁰

⁸ Prior to this, New Zealand's understanding had been that quota was only divided on a market share and equal share basis in the event that a pool was oversubscribed (see New Zealand's First Written Submission, at para 36). Canada's TRQ administration is highly opaque, and obtaining information about how it operates in practice is extremely challenging or not possible.

⁹ During the course of the hearing, in response to a question from the Panel, Canada confirmed that allocations are granted in amounts based on equal share or market share, irrespective of how much applicants have asked for: Hearing Transcript, June 14, Public Session, page 131, lines 11-15.

¹⁰ New Zealand's Opening Statement, at paras. 230-236.