

**DECISION AND REASONS FOR DECISION**

FISHERMEN CLAIMS APPEAL BOARD (TRAWL BAN)  
CASE NOS. SW0090 & SW0091  
(HEARD TOGETHER)

Between

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CHEUNG SAY YEE (張十二)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

And between

CHEUNG KWOK MING (張國明)

*Appellant*

and

THE INTER-DEPARTMENTAL WORKING GROUP

*Respondent*

\_\_\_\_\_  
Date of Hearing: 15 January 2016

Date of Decision and Reasons for Decision: 19 February 2016

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**DECISION AND REASONS FOR DECISION**  
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**JUDGMENT** (Chairman Mr. FEE Chung-ming, Johnny, Member Mr. CHAN Hiu-fung, Nicholas, Member Ms. HUI Ming-ming, Cindi, Member Mr. LO Wai-kei, Wilkie and Member Dr. TYEN Kan-hee, Anthony):-

**Introduction**

1. Case number SW0090 is an appeal by Mr. CHEUNG Say Yee (張十二) (“**Mr. SY Cheung**”) against the decision of the Inter-departmental Working Group (“**IWG**”) dated 14 December 2012 (“**the SW90 Decision**”<sup>1</sup>)

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<sup>1</sup> Hearing Bundle p 95 of SW90

determining that Mr. SY Cheung's fishing vessel (with Certificate of Ownership Number CM90026V) ("**the SW90 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 SW90 Vessel.

2. Case number SW0091, on the other hand, is an appeal by Mr. CHEUNG Kwok Ming (張國明) ("**Mr. KM Cheung**") against the decision of the Inter-departmental Working Group ("**IWG**") dated 30 November 2012 ("**the SW91 Decision**")<sup>2</sup> determining that Mr. KM Cheung's fishing vessel (with Certificate of Ownership Number CM90027V) ("**the SW91 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 SW91 Vessel.
3. The appeals of Mr. SY Cheung and Mr. KM Cheung were with the Appellants' express consent<sup>3</sup> heard together on 15 January 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**").

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<sup>2</sup> Hearing Bundle p 89 of SW91

<sup>3</sup> Hearing Bundle p 323 of SW90 and Hearing Bundle p 318 of SW91

**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>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 from 2009 to 2011 up until the present (2009 年至 2011 年期間到現在), they did operate their vessels in Hong Kong waters each year from the 9<sup>th</sup> month to the 1<sup>st</sup> month of the lunar year. The reasons they gave for doing so were 2-fold: (i) because of the relatively rough seas during the winter months and (ii) because of the fishing season (漁汛) in the area during that time.
11. Mr. SY Cheung contends that he operated 20-30% of the time in Hong Kong waters<sup>7</sup>. Mr. KM Cheung contends that he operated 50% of the time in Hong Kong waters<sup>8</sup>. In particular, Mr. SY Cheung contends that he spent

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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 8 of SW90 and Hearing Bundle p 9 of SW91

<sup>7</sup> Hearing Bundle p 3 of SW90

<sup>8</sup> Hearing Bundle p 3 of SW91

2 to 3 months each year operating his vessel in Hong Kong waters<sup>9</sup>.

12. Both Appellants lodged a witness statement, respectively, dated 24 November 2015, for the purpose of the appeal hearing<sup>10</sup>. The 2 statements by and large mirror each other, with only minor differences. In essence, they state that traditional fishermen do not have good management and as such, do not keep large quantities of documentation or complete accounting records. According to them, this has led to an unfair situation where those who are truly affected by the Trawl Ban cannot adduce evidence in support of their claims for compensation over the general category.

### **The Appeal Hearing**

13. At the hearing, (**“the Appeal Hearing”**):
  - (1) both the Appellants conducted the appeal in person; and
  - (2) IWG conducted the appeal through their representatives, Dr Albert Leung, Dr William Siu and Dr So Chi-ming.
14. Apart from relying on the documentary evidence already submitted to the Board prior to the hearing, the Appellants gave oral evidence, made oral submissions and raised questions with the IWG representatives.
15. The Appellants particularly queried the IWG how it could have been the case that the SW90 Vessel was spotted a number of times during surveys whilst the SW91 Vessel was not spotted even once. They maintained that the 2 vessels operated together all the time and were moored next to each other when they were in the shelter - the IWG could not have done a proper job in recording what they observed during the surveys.
16. On the issue of workers, the Appellants informed this Board that over 90% of their fish catch was sold to the Mainland China market. The reason they gave was that they could sell their fish catch at a better price in Mainland China. And because of that, the Appellants did not qualify for quota for mainland deckhands under the Mainland Fishermen Deckhands Scheme;

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<sup>9</sup> Hearing Bundle p 8 of SW90

<sup>10</sup> Hearing Bundle p 272 of SW90 and Hearing Bundle p 266 of SW91

instead, they each hired 6 full-time mainland workers to operate their vessels<sup>11</sup>.

17. The Appellants emphasized towards the end of the hearing that, but for gale wind conditions (i.e. "Beaufort" scale 7 or 8 winds), they would not have operated in Hong Kong waters at all.

### **Decision & Reasoning**

18. Having considered all the evidence and submissions from the parties, this Board has decided to dismiss both appeals.
19. It is not in dispute that both vessels were pair trawlers of 38.32m / 38.33m in length, of steel construction, each having 1,119kW aggregate engine power and a fuel tank of some 192.35 sq. m. We accept IWG's submission and analysis that such vessels would be capable of operating well beyond Hong Kong waters.
20. Of particular importance are the survey records of the 2 vessels. As mentioned above, there was no sighting recorded<sup>12</sup> in respect of the SW91 Vessel at all – not even during Chinese New Year or the fishing moratorium periods. In respect of the SW90 Vessel, there were 15 sightings at the typhoon shelter<sup>13</sup> out of 44 AFCD visits<sup>14</sup> during January to November 2011, of which 9 were during the fishing moratorium and just 6 were outside it. We accept that those sighting figures are on the low side. We also accept that sightings during the fishing moratorium are not evidence of operation in Hong Kong waters.
21. As mentioned earlier, the Appellants questioned the accuracy of the surveys. Having considered all the materials and submissions before this Board, we are satisfied that the survey data are reliable. First, we are satisfied that the surveys were done properly. AFCD's records<sup>15</sup> show that they had conducted daytime surveys of the Shau Kei Wan typhoon shelter on 4 days during the month of April 2011. IWG's records, meanwhile, show that the SW90 Vessel was sighted there on 6<sup>th</sup>, 12<sup>th</sup>, 19<sup>th</sup> and 26 April 2011. Those data match up. Similarly, the figures for May, June, July 2011 and September were consistent. Apart from bare assertions from the

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<sup>11</sup> Hearing Bundle p 40 of SW90 and Hearing Bundle p 40 of SW91

<sup>12</sup> Hearing Bundle pp 105 – 107 of SW91

<sup>13</sup> Shau Kei Wan typhoon shelter: see Hearing Bundle p111 of SW90

<sup>14</sup> Hearing Bundle p 208 of SW90

<sup>15</sup> Hearing Bundle p 208 of SW90

Appellants that the survey data did not make sense to them, the Appellants have not been able to adduce any counter-evidence or otherwise persuade this Board to reject IWG's figures. Furthermore, the chances of survey error in spotting the SW91 Vessel on 15 occasions in the typhoon shelter during 2011 are simply too remote and insignificant. In short, we are not persuaded that the SW91 Vessel was moored next to the SW90 Vessel on those 15 occasions. Therefore, in view of the operation in tandem of pair trawlers, the 6 sightings of SW90 outside the fishing moratorium (without sighting SW91 on any of those 6 occasions) is not satisfactory evidence of the appellants' operation in Hong Kong waters on those occasions.

22. During the course of the hearing, the Appellants suggested that when the winds were high and the seas were rough, there was no patrol or sea survey done. In particular, they were referring to the period during which they claim to have been operating in Hong Kong waters. They seek to demonstrate that even though they were operating in Hong Kong waters, the authorities were unable to spot them. However, according to documents submitted by the IWG<sup>16</sup>, the number of patrols or sea surveys did not abate during the winter months. To the contrary, there were some months during the winter when the number of surveys increased<sup>17</sup>. In the circumstances, we are not convinced that the Appellants chose, as they claim, to operate in Hong Kong waters when the seas were rough here. As we see it, if the Hong Kong seas were rough, so would the South China seas be. There could be no particular incentive for them to pick Hong Kong waters to do their trawling when there were gale or near-gale force winds here. Their explanation of not having been spotted operating in Hong Kong waters during surveys and patrols is not convincing.
23. As a matter of fact, in the questionnaires answered by the Appellants, there were some major discrepancies between them as regards their fishing grounds within Hong Kong waters. According to Mr. SY Cheung, he operated his vessel in areas identified<sup>18</sup> as 19, 14, 18 and 17. But according to Mr. KM Cheung, he on the other hand operated his vessel in area 14 only<sup>19</sup>. Had they truly been operating in tandem as claimed, their answers should have been consistent. Their respective claimed fishing grounds outside Hong Kong waters do not match up either.

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<sup>16</sup> Hearing Bundle pp 219, 226 of SW90

<sup>17</sup> Hearing Bundle p 209 of SW90

<sup>18</sup> Hearing Bundle p 42 of SW90

<sup>19</sup> Hearing Bundle p 42 of SW91

24. As regards the engagement of direct labour from Mainland China to operate the vessels, claimed to be both within *and* outside Hong Kong waters, we disbelieve the Appellants' assertions insofar as they were referring to the illegal engagement of Mainland workers *within* Hong Kong. We see the Appellants would have the option of engaging workers under the Mainland Fishermen Deckhands Scheme legally and there would be no incentive for them to do anything otherwise than according to the law. After all, on their own admission, over 90% of their catch used to be directed to the Mainland market. The Appellants could and did hire Mainland workers to help them earn their living in Mainland waters. The contention that only when there were gale or near-gale force winds that they used illegal labour to trawl in Hong Kong waters is simply too far-fetched to be capable of belief.
25. In coming to our decision to dismiss the appeals, we have also taken into account of the fact that although the Appellants asserted that they could produce documentary evidence to show their fuel usage, none in fact was produced in the end. We have further taken into account of Mr. KM Cheung's evidence that he was not good with numbers and therefore could have given a percentage figure for Hong Kong waters dependency inconsistent with figures he gave subsequently (i.e. 50% compared with 30%). We have also taken into account of the inconsistent refueling habit between the Appellants.
26. 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 20 – 30% (or 2 to 3 months each year), or 10% which is the required threshold<sup>20</sup>, of its time operating in Hong Kong waters. Their point about there being unfairness in their receiving \$150,000 as compared with some others who were given millions in compensation is not a valid ground in the circumstances of this case. The burden is on them to persuade this Board to accept their case and they have failed to do so here.

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<sup>20</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 : Hearing Bundle p 189 of SW90 and p 183 of SW91

## Conclusion

27. In the circumstances, these appeals are dismissed.

Date of hearing : 15 January 2016

Heard at : Room 1801, 18<sup>th</sup> Floor, East Wing  
Central Government Offices, 2 Tim Mei Avenue,  
Tamar, Hong Kong.

(signed)  
Mr. FEE Chung-ming, Johnny, JP  
Chairman

(signed)  
Mr. CHAN Hiu-fung, Nicholas  
Member

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

(signed)  
Mr. LO Wai-kei, Wilkie  
Member

(signed)  
Dr. TYEN Kan-hee, Anthony  
Member

The Appellants, CHEUNG Say Yee and CHEUNG Kwok Ming appearing in person  
Dr LEUNG Wai-yin, Albert, SFMO, AFCD, representative on behalf of the IWG  
Dr SO Chi-ming, Fisheries Officer (Sustainable Fisheries) 1, representative on  
behalf of the IWG  
Dr SIU Ho-lim, William, Fisheries Officer (Sustainable Fisheries) 3, AFCD,  
representative on behalf of the IWG  
Mr Paul LEUNG, Legal Advisor to the Board