

DECISION AND REASONS FOR DECISION

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)

CASE NO. AB0034

Between

SIN KAM KWAI (洗錦貴)

Appellant

And

THE INTER-DEPARTMENTAL WORKING GROUP

Respondent

Dates of Hearing: 26 April 2017

Date of Further submissions by IWG: 17 May 2017

Date of Further Submissions by the Appellant: 7 June 2017

Date of Decision and Reasons for Decision: 9 July 2018

DECISION AND REASONS FOR DECISION

1. This is an appeal by the Appellant Mr. Sin Kam-Kwai of Case No. AB0034 against the decision of the Inter-departmental Working Group (“**IWG**”) dated 21 December 2012 to issue to him the amount of HK\$799,652 in respect of the ex-gratia allowance (“**EGA**”) provided by the government (“**the Appeal**”).
2. The IWG had classified the Appellant’s inshore shrimp trawler (licence no. CM69768Y) (“**the Vessel**”) as a special case, being a vessel that was highly dependent on Hong Kong waters, but had lower productivity than inshore shrimp trawlers of similar type and length, because it had used only two trawling nets.

3. The Fishermen Claims Appeal Board (**“the Board”**) allows the appeal, and now gives its decision and reasons for it.

Pertinent facts and the IWG’s decision

4. On 13 October 2010 (**“the Cut-off Date”**), the Chief Executive announced that the Government would implement a basket of management measures including banning trawling in Hong Kong waters (**“the Trawl Ban”**) through legislation in order to restore our seabed and marine resources as early as possible. The Trawl Ban took effect on 31 December 2012.
5. In light of the Trawl Ban, an assistance package was approved by the Legislative Council Finance Committee in June 2011. This was a *“One-off assistance package to trawler vessel owners, local deckhands and fish collector owners affected by the trawl ban and other related measures”*. This led to the setting-up of the IWG which was responsible for handling all matters relating to applications received under the assistance scheme. The Appellant was one of such applicants.
6. In assessing EGA applications, the IWG would assess the type of the subject vessel and consider whether it fell into the category of a larger trawler or inshore trawler. If it were the former, a lump sum EGA of HK\$150,000 would be paid to the applicant. If it were the latter, the IWG would further assess and categorize the subject vessel into specific tiers in terms of its dependence on Hong Kong waters and other special cases. This means that subject to the category of the subject vessel and the applicable apportionment criteria, an applicant could be eligible to apportion a total amount of the HK\$1,190 million of EGA with other eligible inshore trawler owners.
7. According to the IWG’s records, the Vessel had 1 engine and measured 17.20 metres in length, with propulsion engine power coming up to 80.57 kilowatts, whereas the fuel tank capacity was 4.12 cubic metres.

8. On 19 December 2011, being the day the Appellant applied for EGA (“**the EGA Application Date**”), an on-site vessel inspection was carried out. This revealed that the Vessel had 2 sets of shrimp trawl nets that could be used for operation, and 8 sets on standby. The Appellant asserted that the Vessel was operated by only two persons, and accordingly he trawled on the Vessel within the vicinity of the Victoria Harbour by operating with 2 nets.
9. On 18 July 2012, the Appellant was interviewed by the IWG (“**the Interview**”) and clarified the following points:
 - (1) as of the EGA Application Date, the Appellant did not employ anybody via the Mainland Fishermen Deckhand Scheme (“**the Deckhand Scheme**”) in respect of the Vessel;
 - (2) from 13 October 2009 till the EGA Application Date, the full-time employees on the Vessel consisted of 2 locals, including the Appellant (as coxswain) and his wife Ng Yung-gum. Their salary was indeterminate.
 - (3) from 13 October 2009 till the EGA Application Date, the Appellant had not employed anybody directly from Mainland China for the purposes of operations on the Vessel;
 - (4) the Appellant averred that from 13 October 2009 till the EGA Application Date, the Vessel would generally start to operate between midnight to 1am, until around 6 to 7am. The locations trawled included North of Green Island, Sai Wan, Tsing Yi South and Chai Wan.
 - (5) only two nets were needed, and although outriggers existed on the vessel, they were not used. During operations, one net would be lowered by each person on each side of the stern of the Vessel when sailing, and the nets would be raised 7-8 times each night. This would be done by the efforts of two people after which the Vessel would be stopped to haul the catch in, and the motor would be restarted after the nets were cast again.

10. On 9 October 2012, the IWG carried out another inspection of the Vessel and requested the Appellant and his wife to do a demonstration (“**the Demonstration**”). The Demonstration was carried out in the waters at the North of Green Island. It lasted for about 25 minutes and nets were cast only once. The following are notable in relation to the Demonstration:

(1) the setup and equipment onboard the Vessel were the same as when the Vessel was first inspected on the EGA Application Date.

(2) as observed, the Appellant and his wife were able to carry out operations with the available equipment in a well-practiced manner. The resultant catch consisted of 3 catties of shrimp (of which 70% - 80% were live), 1.6 catties of crabs and mantis shrimp, 3 catties of cuttlefish (of which 70% were live) and approximately 5 catties of fish (of which 60% or about 3 catties had market value). The Appellant estimated that the catch had a value of HK\$500; however, the IWG disputes this and says the value of the catch should roughly be HK\$300.

(3) the Appellant also said that the Vessel’s catch would be sold at his own fish stall in Tai Kok Tsui Market.

(4) according to the Appellant, the Vessel would operate in the vicinity of Yau Ma Tei, Stonecutters Island and North of Green Island, for around 20-28 days per month. During each operation, they would cast the nets 9-10 times.

(5) according to the Appellant, the reason why the Vessel was able to safely operate in the Victoria Harbour is because:

(a) the operations of the Vessel were carried on at night when marine traffic was relatively uncongested;

(b) the Appellant only used two nets which meant that the Vessel could maneuver around narrow environments; and

(c) during operations, casting and raising the nets could be done rapidly, with the nets trawled for only 20-30 minutes per casting.

11. On 1 November 2012, the IWG made the preliminary decision that the Vessel fell into the category of an eligible inshore trawler that operated within Hong Kong waters, and informed the Appellant that they would notify him of their final decision later.
12. On 21 December 2012, the Appellant was informed by the IWG that all relevant materials and evidence had been considered and that their assessment of his application was completed. Accepting that the Appellant was an eligible inshore trawler owner who was liable to be affected by the Trawl Ban, the IWG made the following decision:

Type of Vessel:	Shrimp trawler
Length of Vessel (in metres):	17.20
Category of dependency on Hong Kong waters:	Highly dependent on Hong Kong waters, but had lower productivity than inshore shrimp trawlers of similar type and length, because it had used only two trawling nets.
Amount of EGA payable:	\$799,652.00

13. By the same letter, the IWG also informed the Appellant that 30% of the EGA payable to eligible inshore trawler owners had been reserved and would be apportioned among all eligible inshore trawlers according to the decisions of the Board and the principles of apportionment after the Board had determined all appeals.

The basis for IWG's decision

14. In their written submissions to the Board, the IWG explained how their

decision as to the amount of EGA payable to the Appellant was determined. In particular, they had taken into account the materials that were available to them, including information about the Vessel's type, length, material and design, statistical data from the Agriculture, Fisheries and Conservation Department ("**the AFCD**") concerning homeport and inshore sightings of the Vessel, the employment profile of the crew, the lack of Mainland fishing permits held by the Appellant, and also the explanations/evidence submitted by the Appellant. As such, they reached the determination that the Vessel was an eligible inshore trawler (not that there is any dispute over this).

15. As regards the Vessel's use of two shrimp nets, the IWG stated that although they were persuaded that the Vessel did spend relatively longer periods of time operating in Hong Kong, and should thereby be classified as an eligible inshore shrimp trawler, they considered the fact that the Vessel's use of 2 nets was considerably less than the 10 nets used by shrimp vessels of comparable length. As such, the Vessel was classified as a special case, for it had lower productivity relative to vessels of the same type and length.

Grounds of Appeal

16. Subsequently, the Appellant sought to appeal the IWG's decision, and by letter dated 28 December 2012, stated that the Demonstration was requested by the IWG without it having been made clear that that was relevant to the amount of EGA that would be awarded. In the circumstances, the Demonstration was done with 2 shrimp nets, simply to show that the Vessel operated normally. The Appellant averred that the Vessel was in fact able to operate with 12 nets during its daily operations, and that the Trawl Ban had devastating impact on vessels like his that only operated in Hong Kong waters.
17. On 20 January 2013, the Appellant wrote again to the FCAB to supplement what he had said in his letter dated 28 December 2012. Apart from repeating the contents of that letter, the Appellant also stated that his catch included a

great variety of seafood.

18. By the time the Notice of Appeal dated 11 February 2014 (“**the Appeal Notice**”) was issued, the Appellant came to be legally represented. The Appeal Notice contained the following matters:

(1) The Appellant applied for EGA on the basis that the Vessel was an inshore trawler. Although the IWG also believed that the Vessel was an inshore trawler that was liable to be affected by the Trawl Ban, he was only awarded with HK\$799,652 on the ground that the Vessel’s productivity was lower than trawlers of the same type and similar length. The IWG’s decision failed to reflect the reality which led him to decide to appeal.

(2) The Appellant expressed discontent at the sum of EGA awarded, for the reason that such sum was far below the amount required to compensate the loss caused to him by the Trawl Ban, and he was willing to provide further details through written/oral representations if so allowed.

(3) The IWG’s categorization of the Vessel as being one with lower productivity than that of vessels of the same type and similar length did not reflect the reality. This could be due to miscommunication during the inspection of the Vessel or when the EGA application form was filled in, which the Appellant was not aware of until he received notification by the IWG of their decision.

19. The IWG submitted its written submissions on 20 July 2016 (“**the IWG’s Submission**”), with the following specific responses to the Appellant’s grounds of appeal:

(1) As regards the Appellant’s claim that there had been miscommunication between himself and the officer carrying out inspection of the Vessel, the IWG averred that the information given by EGA applicants during the interview process would be written down and repeated to the applicants

at least once, and the applicants could ask to vary, add or delete any information. After an applicant had confirmed the accuracy of the information recorded, such record would be signed by the applicant, the recording officer and another staff of the AFCD as witness. This procedure was ostensibly followed in the completion of the Appellant's application form at the time of the EGA Application Date.

- (2) Concerning the Appellant's averment that he was willing to provide further details by way of written/oral representations, the IWG had not received such information and reserved its rights to respond to any such material provided by the Appellant.
- (3) According to the information obtained during inspection of the Vessel on the EGA Application Date, the Interview, as well as the Demonstration, it was understood that the Vessel only used 2 nets in its day-to-day operations, for the following reasons:
 - (a) During inspection of the Vessel on the EGA Application Date, the Appellant claimed that the Vessel only used two shrimp nets when trawling shrimp;
 - (b) At the Demonstration, the Appellant explained that the reason why the Vessel could safely operate within the vicinity of the Victoria Harbour was because he only used two shrimp nets to enable the Vessel to maneuver in narrow spaces;
 - (c) During inspection of the Vessel on the EGA Application Date, it was discovered that the Vessel had 2 shrimp nets in operation and 8 on standby, which were less than the number found on usual shrimp trawlers (i.e. versus 10 nets in operation and 20 on standby for usual shrimp trawlers);
 - (d) At the Demonstration and during the Interview, the Appellant represented that the Vessel was only operated by two persons, so that if the Vessel did trawl with 12 shrimp nets, there was possibly insufficient manpower to rapidly deal with the casting and raising of the nets, as well as sorting of the catch;

(e) At the Interview, the Applicant represented that outriggers were not used. This supports the view that the Vessel would not normally use more than 2 nets at a time; and

(f) Besides, the Appellant had never adduced any evidence to explain how 12 nets could be utilized in the Vessel's day-to-day operations.

20. Subsequently, the Appellant submitted a statutory declaration dated 7 October 2016 to the Board. Amongst other things, the Appellant explained that at the time of the first inspection of the Vessel on the EGA Application Date, this took place at the Aberdeen Typhoon Shelter and as such he was unable to demonstrate how the 12 shrimp nets could be used. He had no idea that the officer wished to know about the way the Vessel generally operated, and the officer also failed to explain about what he wanted to know. So when he was asked the number of nets he used at the time, he intuitively answered 2. Then, at the time of the Interview, it was during the season where he would use 2 shrimp nets and therefore he naturally answered he used 2 shrimp nets. Because he had literacy issues, he was unable to detect any problems with what was read to him about the recorded information. At the time of the Demonstration, the question asked of him was how many nets he used "at this time", and his answer that he used 2 shrimp nets, at Green Island, duly reflected his operations at the time.

21. Also, the Appellant explained how it was nonsensical to equate the use of less nets to lower productivity, because the use of the shrimp nets much depended on the environment and changes in the season and weather, which made it impossible to draw direct comparisons. Also, because adjustments could be made to the casting time, and few shrimp trawlers would operate near the Yau Ma Tei Typhoon Shelter so the catch there tended to be more due to less competition, the use of lesser nets did not necessarily mean he caught less. Depending on many factors such as distance from the market at any given time, and the incentive of selling live catch at a higher price, he needed to be flexible with his fishing operations.

22. In response to the Appellant's submissions, the IWG filed supplementary submissions on 9 January 2017. Therein, the IWG made references to certain photographic evidence of the Vessel that were taken during the homeport surveys, the inspection on the EGA Application Date, and at the Demonstration, and observed that the Vessel's setup lacked certain necessary installations to allow outriggers to be used, and also that their use would be hampered by the presence of bumper tyres and ropes on the Vessel.
23. Moreover, the point was made about how the Vessel's catch during the Demonstration was described by the Appellant himself to be particularly fruitful, and estimated by him to be HK\$500, which is more than the IWG's own estimate of HK\$300. The IWG stated that it was not reasonable to estimate the annual income of the Vessel from operations based on the value of a one-time catch from the Demonstration. It was also noted by the IWG that according to the Appellant's own representation, there would be times when the catch from the 2 shrimp nets was insufficient to stock his fish stall, and the Appellant had to therefore obtain extra stocks elsewhere for sale. As such, it was believed that the Vessel's income only constituted part of the Appellant's income, and so the Appellant's contentions need to be considered in context.
24. In his second statutory declaration dated 22 March 2017, the Appellant amongst other things responded to the IWG's doubts as to whether the Vessel's fit-out allowed 12 nets to be used, and also rejected the IWG's estimate that his catch during the Demonstration was worth \$500 only. In a nutshell, the Appellant argued that the Vessel was not the type of shrimp trawler that had to rely on the use of outriggers on a daily basis and the setup on the Vessel could be easily manipulated and changed if necessary. It was ludicrous for the IWG to rely on photos of the Vessel when it was not in operation to assume that that was the setup it maintained when trawling, and unfair for the IWG to criticize the setup of the Vessel when he had never been asked to do a demonstration with 12 nets.

25. Moreover, the Appellant also disputed that the value of the catch on the day of the Demonstration amounted to only HK\$500. The question posed to his wife on the day was only whether the catch could amount to HK\$500, which was not confirmed in particular by his wife, and who did in any case explain that shrimp could fetch HK\$110 per catty. According to the Appellant, he would normally sell his catch at his own stall and not through middlemen, and argued that the price he could sell was of course higher than what the middlemen would pay him. Using receipts obtained from fellow fishermen, the Appellant argued that it was unacceptable for the IWG to base their valuation on the price of dead/small catch, and to ignore the value of portions of the catch. All in all, it was the Appellant's contention that the catch on the day of the Demonstration was worth HK\$1,062, and the catch from the Demonstration was normal for that season and not a rather good one. He denied that he had ever said the catch from the Demonstration was rather good; he only explained to the IWG officer that there would be good catches of shrimp in that fishing ground during that season. . The Appellant also claimed that his comments about having to buy fish stocks elsewhere were taken out of context because the occasions when that happened before the Trawl Ban were in fact negligible.

26. In the written submissions dated 12 October 2016 submitted to the Board for the purposes of the Appeal, it was argued by Counsel on behalf of the Appellant that:

(1) The only issue in the Appeal is that of quantum.

(2) The IWG's reasoning was that whilst other vessels of same type, size and reliance on Hong Kong waters ("**the Other Vessels**") used 10 nets on average to fish, the Appellant had used 2 shrimp nets. On the basis of this reason alone, the IWG reduced the productivity of the Vessel by the ratio of 2:10 and accordingly, also the EGA payable to the Appellant by the same ratio.

- (3) The Appellant appeals against the basis of this reduction on the grounds that he disputes that only 2 nets are used in (his)fishing operations, also that it is unreasonable and unfair for the IWG to have adopted the fundamentally flawed assumption that the ratio of the number of nets used by the Vessel can be applied to reduce the Vessel's productivity as well as the EGA.
- (4) The Appellant argues that the IWG classified the productivity of his operations solely on the number of nets used, and assumed, without any evidential basis, that productivity increased/decreased at a fixed rate in accordance with the number of nets used. However, there is no evidence whatsoever, in any of the documents relied on by the IWG, to justify this assumption.
- (5) The IWG has assumed for the purposes of productivity that all vessel owners operate in an identical manner. It fails to take into account the Appellant's mode of operation, and how it may differ from (that of) another vessel in terms of the days used on fishing per month, the time used per outing, the price which can be obtained by selling live shrimp yields at a higher price, and that trawling in closer waters can enhance the amount of live shrimp caught.
- (6) That the EGA awarded to the Appellant is 5 times less than the other Vessels can be worked out by way of comparing the sharing percentage of 0.004823753 that was applied to the Other Vessels (as explained in A152, §28 of Attachment 4 to the IWG's Submissions) to the sharing percentage of 0.000964751 ostensibly used for the Vessel, and by making reference to the IWG's Submissions at §112 and Table 5.3, Page A40 of the said Attachment 4.
- (7) The IWG' direct translation of the number of nets used to productivity assumes a linear and direct relationship between the number of nets used and productivity, i.e. productivity increases/decreases at a fixed rate in accordance with the number of nets used. This is not only unscientific and

unrealistic, but also lacks evidential basis, if not overly simplistic. This is contrasted by the relationship between the length of a vessel vs net income which has been shown to actually decrease upon a vessel reaching a particular length (i.e. 25m for shrimp trawlers).

(8) The assumption gives rise to an absurd result that the Vessel yields an Annual Net Income of only HK\$12,182.29 (HK\$1,105.19 per month) (actually the correct figure based on an Annual Net Income of HK\$12,182.29 should be HK\$1,015.19 so note the mistake in the figure stated in the written submission of the Appellant's Counsel), being the only source of income for the Appellant, and his family. Taking it at its highest, a monthly income of HK\$1,106 would not be able to sustain the living expenses of the Appellant and his wife.

(9) The 2 reports made by the officers who inspected the Vessels showed that they were unfamiliar with the economic effects of the number of nets used. Although there was initially doubt as to whether the 2-net operation of the Vessel was economically viable, the Demonstration served to dispel these doubts and to change the mind of the officer observing the inspection, who eventually conceded that "*the harvest from the tow indicated it may be economically viable to operate two nets in the fishing areas of the applicant claimed*". The stance presently taken by the IWG contradicts this finding.

(10) The Appellant actually used 2-12 nets, depending on the location and the season. The productivity of the Vessel cannot be determined on the basis of 2 nets alone.

(11) The factual dispute as to the number of nets appears to stem from a miscommunication with the officer in charge of the inspection, who amongst other things never asked the Appellant as to his mode of operation year round. This led the Appellant to believe that the officer was enquiring about the number of nets used for that particular instance or time period. The Appellant also takes issue with the number of nets stated by the said officer onboard the Vessel and refers to what can be discerned

from the photographs.

(12) Besides, the data/evidence shows that the yield from the Vessel, using 2 shrimp nets, is not any lower than the yield from the Other Vessels. By reasons of the higher frequency and difference in the duration of the casts, the yield could be adjusted. Accordingly, the Vessel cannot be classified as having lower productivity at all.

Matters argued before the Board at the hearing

27. Counsel for the Appellant referred to the arguments made in the written submissions dated 12 October 2016, with further emphasis. A set of calculations (“**the Calculation Tables**”) was also adduced based on the existing information, using an average net income formula derived from the value of catch x 10 casts per day x days worked per month x 12 months per year x 0.1584 Net Yield Ratio. This was used to work out varying annual net income scenarios where the value of the catch using 2 nets was assumed to be \$100, \$150, \$200 and \$300, and the number of working days being 5, 11, 12, 16, 18, 20 and 24 days per month.
28. According to the Appellant’s Counsel, by using the Net Yield Ratio, the costs of operation (i.e. of fuel, repair, ice purchase, salaries...etc.) have already been taken into account. The value of the Appellant’s catch is more than \$500, but for the sake of argument the Appellant can accept its worth as being \$300, because the calculations show that even on such basis, he would be earning the same as his peers. Whilst the figures adopted are favourable to the IWG, the calculations still favour the Appellant’s case.
29. It was submitted on behalf of the Appellant that, so long as the Appellant can demonstrate that his income was not lower than his peers, then the classification that the Vessel was of lower productivity cannot stand. In this regard, the evidence of his peers’ earnings can be found at Table P-4 at page

A138 of the said Attachment 4, and it is the Appellant's contention that even if the value of his catch were assumed to be \$200, and he worked only 16 days a month, his income per year would come to around \$60,825.6, which would be approximately the same as the annual income of his peers. If the IWG is right and the Appellant earned only 1/5 of his peers, he would earn only \$12,000 which is a wholly unrealistic amount. Moreover, based on the same assumption but if the Appellant worked 18 days a month, his income per year would come to around \$68,428.80, which would already be more than the annual income of his peers

30. The Appellant was called as a witness and gave evidence that on average, he would trawl 20-28 days per month, using 2 shrimp nets per outing which were cast 10-12 times on each occasion. He earned \$30,000 to \$40,000 per month (net), and owned a property in Tai Po which was purchased by him and his wife.
31. The Appellant was cross-examined by Dr. So of IWG on matters pertaining to his fish stall, which he says was in Tai Kok Tsui Market and rented from the government. He used to sell what he had caught and was able to close the stall and take rest by around noontime. Nowadays he was fully reliant on his fish stall and although he earned a bit more than before the Trawl Ban, he had to work longer hours. He did not employ anyone to mind his stall when he was fishing.
32. At the hearing, the IWG also relied on their written submissions. Amongst other things, it was submitted that the Appellant did not say what the volume of his catch was, and urged the Board to consider that the Appellant did not solely rely on fishing for his income. Noting that the Appellant did not in fact appear to dispute that he did use only 2 shrimp nets to fish, it was submitted that the IWG would go no further into the issue.
33. That said, and although it was accepted that the number of nets and productivity was not in a linear relationship, the IWG submitted that there

was still a definite relationship and reserved their right to address the contents of the Calculation Tables. That apart, the IWG also submitted that the assumption that the Appellant's average catch per cast amounted to \$300, and that the only variables were the number of days worked, was not realistic either, because one needed also to consider whether the repeated casting of nets was viable in terms of energy and manpower.

34. Dr. So of the IWG also gave evidence and was cross-examined. In gist, he accepted that the Appellant and his wife probably used a rather special *modus operandi* for fishing, in that they knew exactly where to fish and how to make a living. Using just 2 nets however, was uncommon for shrimp trawlers of this size, which led to the need to call for further inspection and the Demonstration. Having seen how smoothly the Vessel operated however, it was considered that the Vessel was an eligible inshore trawler but there were still doubts as to whether it could indeed use 12 nets for fishing. In the circumstances, the Vessel was classified as having lower productivity, although it was accepted by the IWG that there might be room for improvement as regards what ought to be the annual net income value of the Vessel and asked for 28 days to make further submissions.
35. On being cross-examined, Dr. So expressed the view that using two nets was not difficult and more common amongst vessels that were smaller in size compared to the Vessel, although it was denied that the Vessel was small for its size. He accepted that there were not a lot of areas that was suitable for shrimp trawling operations, and that the IWG did not have actual evidence regarding the relationship between the number of nets and productivity. He also accepted that the IWG had no evidence as to how much fish the Appellant did purchase elsewhere for sale at his stall, and was not an expert in fish marketing so he could not comment on whether purchasing fish to sell or selling one's own catch would make for better business.
36. When questioned by the Board, amongst other things Dr. So expressed the view that it would be overly time- and energy-consuming for just two persons

to fish with 2 nets, and believed it to be unsustainable. As regards the value of the Appellant's catch, Dr. So admitted that attempts were made by the IWG to find receipts to support the acquisition price for the varieties of seafood caught, but was not successful in finding good comparables, and also found a rather large discrepancy between collectors for certain types of seafood like prawns and crabs. Nevertheless, he made the point that price comparisons should not be made on the basis of the value the Appellant could sell for, but rather the value that the catch could be sold to fish collectors, to avoid inflating the actual value.

Further submissions by the parties

37. In light of the IWG's request that they be allowed to submit further on what would be a more appropriate formula that would better reflect the Vessel's lower productivity, permission was granted by the Board to allow the IWG to deliver written submissions pertaining to the calculation of the annual net income of the Vessel within 21 days, on the basis of materials that had already been placed before the Board, and for the Appellant to deliver written submissions in reply within 21 days thereafter.
38. Although the IWG duly filed its supplementary submissions, no new formula was put forward. Instead, it was argued that because a) the Demonstration was only meant to prove whether the Appellant's *modus operandi* was indeed feasible and not to estimate the value of the Vessel's catch; b) the value of yield derived from Table P-4 on page A138 of the said Attachment 4 was concerned with vessels who were partly or entirely reliant on Hong Kong waters; and c) the Vessel's catch during the Demonstration was made under conditions that could not be compared with the yield value of shrimp trawlers 17-18m long in Table P-4, it was argued that the Appellant's calculations could not establish that the Vessel ought not to be classified as having lower productivity.

39. In response, the Appellant argued that his reliance on the data in Table P-4 to make comparative calculations was wholly reasonable, because:

(1) The figure of \$60,911.44 from Table P-4 summarizes the net income derived from Hong Kong waters by shrimp trawlers 17-18m long;

(2) IWG itself accepts that the Appellant is classified as mainly reliant on Hong Kong waters;

(3) The situation may be different if the Appellant's reliance on Hong Kong waters were classified differently, but this is not the present case;

(4) The figure of \$60,911.44 is further used as a fundamental premise in the IWG's calculations of the sharing percentage for shrimp trawlers 17-18m long.

The Board's Decision

40. The Board wishes to point out at the outset that the formulae/assumption used by the IWG (i.e. the productivity of the Vessel should be reduced by the ratio of 2:10 as the Vessel used 2 nets whilst the comparables used 10 nets) is fundamentally flawed. There is no evidential basis for the IWG to conclude that the productivity increased/decreased at a fixed rate in accordance with the number of nets used. There are other variables (such as working hours, mode of operation and the like) which affect the productivity.

41. On the basis of the materials before us, the Board considers that on a balance of probabilities, it is more probable than not that by using only 2 nets in the manner described, the Appellant was able to achieve a yield value that was no worse than his peers who operated shrimp trawlers of comparable size and who used in average 10 nets, i.e. in other words, the Vessel's productivity was no worse than his peers'. As such, the Appellant has succeeded in persuading

us that the IWG's decision was in error and that the amount of EGA awarded to him should not have been discounted at all. We find, in the circumstances, that he should have been awarded EGA by the sum of HK\$3,998,263.

42. The Appeal is allowed. The IWG is hereby directed to pay the sum of \$3,198,611 (i.e. the difference between the sum of EGA that should have been awarded and that actually awarded) to the Appellant forthwith.

Case No. AB0034

Date of hearing : 26 April 2017
Heard at : 9/F, Rumsey Street Multi-storey Carpark Building,
2 Rumsey Street, Sheung Wan, Hong Kong

(Signed)

Mr. YEUNG Ming-tai
Chairman

(Signed)

Mr. AU Pak-ching, Romeo, JP
Member

(Signed)

Ms. LAM Po-ling, Pearl
Member

(Signed)

Dr. TYEN Kan-hee, Anthony
Member

(Signed)

Ms. WONG Pie-yue, Cleresa
Member

Mr. Albert Chan, Counsel for the Appellant (instructed by Messrs Hoosenally & Neo)

Mr. Yim Ho-ching, Government Counsel for the Respondent

Ms. Abigail Wong, Legal Advisor of the Board