

**DECISION AND REASONS FOR DECISION**

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)  
CASE NOS. CP0161 & CP0170  
(HEARD TOGETHER)

Between

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CHAN KAM CHIU (陳錦照)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

And between

CHAN KAM MING (陳錦明)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

\_\_\_\_\_  
Date of Hearing: 23 September 2016

Date of Decision and Reasons for Decision: 15 June 2017

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**DECISION AND REASONS FOR DECISION**  
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**JUDGMENT** (Chairman Mrs. CHEUNG Po-yee, Peggy, JP, Member Mr. KONG Tze-wing, James, MH, JP, Member Ms. HUI Ming-ming, Cindi, Member Ms. CHOW Kin-tak, Alice and Member Ms. AU Sin-lun, Catherine):-

**Introduction**

1. Case number CP0161 is an appeal by Mr. Chan Kam-chiu (陳錦照) (“**Mr. KC Chan**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 14 December 2012 (“**the CP0161 Decision**<sup>1</sup>”) determining

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<sup>1</sup> Hearing Bundle p 157 of CP0161

that Mr. KC Chan's fishing vessel (with Certificate of Ownership Number CM65551A) ("**the CP0161 Vessel**") was an eligible trawler that generally did not operate in Hong Kong waters (一艘一般不在香港水域作業的合資格拖網漁船) and awarding him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the CP0161 Vessel.

2. Case number CP0170, on the other hand, is an appeal by Mr. Chan Kam-ming (陳錦明) ("**Mr. KM Chan**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 14 December 2012 ("**the CP0170 Decision**<sup>2</sup>") determining that Mr. KM Chan's fishing vessel (with Certificate of Ownership Number CM64763A) ("**the CP0170 Vessel**") was also an eligible trawler that generally did not operate in Hong Kong waters (一艘一般不在香港水域作業的合資格拖網漁船) and awarding him an *ex gratia* payment of \$150,000 under the one-off assistance scheme in respect of the CP0170 Vessel.
3. The appeals of Mr. KC Chan and Mr. KM Chan were with the Appellants' express consent<sup>3</sup> heard together on 23 September 2016 for the reason that the 2 vessels in questions had, according to the Appellants, 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**").

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<sup>2</sup> Hearing Bundle p 134 of CP0170

<sup>3</sup> Hearing Bundle p 243 of CP0161 and Hearing Bundle p 169 of CP0170

## **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>4</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>5</sup>.

## **The Appeal Grounds**

10. In both their appeals, the Appellants contend<sup>6</sup> that:
  - (1) their dependency on Hong Kong waters for their trawling operations amounted to 40%;
  - (2) their vessels were made of wood and had been in service for 9½ years (in the case of CP0161) and for 17 years (in the case of CP0170);
  - (3) they had gradually moved towards operating in Hong Kong waters.

## **The Appeal Hearing**

11. At the hearing, (“**the Appeal Hearing**”):

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<sup>4</sup> Paras. 5 to 10 of FC Paper

<sup>5</sup> Paras. 9 and 10 of FC Paper

<sup>6</sup> Hearing Bundle p 3 of CP0161 and p 3 of CP0170

- (1) Both Appellants conducted their appeals in person; furthermore, they also authorized Mr. Yeung Yun Kwong (“**Mr. Yeung**”) to represent them at the hearing; and
  - (2) IWG conducted the appeal through their representatives, Dr. William Siu and Ms. Teresa Yuen.
12. At the start of the hearing, Mr. Yeung on behalf of the Appellants raised the following points:
- (1) IWG had no yardstick. Some owners of vessels which were longer than 30m were granted EGA of \$6,000,000 or more whereas the Appellant’s vessel was 28.4m in length only and the EGA given was just \$150,000.
  - (2) The Appellants trawled at night so it was not surprising that they were not sighted during sea surveys.
  - (3) The CP0170 Vessel had 4 mainland workers on board. This is Hong Kong: One Country Two Systems. Why should we be concerned about their certificates?
  - (4) In the past, the Appellants used to only engage their family members to work on the vessels. However, in the recent decade, they started engaging mainland workers to work for them.
13. IWG’s representatives pointed out:-
- (1) Each case for EGA was assessed based not only on the length of vessel or engine power. A whole basket of factors were considered by the IWG, including the designs of the vessels, the mode of operations adopted, the number of sightings during surveys and the type of workers on board.
  - (2) Mr. KM Chan had, on 11 October 2012, declared during an interview that his vessel had mostly moored at Lingding Island<sup>7</sup>. Only during long holidays was the vessel moored at Castle Peak Bay.
  - (3) Sea surveys were carried out during night time as well as day time. Day surveys were carried out between 9 am and 5 pm. Night surveys were between 5 pm and 8 am. During the surveys between

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<sup>7</sup> Hearing Bundle p103 of CP0170

October 2009 and November 2011, the surveys were done in 3 shifts, including an afternoon shift between 1pm and 9pm, followed by a night shift between 11 pm and 8 am.

- (4) Mr. KM Chan's case has a number of significant inconsistencies. For example, in the questionnaire<sup>8</sup> dated 20 January 2012, he declared that he mainly sold fish to mainland fish traders (大陸收魚艇). In another document<sup>9</sup>, dated 3 October 2012, he stated that most of his fish were sold to traders (運魚船代賣). Yet, in an undated handwritten document<sup>10</sup>, he stated that most of his fish were sold within Hong Kong waters, such as at Castle Peak Bay's wholesale fish market and to the wholesaler, 成興仔海鮮批發. On the other hand, he stated<sup>11</sup> also that the main location for his fish sale was Lingding Island, followed by A Chau(鴉洲) and Guishan(桂山).
- (5) The Appellants did not produce any receipts of their fish sale during the Mainland's fishing moratorium periods.
- (6) As such, the IWG had reasons to believe that the Appellants' vessels were more likely to have been operated mainly in Mainland waters.

14. The Appellants gave oral evidence on the following points:

- (1) They sourced their ice for their fish from Lingding Island.
- (2) They refueled only once every 20 or more days.
- (3) They could not tell what proportion of their catch was from Hong Kong waters and what was from outside Hong Kong waters.
- (4) They usually operated in Mainland waters during periods when there was northerly winds.
- (5) During the months of August and September, the catch was best in Hong Kong waters.
- (6) They had taken out fishing moratorium loans (休漁期貸款) offered by the Fish Marketing Organization (魚類統營處). For those loans,

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<sup>8</sup> Hearing Bundle p 51 of CP0170

<sup>9</sup> Hearing Bundle p 98 of CP0170

<sup>10</sup> Hearing Bundle p 141 of CP0170

<sup>11</sup> Hearing Bundle p 104 of CP0170

they had declared that they would not operate (不會出海作業) during the fishing moratorium periods at all.

15. In the hearing bundle<sup>12</sup>, there was a certificate or written statement apparently issued by the fish wholesaler, 成興仔海鮮批發. It certifies that from 2009 to 2012, each time the CP0170 Vessel had caught fish, the fish would be sold to the wholesaler. All the fish caught in Hong Kong waters were sold to the wholesaler. A contact phone number of its representative, Miss Lam, was given. The Board on its own initiative made a phone call to the representative of 成興仔海鮮批發 during the course of the hearing, in the presence of all parties concerned and with their express consent. The purpose for the call was to ascertain the source of the Appellants' fish. During the call, the representative admitted that the Appellants had told her where their trawling had taken place. In other words, she did not have first hand knowledge of where the Appellants trawled. She further said that the Appellants sold fish almost on a daily basis to 成興仔海鮮批發. The wholesaler then sold their fish in Aberdeen.
16. In closing submissions, IWG's representatives pointed out that it was Mr. KM Chan who volunteered<sup>13</sup> the information about his vessel mainly mooring in Lingding Island. They put forward the submission that Miss Lam was not a reliable witness as she did not have direct, first-hand knowledge about the Appellants' mode of operations. They further pointed out that if the Appellants mainly operated in the vicinity of Lingding Island, why were their fish catches not sold to the wholesaler at locations near Lingding Island? It would seem odd for the Appellants to sail in and out of Hong Kong waters everyday or every other day to sell their catch to the wholesaler in Hong Kong waters.
17. Mr. KM Chan in closing submissions referred to page 50 of the bundle in his case and remarked that it was impossible for him to operate 210 days in a year.
18. Mr. Yeung gave his final remarks on behalf of the Appellants. He conceded that it was not possible to tell how much time the Appellants actually spent in Hong Kong waters.
19. During the course of the hearing, the Appellants were asked whether they could produce documentary evidence such as ice receipts or fuel receipts in support of their appeals. They indicated that they would need time to look for those documents. The Board allowed them 1 month to do so and gave

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<sup>12</sup> Hearing Bundle p 167 of CP0170

<sup>13</sup> Hearing Bundle p 103 of CP0170

directions accordingly (including directions for IWG to make any submissions within 28 days after the Appellants' submission of documents). On 19 October 2016, the Appellants provided some fuel receipts. Mr. KC Chan further provided a statement issued by the Fish Marketing Organization at Castle Peak Wholesale Fish Market dated 27 September 2016 in respect of fish sales of Mr. KC Chan between 2010 and 2015.

### **Decision & Reasoning**

20. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
21. The Appellants admitted directly, as well as through their representative, Mr. Yeung, that it was not possible to tell how much time they actually spent trawling in Hong Kong waters and how much time outside Hong Kong waters. They could not tell what proportion of their catch was from within Hong Kong. The burden of proof is on the Appellants to establish their case of dependency on Hong Kong waters to the extent of 40%. This admission clearly does not help them discharge their burden.
22. The Appellants' vessels had their base in Lingding Island. Not only were they moored there most of the time, the sale of their catch was also mostly conducted there or in that vicinity<sup>14</sup>. They mainly sourced ice from Lingding Island too.
23. The majority of the Appellants' crew were workers from the Mainland who did not have permission to enter or work in Hong Kong waters. It is inherently unlikely that the Appellants would choose to break the law by operating their vessels with Mainland crew members in Hong Kong waters whilst their base was in or around Lingding Island.
24. The Board has carefully considered the evidence of the wholesaler, 成興仔海鮮批發, including documentary evidence and the evidence of Miss Lam over the phone call made during the hearing. We accept the submission of IWG's representatives that Miss Lam did not have first-hand knowledge of the Appellants' mode of operations. The probative value of her evidence was very limited. Although the wholesaler's document<sup>15</sup> suggests that the Appellants trawled in Hong Kong waters, we cannot put any real weight on it, given Miss Lam's confirmation that she had merely been told by the Appellants where they operated. In any event, that document does not help

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<sup>14</sup> Hearing Bundle pp 103, 104 of CP0170

<sup>15</sup> Hearing Bundle p 167 of CP0170

the Appellants show they were relying on Hong Kong to the extent as claimed.

25. We also consider it inherently unlikely that the Appellants would sail their vessels into Hong Kong waters everyday or every other day to deliver their catch to the wholesaler, whilst that wholesaler had collection boats outside Hong Kong that were more conveniently located for the Appellants. It was much more likely that the wholesaler was transacting with the Appellants close to Lingding and Guishan.
26. We accept the Appellants' evidence that they had taken out fishing moratorium loans, which precluded them from operating during the fishing moratorium periods. This piece of evidence strongly suggests that the Appellants had not been relying on Hong Kong waters to any significant extent. If, for example, they had been relying on Hong Kong to the extent of say 40%, we cannot see why they should stop operating all together during the moratorium periods, in Hong Kong waters in particular. It would not make any commercial sense for them to refrain from making a living during those periods even though the moratoria did not cover Hong Kong waters.
27. We further note that the Appellants had not been consistent with their claimed dependency on Hong Kong. At one stage, they claimed<sup>16</sup> 20-25%. Later, they claimed<sup>17</sup> 40%. Their only explanation seemed to be that they could not tell the respective proportions.
28. Whilst we accept the fact that the vessels were made of wood and had been in service for nearly 10 years in the case of CP0161 and some 17 years in the case of CP0170, we do not see how these facts can assist the Appellants' appeal. These facts are undisputed facts and have apparently been taken into account by the IWG when they made their decision on how much EGA should be granted to the Appellants.
29. As to the assertion that the Appellants had gradually moved towards operating in Hong Kong waters in more recent years, again, we do not see how that alone can assist the Appellants' case. The burden is on them to persuade us that they actually relied on Hong Kong to the extent claimed.
30. Finally, the additional documentary evidence produced by the Appellants on 19 October 2016 was unhelpful to the Appellants. For example, the statement issued by the Fish Marketing Organization in September 2016

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<sup>16</sup> Hearing Bundle p 50 of CP0170 and p 50 of CP0161

<sup>17</sup> Hearing Bundle p 3 of CP0170 and p 3 of CP0161



show there was no sale by the Appellants to them in 2010 at all. There were only 2 occasions when Mr. KC Chan sold to them in the whole of 2011. Paradoxically, the statement shows that Mr. KC Chan sold to them far more frequently *after* the Trawl Ban, i.e. 26 times in 2015 and 4 times in 2014. The refuelling records also do not show the Appellants as operating trawlers that were mainly based on Hong Kong.

31. Having considered all the evidence, the Board has taken the view that the Appellants have not been able to discharge the burden of proof to establish their case that, on a balance of probabilities, their vessels had been spending about 40%, or 10% which is the required threshold<sup>18</sup>, of its time operating in Hong Kong waters. There is no real evidence to support any such case, whether it be 10%, 40% or anything in between. The burden is on the Appellants to persuade this Board to accept their case and they have failed to do so here. They have 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 丁部).

## **Conclusion**

32. In the circumstances, these appeals are dismissed.

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<sup>18</sup> The Board is mindful that any percentage of fishing time in Hong Kong waters at or above 10% would satisfy the threshold requirement stipulated in Annex III of the Food and Health Bureau Paper dated 29 January 2013

**Case Nos. CP0161 & CP0170**

Date of hearing : 23 September 2016

Heard at : Room 1801, 18/F, East Wing, Central Government  
Offices, 2 Tim Mei Avenue, Tamar, Hong Kong.

(signed)  
Mrs. CHEUNG Po-yee, Peggy, JP  
Chairman

(signed)  
Mr. KONG Tze-wing, James, MH, JP  
Member

(signed)  
Ms. HUI Ming-ming, Cindi  
Member

(signed)  
Ms. CHOW Kin-tak, Alice  
Member

(signed)  
Ms. AU Sin-lun, Catherine  
Member

The Appellants, CHAN Kam-chiu appearing in person in CP0161 and as authorized representative of the appellant in CP0170; CHAN Kam-ming in person in CP0170 and as authorized representative of the appellant in CP0161; YEUNG Yun-kwong as authorized representative of both the appellants in CP0161 and CP0170

Dr SIU Ho-lim, William, Fisheries Officer (Sustainable Fisheries) 3, AFCD, representative on behalf of the IWG

Ms. YUEN Wing-sum Teresa, Fisheries Officer (Sustainable Fisheries) 4, AFCD, representative on behalf of the IWG

Mr Paul LEUNG, Legal Advisor to the Board