

**DECISION AND REASONS FOR DECISION**

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)  
CASE NOS. CC0113 & CC0114  
(HEARD TOGETHER)

Between

CHENG MUK SHING (鄭木勝)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

Date of Hearing: 24 February 2017

Date of Decision and Reasons for Decision: 21 April 2017

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**DECISION AND REASONS FOR DECISION**

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**JUDGMENT** (Chairman Mr. FEE Chung-ming, Johnny, Member Mr. CHAN Wai-chung, Member Ms. LAM Po-ling Pearl, Member Mr. LO Wai-kei Wilkie and Member Prof. CHU Ka-hou):-

**Introduction**

1. Case number CC0113 is an appeal by Mr. CHENG Muk-shing (鄭木勝) (“**Mr. Cheng**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 21 December 2012 (“**the CC0113 Decision**”<sup>1</sup>) determining that his fishing vessel (with Certificate of Ownership Number CM63407A) (“**the CC0113 Vessel**”) was a trawler which did not mainly rely on Hong Kong waters for its operations (非主要依賴香港水域為其拖網捕魚作業的區域) and awarding him an ex-gratia payment of \$966,675 under the one-off assistance scheme in respect of the CC0113 Vessel.
2. Case number CC0114, on the other hand, is an appeal by Mr. Cheng against the decision of the Inter-departmental Working Group (“**IWG**”) dated 21 December 2012 (“**the CC0114 Decision**”<sup>2</sup>) determining that his other fishing vessel (with Certificate of Ownership Number CM63958A) (“**the**

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<sup>1</sup> Hearing Bundle p 142 of CC0113

<sup>2</sup> Hearing Bundle p 138 of CC0114

CC0114 Vessel”) was also a trawler which did not mainly rely on Hong Kong waters for its operations (非主要依賴香港水域為其拖網捕魚作業的區域) and awarding him an ex-gratia payment of \$949,531 under the one-off assistance scheme in respect of the CC0114 Vessel.

3. The 2 appeals were heard together on 24 February 2017 for the reason that the 2 vessels in questions had, according to Mr. Cheng, at the material time before the Trawl Ban (as defined hereinbelow) been operating in tandem as “pair trawlers” (雙拖).

### **The Trawl Ban and the EGA**

4. According to Paragraph 3 of Food and Health Bureau Paper dated 29 January 2013 (“**FHB Paper**”), the Chief Executive announced in his 2010-11 Policy Address that the Government would implement a basket of fisheries 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 legislation for the Trawl Ban was passed by the Legislative Council (“**LegCo**”) in May 2011 and came into effect on 31 December 2012.
5. The Finance Committee (“**FC**”) of LegCo also approved in June 2011 a one-off assistance package to trawler owners affected by the Trawl Ban, which included making ex-gratia allowance (“**EGA**”) to affected trawler owners for permanent loss of fishing grounds arising from the Trawl Ban (“**EGA Package**”).

### **The Policy and Guiding Principle**

6. According to paragraph 7 of the FHB Paper, the policy and guiding principles underlying the EGA Package are set out in FC Paper FCR(2011-12)22 (“**FC Paper**”).
7. According to Paragraph 12 of the FC Paper, the guiding principle is that the EGA apportioned to different groups of claimants should be proportional to the impact on them caused by the Trawl Ban.
8. Owners of inshore trawlers which operated wholly or partly in Hong Kong waters were expected to be most affected when the Trawl Ban took effect as they would lose their fishing grounds in Hong Kong waters. They would

receive a greater amount of EGA than owners of larger trawlers<sup>3</sup>.

9. Owners of larger trawlers which generally did not operate in Hong Kong waters were also affected by the Trawl Ban since they would lose the option to trawl in Hong Kong waters in the future. However, as the impact of the Trawl Ban on them was far much less when compared with owners of inshore trawlers, an owner of larger trawler is only granted a lump sum EGA of HK\$150,000<sup>4</sup>.

### **The Appeal Grounds**

10. In both appeals, the Appellant contends<sup>5</sup> that:
  - (1) his dependency on Hong Kong waters for the trawling operation of both vessels amounted to 70%;
  - (2) the results of the sea surveys conducted by the Agriculture, Fisheries and Conservation Department (漁農自然護理署) should not be relied on;
  - (3) as the 2 vessels were already becoming old, he would be unable to operate them as trawlers too far from shore. With the trawl ban in place in Hong Kong, he could no longer make a living with his vessels;
  - (4) the award for pair trawlers, according to Finance Committee papers, should be between \$1.5 million and \$2 million but in his cases, he was only awarded about \$960,000 for each of his vessels.
  - (5) the awards for pair trawlers similar to his, in length and type, were millions dollars more.

### **The Appeal Hearing**

11. At the hearing, (**"the Appeal Hearing"**):
  - (1) Mr. Cheng conducted his appeals in person; he was further represented by his brother, Mr. Cheng Kam-yau (鄭金有), in the

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<sup>3</sup> Paras. 5 to 10 of FC Paper

<sup>4</sup> Paras. 9 and 10 of FC Paper

<sup>5</sup> Hearing Bundle p 4 in CC0113 and CC0114

conduct of his appeals; and

- (2) IWG conducted the appeal through their representatives, Dr. SO Chi-ming and Ms. Teresa YUEN.
12. Mr. Cheng submitted a number of documents including a letter<sup>6</sup> dated 16 January 2013 issued in the name of “鄭少華” stating that for over 10 years, he had been relying on small fishes supplied by trawlers operating in Hong Kong waters, including Mr. Cheng’s 2 vessels, and a similar letter<sup>7</sup> dated 11 January 2016 issued in the name of “鄭明”, further stating that the transactions with Mr. Cheng took place once every 2 to 3 days. He further submitted an undated statement<sup>8</sup> of “肥九海鮮” stating that Mr. Cheng has been supplying most of his catch to “肥九海鮮” since 2006 (由 2006 年至現在大部份魚(漁)獲是由本公司收購代賣).
13. No documentary evidence of fuel expense or payment for ice has been submitted.
14. Mr. Cheng included a number of arrival and departure records of his crew in his document submission.
15. Both Mr. Cheng and his brother gave oral evidence. In summary:
  - (1) They operated the pair trawlers together. Their operations were mostly at night. The sea surveys conducted by Agriculture, Fisheries and Conservation Department could have missed them because of this.
  - (2) Most of their catch was sold to “肥九海鮮”. Small fishes (魚仔) were sold as feed for cultured fish in fish cages (魚排). Almost every day or every few days, they would transact near Cheung Chau with “鄭少華” and, if there was surplus fish, with “鄭明” as well. Sometimes they also sold to mainland buyers.
  - (3) They have not kept receipts. Once they reconciled their accounting records between themselves, they threw away their receipts. They bought fuel from 1 supplier in Hong Kong. They have never tried to obtain purchase records from that supplier even though they believe that it could be done.

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<sup>6</sup> Hearing Bundle p 210 of CC0113 and p 204 of CC0114

<sup>7</sup> Hearing Bundle p 211 of CC0113 and p 205 of CC0114

<sup>8</sup> Hearing Bundle p 140 of CC0113

- (4) Their trawling operations were near Hong Kong waters and they could return to their Cheung Chau base in the morning. Usually they would only stay out at sea for a few days and return to base afterwards. They have 2 daughters and elderly family members here in Hong Kong.
- (5) On average, they stopped operations during about 3 to 4 months each year. In particular, during the fishing moratorium period (休漁期) every year, they did not operate their trawlers at all. Mr. Cheng's daughter had recently helped him download a web-page from the Internet which shows the moratorium restrictions covered mainland waters in the South China Sea as well as Hong Kong waters. He admitted that he did not know if that information was correct or not. On the other hand, he believed the mainland deckhands onboard his 2 vessels (holding entry permits under the Mainland Fishermen Deckhands Scheme) would unlikely be covered by insurance during the moratorium period even though his operations were in Hong Kong waters only. Asking them to work during the moratorium period would be troublesome (麻煩) and appear to be smuggling workers across the border (偷渡). Besides, the workers wanted to take a rest during those months. They were unwilling to work. In any case, Mr. Cheng was unwilling to take any risk, as he had been informed by his association (魚會) that most likely, insurance would not cover such workers during the moratorium months and any liability for work injuries, which could run into millions of dollars, could fall on him.

### **Decision & Reasoning**

16. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
17. Mr. Cheng has not produced any new materials or evidence to support his case of 70% dependency on Hong Kong waters. The statement and letters from “肥九海鮮”, “鄭少華” and “鄭明” mentioned above are too unspecific for any proper weight to be placed on. Most importantly, they do not tell us the degree of Mr. Cheng's dependency on Hong Kong waters for his trawling operations. We can only rely on his and his brother's oral evidence on this important aspect of his appeal. Regrettably, neither of these witnesses' oral evidence can support such a degree of dependency.
18. Mr. Cheng's evidence of completely ceasing to operate during the fishing

moratorium periods each year also did not help his case. It was not his evidence that he had known all along that Hong Kong was included in the moratorium zone. Rather, his evidence was that he had chosen not to operate during those months. His workers wanted to rest and he did not want to risk *not* being covered by insurance on the mainland during that period of time. As a matter of law, the fishing moratorium was a mainland measure and the moratorium zone did not cover Hong Kong waters. Hence, prior to the Trawl Ban, Hong Kong fishermen could legally operate their trawlers within Hong Kong waters during that period. An appellant who chose not to operate his trawlers during the moratorium period year after year would be consistent with someone whose business depended mostly on fishing in mainland waters rather than Hong Kong waters.

19. Mr. Cheng has not produced any business records such as receipts issued by his fuel supplier or ice supplier. No attempt has been made to obtain such records from his fuel supplier. We do not accept his explanation that producing fuel purchase records from the supplier at a late stage would necessarily be looked upon as suspicious. Many fuel suppliers have computer records of transactions that they can print out and certify as accurate. In the circumstances, the Board has been deprived of potentially useful and objective evidence that could shed light on how frequently he returned to Hong Kong for supplies replenishment.
20. As regards the lack of sighting of Mr. Cheng's vessels at sea, we accept IWG's explanation at the hearing that there had been in excess of 400 survey trips conducted in the relevant zones (where Mr. Cheng claimed to operate) during the relevant time of the day (during which Mr. Cheng claimed to operate) and that on none of those trips was either of his 2 vessels seen. We accept that this was one objective fact that IWG was entitled to take into account when assessing Mr. Cheng's dependency on Hong Kong waters for his trawling business.
21. In evidence were 3 sets of arrival and departure records of crew submitted by Mr. Cheng for the CC0113 vessel. These show that on 9 August 2012<sup>9</sup>, his crew entered Hong Kong from South China Sea to offload catch and replenish supplies (起卸漁獲及補給), berthing at the wholesale fish market in Aberdeen, and departed for South China Sea on the same day<sup>10</sup>. They also show his crew entered Hong Kong on 3 September 2012<sup>11</sup> and left on the same day<sup>12</sup> under similar circumstances. His crew again entered

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<sup>9</sup> Hearing Bundle pp 218-219 of CC0113

<sup>10</sup> Hearing Bundle pp 216-217 of CC0113

<sup>11</sup> Hearing Bundle pp 222-223 of CC0113

<sup>12</sup> Hearing Bundle pp 220-221 of CC0113

Hong Kong on 17 October 2012<sup>13</sup> and left on the same day<sup>14</sup> under similar circumstances. Similar records were also submitted for the CC0114 vessel<sup>15</sup>. The Board considers these records as reliable evidence to show the movements of Mr. Cheng's 2 vessels on those days. Such evidence is inconsistent with Mr. Cheng's claimed dependency on Hong Kong waters, namely, 70% dependency. It shows that his crew operated in South China Sea and only entered Hong Kong waters for less than 1 day before returning to South China Sea.

22. Having considered all the evidence, the Board has taken the view that Mr. Cheng has not been able to discharge the burden of proof to establish his case that, on a balance of probabilities, his 2 vessels had been spending about 70% of the time operating in Hong Kong waters. The burden is on the Appellant to persuade this Board to accept his case and he has failed to do so here. He has also failed to challenge IWG's reasoning as set out in the Statement Submitted by the Respondent in the hearing bundles, Parts B, C and D (乙部、丙部及丁部). In particular, he has failed to challenge IWG's conclusion that although his 2 vessels were based in Hong Kong, they operated mainly in shallow waters outside (albeit near) Hong Kong waters and only spent a small part of time operating in Hong Kong waters. IWG's above conclusion was reached after consulting a panel of fishermen experts, in addition to the consideration of survey reports and statistics analysis. The Board finds the conclusion well supported by evidence.

## **Conclusion**

23. In the circumstances, these appeals are dismissed.

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<sup>13</sup> Hearing Bundle pp 226-227 of CC0113

<sup>14</sup> Hearing Bundle pp 224-225 of CC0113

<sup>15</sup> Hearing Bundle pp 209-220 of CC0114

**Case Nos. CC0113 & CC0114**

Date of hearing : 24 February 2017  
Heard at : 9/F, Rumsey Street Multi-storey Carpark Building,  
2 Rumsey Street, Sheung Wan, Hong Kong

(signed)

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Mr. FEE Chung-ming, Johnny, JP  
Chairman

(signed)

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Mr. CHAN Wai-chung, MH  
Member

(signed)

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Ms. Lam Po-ling, Pearl  
Member

(signed)

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Mr. LO Wai-kei, Wilkie  
Member

(signed)

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Prof. CHU Ka-hou  
Member

The Appellant, CHENG Muk-shing appearing in person in CC0113 and CC0114,  
with his authorized representative, CHENG Kam-yau  
Dr. SO Chi-ming, Fisheries Officer, AFCD, representative on behalf of the IWG  
Ms. YUEN Wing-sum Teresa, Fisheries Officer, AFCD, representative on behalf of  
the IWG  
Mr. Paul LEUNG, Legal Advisor to the Board