IN THE COURT OF APPEAL OF THE COOK ISLANDS

HELD AT RAROTONGA

CA No. 1/18

	BETWEEN	**WILLIAM FRAMHEIN** **First Appellant**
	AND	**TE IPUKAREA SOCIETY 1996 INCORPORATED** **Second Appellant**
	AND	**ATTORNEY-GENERAL** **Respondent**

Coram: Williams P
Barker JA
Paterson JA

Hearing: 30 April, 1–2 May 2018

Judgment: 26 September 2018

Counsel: I Hikaka & J Cundy for Appellants
D James (Solicitor General), R Rose & A Herman for Respondent

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JUDGMENT OF THE COURT OF APPEAL

Solicitors:	Charles Petero Rarotonga For Appellants	Crown Law Office Rarotonga For Respondent

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Introduction

1. This is an appeal against a judgment of Potter J given on 15 December 2017 when her Honour declined to grant the applicants any relief in respect of the orders sought.

2. The relief sought related to the Cook Islands Government's move to increase and expand its Purse Seine Fishery (**Purse Seine Fishery**) for skipjack tuna in the Cook Islands Exclusive Economic Zone (**EEZ**). The orders sought by the applicants were:

   (a) the setting aside of the Marine Resources (Purse Seine Fishery) Regulations 2013 (**the Regulations**). The Regulations designated the Purse Seine Fishery as a designated Fishery pursuant to s 6 of the Marine Resources Act 2005 (**MRA**) and provided for the entry into force of the Purse Seine Fishery Plan (2013) (**the Fishery Plan**);

   (b) the setting aside of the Fishery Plan, which had been prepared by the Secretary of Marine Resources (**the Secretary**) in or around February 2013 in accordance with s 2 MRA;

   (c) the setting aside of the decisions of the Government to initial and then sign a Sustainable Partnership Agreement with the European Union (**the Partnership Agreement**) and an Implementation Protocol (**the Protocol**) in respect of the Partnership Agreement. The particular decisions which the applicants sought to be set aside are:

      (i) the Government's initialling of the Partnership Agreement and the Protocol on or around 21 October 2015; and

      (ii) the Government signing the Partnership Agreement on or around 14 October 2016;

   (d) a declaration that the Aronga Mana are key stakeholders in the Purse Seine Fishery and under the Fishery Plan;

   (e) a declaration that the second appellant, the Te Ipukarea Society 1996 Incorporated, is a key stakeholder in the Purse Seine Fishery and under the Fishery Plan;

   (f) a direction that the Secretary carry out consultation as required under the Fishery Plan.

Grounds of Appeal

3. The essence of the appellants' detailed grounds of appeal, all of which alleged errors of law, are:

   (a) the respondent failed to act in a manner consistent with the Government's international obligations. The obligation which was allegedly breached is a requirement to carry out an Environmental Impact Assessment (**EIA**) in respect of the proposed extension of purse seine fishing;

   (b) a failure by the respondent, in breach of s 4 of the MRA, when making the three decisions referred to in subparagraphs 2(a), (b) and (c) above (**the Decisions**) to comply with the precautionary approach, or to have any or proper regard to the impact on bycatch species and on artisanal and subsistent fishers;

   (c) a failure by the respondent to consult with the Aronga Mana and the second appellant in making the Decisions. The appellants contend that there is an obligation to so consult under both s 4(d) MRA and Article 66A(3) of the Constitution;

   (d) the Secretary's subsequent failure to carry out consultation with key stakeholders including both appellants and to review the Fishery Plan, as required by the Fishery Plan. This is an alternative ground of appeal in the event that this Court declines to set aside the Fishery Plan.

Background

4. There is an extensive summary of the background facts in the careful and comprehensive judgment of Potter J. It is only necessary at this stage of the judgment to give an overview of them.

5. Regular purse seine fishing did not occur in Cook Islands waters until recently, although limited purse seine fishing for tuna had occurred in Cook Islands waters since 1979. Fishing has been important in the Cook Islands culture and in recent years, commercial fishing licences issued by the Government to foreign vessels have been an important source of revenue for the Government. Longline fishing was previously the main method of fishing for tuna.

6. Between 2013 and 2016, the Government moved to increase the potential volume of purse seine catches within the Cook Islands EEZ. Purse seine vessels largely target

skipjack tuna. While this method has been permitted since 1979, it was not until the late 1980s that the Cook Islands entered into a multilateral Treaty with the United States of America permitting use of the purse seine method. It was not until 2012 that there were significant catches under this Treaty.

7. Fish aggravating devices (**FADs**) are used in conjunction with purse seine fishing. They cause tuna and other fish to aggregate around the devices and greatly increase the yield of purse seine fishing ventures. However, the use of FADs can be controversial as they can result in much higher bycatch of other non-targeted species, particularly bigeye and yellowfin tuna. For this reason, the use of FADs is often restricted when purse seine fishing is allowed. Their effect on bycatches are relevant in this case.

8. The Ministry of Marine Resources (**MMR**) between 2011 and 2013 explored the possibility of expanding the Purse Seine Fishery in Cook Islands waters. Its position is that it considered or received four reports over this period. These reports were the Lehodey Report (**Lehodey Report**), the Oceanic Fisheries Programme (**OFP**), the 2012 Conservation and Management Measures (**2012 CMM**), and the MMR's 2012 Annual Report on Cook Islands Tuna Longline Fishery (**Longline Report**). It also carried out limited consultation, namely two public meetings and a meeting with the House of Ariki, all in January or February 2013.

9. As a result of the work of the MMR, the Regulations were promulgated on 26 February 2013 and they brought into force the Fishery Plan. Subsequently, the Government of the Cook Islands entered into the Partnership Agreement and the Protocol with the European Union. These documents were initialled by the Government in October 2015 and ratified by it in October 2016.

The Decisions

Marine Resources (Purse Seine Fishery) Regulations 2013

10. The Regulations came into force on 26 February 2013 and declared the Purse Seine Fishery to be a Designated Fishery under the provisions of the MRA. These Regulations apply to all commercial purse seine fishing within the fishery waters. They do not apply to exploratory fishing carried out under s 5 of the MRA. Fishing by purse seine fishing vessels is limited to 1,250 effort days per annum. The total level of purse seine catch is to be determined by the Secretary who has the power in specified circumstances to reduce the total fishing allowance.

11. The Regulations contain a provision to protect non-target species, but the relevant regulation does not specifically refer to the bycatch of bigeye and yellowfin tuna. Part 2 of the Regulations sets out the provisions for licensing vessels and the conditions of the licences, while Part 3 deals with offences.

12. The Regulations brought the Fishery Plan prepared by the Secretary in accordance with s 6(2) of the MRA into effect on the same day that the Regulations came into force.

Purse Seine Fishery Plan (2013)

13. Included in the Fishery Plan is a purpose statement, namely "*to provide ecological, sustainable development and establish an effective, beneficial and enforceable management structure for the purse seine fishery*".

14. Paragraph 6 of the Fishery Plan sets out its primary objectives. These include:

> (a) To provide for the sustainable use of the large pelagic fish resources for the benefit of the people of the Cook Islands;
>
> (b) To ensure the long-term sustainability of the Purse Seine Fishery;
>
> (c) To mitigate the impact of fishing on the non-target species;
>
> …
>
> (g) To protect traditional and small scale commercial inshore fishes;
>
> (h) To protect the integrity of government revenue.

15. Paragraph 7 of the Fishery Plan (Principal Ways to Achieve the Objectives) sets out the measures applied to achieve the objectives of the Fishery Plan and includes limiting the size of the purse seine fleet in the fishery waters to avoid local depletion particularly of skipjack tuna and yellowfin tuna.

16. Paragraph 9 of the Fishery Plan (Appropriate Scale and Extent of the Fishery) notes the long period of access which the US fleet has had, but states there have only been sporadic results and "*one comprehensive year of catch history to fully understand the likely catch rates and catch values of the domestic purse seine fishing*". It notes that a stock assessment was conducted by the oceanography division of the French Space Agency (i.e. The Lehodey Report), suggesting that the biomass of skipjack tuna in the Cook Islands waters is 189,000 tonnes and that the fishing effort of 3,000 tonnes will not significantly reduce spawning biomass below the 40% reference point commonly utilised in fisheries management.

17. Paragraph 10 of the Fishery Plan (Impacts and Interactions) notes that there are no substantial concerns about the risk of over-fishing of the skipjack stock which was expected to make up the bulk of the purse seine catch but records that there are concerns about the status of yellowfin tuna and particularly, bigeye tuna which will also be caught in the Purse Seine Fishery. It also notes that the bigeye tuna bycatch rates from sets of FADs was known to be moderately high in waters adjacent to the Cook Islands EEZ in the north east "*but there is little information available on bigeye tuna bycatches in Cook Islands waters*". There is also a provision noting that the Cook Islands applies the key principles and obligations of international law relating to the offshore fisheries including the application of the precautionary approach through the MRA. The same paragraph refers to the international ban on FADS which applies from July to September in each year and added to it the further month of October. Other parts of the Fishery Plan deal with the consultative process and management issues.

18. Paragraph 18 of the Fishery Plan (Conditions of Fishing) notes that no licensed purse seine vessel shall fish within 48 nautical miles of Rarotonga or within 24 nautical miles of any other island of the Cook Islands. Another provision requires the Secretary to conduct a review of the conservation and management measures set out in the Fishery Plan every two years and to determine then whether the Fishery Plan should be amended and/or revoked. A matter which is required to be taken into account in the review is "*the effectiveness of the conservation and management measures*".

19. An appendix to the Fishery Plan reports on the status of the Cook Islands Purse Seine Fishery. It notes the limited fishing in the past using the purse seine method and that it had been generally thought that the Cook Islands EEZ is located east and south of the main fishing grounds. There then appears this statement:

> Recent results from the SEAPODYM Model … for skipjack suggests that a significant biomass of skipjack exists in the northern part of the Cook Islands EEZ. While these results are preliminary and have not been fully validated, the recent fishing activity is not inconsistent with the predictions on SEAPODYM that skipjack exists in fishable densities in Cook Island waters.

The SEAPODYM Model comes from the Lehodey Report.

20. At this stage the Court makes the following general points:

(a) The Regulations and Fishery Plan were aimed at creating a commercial Purse Seine Fishery in Cook Islands waters with provisions limiting the total fishing effort days, acknowledging and imposing restrictions on the use of FADs and

containing the right to impose management controls to ensure the sustainability of the Purse Seine Fishery.

(b) The Fishery Plan acknowledged that the Lehodey Report model produced preliminary results which had not been fully validated at the time of that report.

(c) The Regulations declared the Purse Seine Fishery as a Designated Fishery, the characteristics of which are:

(i) the Fishery is important in the national interests; and

(ii) the Fishery requires management measures for ensuring sustainable use of the fishery resource.

(d) Under s 5 MRA, an exploratory fishery cannot be a Designated Fishery.

Sustainable Partnership Agreement with the European Union and Implementation Protocol

21. The Partnership and the Protocol were entered into in 2016 but had been initialled by both parties in October 2015. They established the principles, rules and procedure governing the conditions under which vessels of the European Union may engage in fishing activities in the Cook Islands fishing areas. The initial duration of the Partnership is eight years with the right for another eight years unless terminated by one of the parties because of "unusual circumstances" as defined in the Partnership Agreement. The Protocol provides for renewable fishing licences for twelve-month periods and provides for four vessels to fish for the highly migratory species in the first four-year period. There are substantial payments to the Cook Islands under the provisions of the Protocol.

First Ground of Appeal – Failure to carry out EIA

22. The issue before Potter J was whether the Regulations, the Fishery Plan and the Partnership Agreement and Protocol were all made in breach of the provisions of the MRA because they were not made in a manner consistent with international law and in particular, were in breach of the Cook Islands Government's international customary law obligation to carry out an EIA.

23. As pleaded, there are two limbs to this submission, namely:

(a) whether an EIA was required by international law; and

(b) whether an EIA was undertaken before the Decisions were made?

Potter J only considered the second limb.

24. The reason for only the second limb being considered was that as recorded in the judgment, the respondent conceded that an EIA was necessary but claimed that it had complied with their obligations in respect of an EIA. In this Court, the respondent, stating that counsel at the High Court could not recall making the concession, sought leave to withdraw the concession. This request was opposed by the appellants and will be further referred to below.

Need for EIA

25. Counsel for the appellants prepared their submissions on the basis of the concession and did not set out in their written submissions the reasons for the contention that international law required an EIA to be undertaken. Mr Hikaka, in oral submissions, gave five reasons for the submission that international law required an EIA in this case, namely:

(a) Article 206 of the United Nations Convention on the Law of the Sea 1982 (**UNCLOS**) states:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessment in the manner provided in Article 205.

The obligation in Article 205 is to publish reports of the results obtained or provide such reports at appropriate intervals to the competent international organisations, which should make them available to all States.

(b) Customary international law requires an EIA to be undertaken. That requirement, based on two decisions of the International Court of Justice and an expert opinion from Dr Miles of Cambridge University, is to undertake an EIA where there is a risk that the proposed activity may have a significant adverse impact in a transboundary context, and in particular, on resource shared by more than one State.

(c) The terms of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating

to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (**UNSFA**). Reliance is placed on Article 5 of UNSFA.

(d) The terms of a convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (4 September 2000) (**WCPO Convention**).

(e) Section 36(3) of the Cook Islands Environment Act 2003 (**Environment Act**) which requires an environment impact assessment in respect of every application for a project permit. This submission is based on domestic law and not international law.

26. In considering this issue, the Court notes the respondent's submissions on the wider context of reviewing decisions, such as those in issue in this case. It submitted that in sensitive decisions such as allocating fisheries, there is a high policy content and a Court should be cautious in reviewing such decisions. The MRA and the Ministry of Marine Resources Act 1984 (**MMRA**) are said to contain strong indications that the MMR and both the Minister and the Secretary should not be second-guessed where a decision is rationally open to the decisionmaker. The Decisions were taken to advance the Cook Islands' national interest; the decisionmakers were entitled to rely heavily on regional reports and recommendations and many of the factors that must be taken into account under the MRA are barely justiciable.

27. It is accepted that both the Minister and the Secretary in making decisions under the MRA have a discretion and a Court should be cautious in setting such decisions aside. However, it is necessary in this Court's view for the decision-maker to have sufficient information to justify the decision. The position is as stated in Dr Taylor's book *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [15.52] in the following terms:

> If a factor is to be considered there is a duty on the authority doing so to be sufficiently informed on it so far as it appears to be necessary in terms of the enactment …
>
> What is reasonable depends on the circumstances, such as time available, resources at hand, existing knowledge and expertise, reliability or apparent reliability of sources, and the like. One relevant consideration in deciding this is how readily available the missing information might be …

28. The Decisions were all purportedly entered into pursuant to powers in the MRA. Part 1 of the MRA provides for "*FISHERIES CONSERVATION, MANAGEMENT AND DEVELOPMENT*". Section 3 states:

> 3. Objective, Function and Authority – (1) The principal objective of this Act and the Ministry of Marine Resources is to provide for the sustainable use of the living and non-living marine resources for the benefit of the people of the Cook Islands.
>
> (2) The Ministry of Marine Resources has the principal function of, and authority for the conservation, management, development of the living and non-living resources in the fishery waters in accordance with this Act and the Ministry of Marine Resources Act 1984.
>
> (3) This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under this Act and the Ministry of Marine Resources Act 1984 shall act, in a manner consistent with the Cook Islands international and regional obligations relating to the conservation and management of living and non-living resources in the fishery waters.
>
> (4) To ensure that the objectives, functions and authority provided under this Act and the Ministry of Marine Resources Act 1984, and Cook Islands obligations under international and regional law are effectively discharged, the provisions of this Act shall prevail in the event of inconsistency or incompatibility with any other Act or instrument having the force of law in the Cook Islands from time to time, except for the Constitution of the Cook Islands.
>
> (Underlining added)

29. Section 4 of the MRA sets out various matters which the Minister of Fisheries (**the Minister**) or Secretary are required to take into account when performing their functions or exercising powers under the Act. These include:

> (a) environmental and information principles in relation to achieving the sustainable use of fisheries and the need to adopt measures to ensure the long term sustainability of the fish stocks –
> (i) decisions should be based on the best scientific evidence available and be designed to maintain or restore target stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors;
> (ii) the precautionary approach should be applied;
> (iii) impacts of fishing on non-target species and the marine environment should be minimised;
> (iv) …
> (b) the protection and conservation of the natural resources of the fishery waters and the prevention of damage to the flora and fauna of the aquatic environment;
> …
> (i) the maintenance of traditional forms of sustainable fisheries management;
> (ii) protection of the interests of artisanal fishers, subsistence fishers and local island communities, including ensuring their participation in the management of fisheries and of aquaculture; and;
> (iii) broad participation by Cook Islanders in activities related to the sustainable use of marine resources.
>
> (Underlining added)

NB: the published copy of the MRA has inconsistent numbering but the above principles obviously apply to the MMR and both the Minister and Secretary in carrying out their functions and powers under the MRA.

30. The Fishery Plan was issued under the provisions of s 6 of the MRA which provides for the designation of a fishery and requires a fishery plan for the management of each designated fishery. Section 6(3) provides:

> (3) Each fishery plan shall –
>
> (a) identify the fishery;
> (b) describe the status of the fishery;
> (c) specify management measures to be applied to the fishery;
> (d) specify the process for the allocation of any fishing rights provided for in the fishery plan;
> (e) make provision in relation to any other matter necessary for sustainable use of fishery resources.

31. Section 9 of the MRA confers upon the Minister the power to enter into access and fisheries management agreements and it was this power that the Minister used when entering into the Partnership Agreement and the Protocol.

32. The parties disagree on the extent of the Cook Islands international obligations and in particular, whether the respondent required an EIA before the making of the Decisions. It is the respondent's position that the Cook Islands' international obligations are, and were at the time of the Decisions, governed by the various international Treaties the Cook Islands has entered into and these Treaties require an "assessment" and not an EIA. An "assessment" is said to impose less demanding requirements than does an EIA. The respondent does not accept that international customary law imposes any further obligation. The appellants' position is that international customary law requires an EIA to be completed and that it should have been undertaken before the Decisions were made.

33. While the appellants' pleadings do not refer to the Environment Act, and it is not a source of international law, that Act was referred to in the respondent's pre-hearing written submissions. The respondent's counsel submitted that in any event "*the Act gives the appellants' position no nourishment*". In submissions on another issue made after the hearing, the appellants' counsel stated that the argument that the Act requires the Crown to undertake an EIA was clearly made before Potter J. As the Crown had already conceded at that hearing that an EIA was required, there was no argument about formally amending the pleadings. This Court can and will consider the relevance and effect of the Environment Act as, in its view, the respondent has not been prejudiced by the failure of the appellants to refer to the Environment Act in the pleadings.

34. It is convenient to consider this issue by determining first what the Cook Islands Treaty obligations required of it, as a prerequisite to entering into the Decisions; secondly, whether international customary law required further action; and lastly, whether s 36 of the Environment Act altered in any respect those requirements.

35. The Cook Islands signed UNCLOS on 10 December 1982 and ratified it on 15 February 1995. It came into effect in the Cook Islands on 17 March 1995. Its preamble confirms that matters not regulated by UNCLOS continue to be governed by the rules and principles of general international law. At its inception, UNCLOS codified the existing customary international law and created new rights and obligations. Part V refers to EEZs and Article 55 provides that an EEZ is "*subject to the specific legal regime established in this Part, under which the rights and jurisdictions of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention*".

36. Skipjack tuna is defined in Annex I of UNCLOS as a "highly migratory species". Article 64 provides that States whose nationals fish for highly migratory species in the region "*shall co-operate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species through the region, both within and beyond the EEZ*".

37. Article 206 of UNCLOS, (see paragraph 25 above) requires a State which has reasonable grounds for believing that a planned activity under its jurisdiction or control may cause significant and harmful changes to the marine environment to "*as far as practical, assess the potential effects of such activities on that environment and communicate reports of the results as required by Article 205*".

38. Neither party disputed that the prerequisite of having reasonable grounds for believing that the extension of the purse seine fishery may cause significant and harmful changes to the marine environment had been reached. Although Potter J raised a doubt as to whether there were such grounds, she did not determine the matter because of the respondent's concession. The Cook Islands' obligations under Article 206 of UNCLOS, if there were reasonable grounds for believing the activity may cause significant and harmful changes to the marine environment were as far as practicable:

    (a) to assess the potential effects of the extension of the Purse Seine Fishery on the marine environment; and

(b) to report the results of that assessment to the competent international organisations, which would obviously include the Western Central Pacific Fisheries Commission (**WCPFC**).

39. The Cook Islands ratified UNSFA on 1 April 1999. It entered into force on 11 December 2001. UNSFA is an agreement for the implementation of UNCLOS, relating to "*the conservation and management of straddling fish stocks and highly migratory fish stocks*". All parties affirmed in the agreement that the matters covered by UNCLOS and UNSFA "*continue to be governed by the rules and principles of general international law*". The Cook Islands was at the relevant time a party to UNSFA.

40. Article 5 of UNSFA contains general principles in order to conserve and manage straddling fish stocks and highly migratory fish stocks. Skipjack tuna are such a stock. Relevant portions of the article are:

> (a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization;
>
> (b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;
>
> (c) apply the precautionary approach in accordance with article 6;
>
> (d) assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks;
>
> (e) …
>
> (f) …
>
> (g) …
>
> (h) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources:
>
> (i) take into account the interests of artisanal and subsistence fishers;

41. Other provisions of Article 5 are relevant to the Cook Islands' obligations after entering into the Decisions and may be relevant to the cause of action seeking a declaration that the Secretary carry out consultation as required under the Fishery Plan.

42. UNSFA's provisions are more specific than the general provisions in UNCLOS. The provisions of Article 5 of UNSFA state in mandatory terms a State's obligation in order to conserve and manage migratory fish stocks. These obligations include:

    (a) Considering measures to conserve and manage skipjack tuna stocks.

    (b) Base such measures on the best scientific advice available.

    (c) Ensure the measures are designed to maintain skipjack stock at levels capable of producing maximum sustainable yields.

    (d) Carry out the precautionary approach which is more particularly described in Article 6 UNSFA.

    (e) Assess the impact of fishing not only on skipjack stocks but also on the stocks of bigeye and yellowfin tuna.

    (f) Consider the effects of the Fishery Plan on the interests of artisanal and subsistent fishers.

43. The respondent submits that the obligations contained in UNCLOS and UNSFA are modified by other provisions in the same conventions. These submissions are discussed later.

44. The other international Treaty relied upon by the appellants is the WCPO Convention of which the Cook Islands is a contracting party. Although the WCPO Convention is dated before UNSFA, it effectively imposes the UNSFA requirements on the Convention area, namely the Western and Central Pacific Ocean (**WCPO**) of which the Cook Islands' EEZ is part. Thus, the WCPO Convention adds little if anything to the obligations which the Cook Islands has under UNSFA.

45. While different wording is used to describe the respective obligations under UNSFA and the WCPO Convention, the UNSFA obligations in respect of the precautionary approach are imported into the WCPO Convention by Article 5(c) of that Convention which requires when applying that approach to apply both the provisions of the WCPO Convention and "*all relevant internationally agreed standards and recommended*

practices and procedures". Further, a member is to apply the guidelines set out in Annex II of UNSFA, which contains the guidelines to the application of the precautionary reference points.

46. The purpose of the UNSFA provisions in respect of the precautionary approach (see Articles 5(c), 6 and Annex II) is to protect the living marine resources and preserve the marine environment. They apply to the Cook Islands and include an obligation to be more cautious when information is uncertain, unreliable or inadequate; to take into account uncertainties relating to the size and productivity of the stocks, stocks specific reference points, stock conditions in relation to such reference points; and to assess the impact of fishing activities on non-target species and associated or dependent species. They note that the absence of adequate scientific information is not to be used as a reason for postponing or failing to take conservation and management measures.

47. Annex II defines a precautionary reference point as "*an estimated value derived through an agreed scientific procedure, which corresponds to the state of the resources and of the fishery, and which can be used as a guide for fisheries management*". There are two types of precautionary reference points. The first is a limit reference point which sets boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce maximum sustainable yield. The second is a target reference point, intended to meet management objectives. Management strategies are required to seek to maintain or restore populations of harvested stocks at levels consistent with previously agreed precautionary reference points. Annex II contains detailed provisions relating to precautionary reference points.

48. This Court finds that the three international instruments imposed on the respondent certain obligations before entering into the Decisions, namely:

    (a) to carry out an assessment of the potential effects of the extension of the Purse Seine Fisheries on the marine environment;

    (b) to report the results of that assessment to the WCPFC;

    (c) to utilise the best scientific advice available to consider measures to conserve and manage the Purse Seine Fishery;

    (d) to ensure such measures are designed to maintain the stocks of skipjack tuna at levels capable of producing maximum sustainable yield;

    (e) to apply the precautionary approach;

(f) to assess the impact of the Purse Seine Fishery not only on the skipjack stocks but also on the stocks of bigeye and yellowfin tuna;

(g) to consider the effect on the interests of artisanal and subsidiary fishers.

49. The respondent's position was that these obligations needed to be considered against other provisions in the WCPO Convention, particularly those in Articles 7(2) and 30 relating to consideration to be given to the respective capacities of developing coastal States and to recognise the special requirements of such States. It also submitted that the terms of Article 206 UNCLOS also indicate that a lesser assessment than an EIA was all that was required.

50. The appellants' position is that customary international law imposes obligations on the Cook Islands and in respect of the Decisions, these obligations required an EIA to be completed before the decisions were made. The respondent did not dispute the general obligation to carry out an EIA as identified in two cases in the International Court of Justice, and more particularly discussed below, but said that the specific provisions of UNCLOS, UNSFA and the WCPO Convention prevail over the general obligation.

51. Expert evidence on relevant Cook Islands' international obligations was given by Dr Catherine Miles of the University of Cambridge. She referred to the two International Court of Justice decisions, namely *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment) [2010] ICJ Rep 14 and *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* Judgment [2015] ICJ Rep 665. In the *Pulp Mills* case, it was determined that it was a requirement under general international law:

> to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.

This principle was confirmed as being part of customary international law in the subsequent *Nicaragua* case.

52. Dr Miles expressed the opinion that the principle in the two cases applied to the Cook Islands in respect of the purse seine fishery because the proposed activities would have a significant impact on a shared resource. Thus, it was necessary in this case for the Cook Islands to undertake an EIA before entering into the Decisions. The

respondent's position was that this is not correct because the Cook Island's treaty obligations take precedence over customary international law and they only require an "assessment" and not an EIA.

53. Dr Miles also expressed the following opinions:

(a) Specific treaty regimes can apply as *lex specialis* but do not automatically eliminate or override the existence of relevant customary law obligations. Customary international law sits alongside treaties unless there is an express contradiction between the specific treaty regime and customary international law. This opinion is based on the *Nicaragua* case;

(b) In the *Pulp Mills* case, an international agreement governed the management of the shared resource which contained no mention of a requirement to conduct an EIA. Nevertheless, the Court held that under customary international law an EIA was required.

54. As noted above, Ms Rose, counsel for the respondent, accepted the general principles stated in the International Courts of Justice cases and noted in the opinion of Dr Miles. Those general principles which this Court accepts apply, unless the application is precluded by the treaties referred to above, is that an EIA is required where there is a substantial risk that the proposed activity may have a significant adverse impact in a transboundary context, and in particular, on a shared resource. The EIA must be conducted prior to the implementation of the project. It is for each State to determine in its domestic legislation or in its authorisation process for the project, the specific contents of the EIA.

55. The Court notes that the respondent did not seek to cross-examine Dr Miles, nor did the respondent proffer any evidence from another international law expert.

56. Before determining what the obligations of the respondent were before the Decisions were made, it is appropriate to refer to the Cook Islands own Environment Act which is relied upon by the appellants. Section 36(3) of that Act provides that every application for a project permit shall be submitted to the National Environment Officer and shall include an EIA setting out the details referred to in s 36(3). The application of this section was not subject to detailed submissions before this Court. It is noted however that s 36 appears to apply as the functions of the service as stated in s 9 of the Environment Act include:

> (a) protect, conserve, and manage the environment to ensure the sustainable use of natural resources;
>
> (b) …
>
> (c) protect, conserve, and manage the environment in relation to Cook Island waters.
>
> (d) …
>
> (e) carry out investigations, research and monitoring relevant to the protection and conservation of the natural resources of the Cook Islands;
>
> (f) Cook Island waters include its territorial sea and the exclusive economic zone.

57. The details which s 36(3) requires to be included in an EIA are set out in the section as follows:

> (a) the impact of the project upon the environment and in particular –
>
> (i) the adverse effects that the project will have on the environment; and
>
> (ii) a justification for the use or commitment of depletable or non-renewable resources (if any) to the project; and
>
> (iii) a reconciliation of short-term uses and long-term productivity of the affected resources; and
>
> (b) the proposed action to mitigate adverse environmental effects and the proposed plan to monitor environmental impacts arising out of the project; and
>
> (c) the alternatives to the proposed project.

58. Even if the Environment Act does not apply to the making of the Decisions (and this Court is of the view that it does apply), s 36 sets out what the Cook Islands Parliament considers to be required in an EIA. By analogy, if customary international law required an EIA before the Fishery Plan was adopted, it can be assumed that the EIA would be required to comply with the provisions of s 36(3) of the Environment Act.

59. As the WCPO Convention was in effect imposing the UNSFA provisions on the Cook Islands, and both conventions were implementing the provisions of UNCLOS relating to the conservation and management of straddling and highly migratory fish stocks, it is convenient to consider the obligations of the Cook Islands under three possible sources, namely the WCPO Convention, international customary law and the provisions of the Environment Act 2003. In particular, it is necessary to determine whether the EIA obligation under international customary law was modified and only a

lesser type of assessment was required. Article 4 of the WCPO Convention provides that it is to be interpreted and applied in the context of and in a manner consistent with UNCLOS and UNSFA. Further, nothing in the WCPO Convention is to prejudice the rights, jurisdiction and duties of a State under UNCLOS and UNSFA.

60. Customary international law does not specify the contents of an EIA and it is for each State to determine in its domestic legislation or in the authorisation process for the project, the specific content of an EIA. The position as stated in the *Pulp Mills* case is:

> [I]t is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

61. This Court accepts that customary international law, if it applies in this case, required the completion of an EIA prior to entering into the Decisions of the likely adverse impact of the Decisions on the marine environment. This requirement would have applied particularly to the Regulations and the Fishery Plan. It was necessary to evaluate in such an EIA the likely adverse impact on the shared resource, namely the migratory skipjack tuna stocks, as well as on the bycatch species and on artisanal and subsistence fishers. In doing so, it was required to act diligently and in accordance with the precautionary principle. The respondent submitted that in substance these requirements are materially different from the assessment requirements under the international conventions.

62. The assessment requirements under Article 206 UNCLOS impose a general obligation to carry out an assessment in certain circumstances. UNSFA has specific requirements in respect of highly migratory fish stocks and the WCPO Convention materially applied the same provisions to the WCPO which includes the Cook Islands EEZ. The objective of UNSFA is stated to be "*to ensure the long-term conservation and sustainable use of fish stocks such as skipjack tuna*", while the objective of the WCPO Convention is to ensure the long-term conservation and sustainable use of highly migratory fish stocks.

63. When the respondent's obligations under UNSFA and the WCPO Convention to make an assessment are considered against an EIA required under international customary

law, there is in this Court's view, very little material difference between the two. An EIA under international customary law requires consideration on the likely adverse impact on the environment. Under Article 206, if it applies it is necessary to "assess" the potential effects of such activities on the marine environment. It is difficult to see that "*considering the likely adverse impact on the environment*", differs in any substantive way in respect of adverse effects from "*assessing the potential effects of such activities on the marine environment*".

64. In carrying out a State's obligations under the UNSFA and the WCPO Convention requirements, it is obviously necessary to assess the adverse environmental impact in fulfilling the obligations noted under paragraph 42 above. In considering measures to conserve and manage skipjack stocks, adopt measures to maintain stocks at levels capable of producing maximum sustainable yield, assessing the impact on the activities of bycatches and considering the interests of artisanal and subsistence fishers, it is first necessary to determine as far as is practical the environmental impact of the proposed activities on the marine environment.

65. The view expressed in the previous two paragraphs is supported by Article 8.2 of the WCPO Convention which states:

> 8.2 In establishing compatible conservation and management for highly migratory fish stocks in the Convention areas, the Commission shall:
>
> (a) …
>
> (b) take into account:
>
> (i) the conservation and management measures adopted and applied in accordance with Article 61 of [UNSFA] in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the Convention Area as a whole do not undermine the effectiveness of such measures.

This Article contemplates that coastal States adopt measures based on their own requirements and should not rely on regional measures. Thus, Articles 7(2) and 30 of the WCPO Convention cannot undermine the obligations of coastal States in this respect.

66. The respondent submitted that the obligations are modified by the words "reasonable" qualifying "grounds" in Article 206 UNCLOS and insertion of the phrase "as far as practicable" in the same Article. However, the mandatory provisions of Article 5 of the WCPO Convention (and similar mandatory provisions in UNSFA) to fulfil the

obligations detailed in paragraph 40 above, are not in conflict with the provisions of Article 206, even if that Article is modified as suggested by the respondent.

67. It is necessary to make the assessment "*as far as is practicable*" but in doing so it is necessary to base measures on the best scientific advice available and to adopt the precautionary approach. The respondent was correct in referring to Articles 7(2) and 30 of the WCPO Convention. Article 7(2) states:

> The members of the Commission shall give due consideration to the respective capacities of developing coastal States, in particular small island developing states, in the Convention Area to apply the provisions of Articles 5 and 6 within areas under national jurisdiction and the need for assistance as provided for in the Convention.

It is for the WCPFC to give consideration to the capacity of a developing coastal State and there is no evidence before either Court as to any consideration by the WCPFC of this requirement, or whether assistance was requested as provided in the Article. The Court does not accept that this provision permits a State to enter into an activity which may cause substantial harm to migratory stocks without conducting a proper assessment, particularly if its capacity to conduct an assessment was not considered by the WCPFC.

68. Article 30 sets out the requirements of a developing State and the need for the Commission to give full recognition to the special requirements of such a State in relation to the conservation and management of stock such as tuna. There is a duty to co-operate in the establishment of conservation and management measures for highly migratory fish stocks. The main thrust of this particular article is to protect a small State from adverse impacts from the activities of other States. The comments made in the previous paragraph apply to this Article.

69. As noted above, the Environment Act, although being a domestic statute, does have relevance. Obligations under that Act appear to differ little in substance from the obligations under customary international law or under UNSFA and the WCPO Convention. That Act requires (a) an assessment of the impact that the Fishery Plan will have on the environment; (b) justification for the use or commitment of depletable or non-reviewable resources (if any); and (c) reconciliation of the short-term use and long-term productivity. Those requirements are contained both in an EIA and international customary law and in this Court's view under the assessments required under UNSFA and the WCPO Convention.

70. In the circumstances, it is not necessary to consider whether customary international law placed additional obligations on the respondent. The obligations contended for by the appellants are in fact contained in the requirements of the assessment obligations under UNSFA and the WCPO Convention. The respondent's actions will therefore be measured against the requirements set out in paragraph 42 above.

71. In the circumstances, it is not necessary to determine the application to withdraw the concession made in the High Court. If the respondent did in fact have an obligation to complete an EIA before entering into the Decisions, the obligations under the assessment provisions of UNCLOS, UNSFA and the WCPO Convention or under the provisions of the Environment Act do not differ materially from an EIA obligation.

Was a proper assessment undertaken?

72. There was very little purse seine fishing for skipjack in the Cook Islands EEZ before the Decisions. The United States had had the right for at least 25 years to undertake purse seine fishing in the Cook Islands waters under the provisions of a multilateral treaty with certain specific island countries including the Cook Islands. However, there were very few purse seine vessels fishing in the Cook Islands EEZ until about 2011. The evidence is that by November 2015, there were 25 foreign fishing vessels licensed to fish in the EEZ in addition to the US Treaty vessels.

73. The circumstances which led to the Regulations and the Fishery Plan are recorded in the evidence of Mr Ponia who was at all relevant times the Secretary of the MMR. A summary is:

    (a) In 2011, the MMR proposed an exploratory purse seine fishery of 500 days. There is no evidence as to whether this proposal was fully implemented.

    (b) In 2012, the MMR commissioned Dr Lehodey from the French Space Agency to assess skipjack tuna abundance. His report combined previous catch records and environmental parameters to create an ecosystem model from which a sustainable EEZ catch could be determined.

    (c) The findings of the Lehodey Report led the MMR to propose a conservative catch limit of 1,250 fishing days.

    (d) In 2012, the US fleet operating under the US Treaty landed its first significant catches totalling 12,794 tonnes. Previously, the highest annual catch was

15,500 tonnes in the Cook Islands EEZ, such catch not being from purse seine fishers but from longline fishers.

(e) The Regulations and Fishery Plan passed in 2013 were based on the Lehodey Report and the 2012 catch history (the 2012 catch history is from the Longline Report). A limit of 1,250 fishing days was adopted in the Regulations.

(f) In 2015, the Cook Islands EEZ reported a record level of purse seine catches of 18,546 tonnes. Approximately 90% of this catch was skipjack tuna. The catch report noted that artisanal catches were at an all time high at 219 tonnes, 52% of which was yellowfin.

(g) In 2016, purse seine revenues amounted to $10.4 million. Prior to 2009, the total amount of fisheries revenue was less than $1 million.

74. The WCPFC, at a session in December 2012 set an overall limit of 64,000 fishing days for purse seine fishing as a measure to restore bigeye tuna stocks. This was set on the advice of its Scientific Committee. Coastal States, including the Cook Islands, whose efforts were less than 1,000 fishing days, were requested to establish effort limits and notify the Commission no later than November 2013. In November 2013, Mr Ponia, the Secretary of MMR advised the WCPFC of the limit of 1,250 fishing days which the Cook Islands had set under the Regulations passed in February that year. In December 2013, at a regular session of the WCPFC, the Cook Islands was granted an EEZ limit of 1,250 fishing days.

75. Although not relevant to this ground of appeal, but possibly relevant to relief if the appeal succeeds, the Cook Islands Offshore Fisheries Annual Report of 2016 notes that in the 2016 year, the longline fishery catch was 4,684 metric tonnes, 60% of which was albacore tuna and that the total Purse Seine Fishery catch was 7,880 metric tonnes with approximately 96% being skipjack tuna. Reported artisanal catches were at an all time high at 324 metric tonnes, 53% of which was yellowfin. The artisanal fishery operated out of each of the inhabited islands mostly for subsistence with some tourist operators present in Rarotonga and Aitutaki. The bulk of purse seine fishing was conducted by US flag vessels because in 2016, fishing had not commenced under the Partnership Agreement.

76. The 2016 annual report also notes that the Cook Islands had 350 days available to be fished by the US vessels of which 134 days were actually used. 900 days were available to be fished by any other purseiners of which 31 days were used. The purse

seine catch in 2016 was actually less than the catch in 2015 by 44%. 98% of the total catch in 2016 was taken in conjunction with FADs.

77. A further factual matter, not relevant to this ground of appeal, but possibly relevant to relief, is that the Marae Moana Act 2017 established a marine protected area of 50 nautical miles around all islands of the Cook Islands. One of the purposes of the marine protected area is to protect the alleged habitat. Large scale commercial fishing is prohibited in the marine protected area. Mr Ponia's evidence was that the Regulations and Partnership Agreement are to be amended to exclude commercial fishing in the marine protected area.

78. A summary of other evidence given by Mr Ponia is:

(a) The Partnership Agreement seeks to utilise surplus fishing days from the 1,250 fishing days provided for in the Fishery Plan. At February 2017, 423 of those days were committed to the United States and 156 days were to be committed to the European Union leaving a balance of 671 unutilised fishing days.

(b) Between March and 2011 and January 2017, there were 51 public meetings and 17 Cabinet meetings on the issue of purse seine fishing. However, of particular relevance to this ground of appeal, there were only 4 public meetings before the Regulations and Fishery Plan came into force, one each in Rarotonga and Aitutaki in April 2011, a further one in Rarotonga on 23 January 2013 and the fourth in Aitutaki on 20 February 2013. The Regulations and Fishery Plan came into force on 26 February 2013. It is difficult to accept in these circumstances that the last two meetings could have been for any purpose other than to advise the provisions of a proposed Regulation and Fishery Plan. The subject of the April meetings in 2011 was stated to be "*overview of purse seining, exploratory fishery plan*". Because the meetings were before the Lehodey Report was received, they could not have amounted to a consultation on any particular proposals in the Regulations or the Fishery Plan.

(c) In November 2015, Mr Ponia advised the WCPF Commission of the purse seine day limit of 1,250 fishing days established by the Cook Islands in its EEZ. He also advised that catch limits of skipjack tuna were limited to a total of 30,000 metric tonnes in any consecutive four quarterly period. The latter statement was not correct as the Regulations did not so limit the catch. However, they

did give the Secretary the right to review the position if the catch did exceed the 30,000 metric tonnes and the right to reduce the fishing allowances.

(d) Mr Ponia understood that the customary fishing ground of traditional fishermen to not extend beyond the natural boundary of the sea formed by the horizon.

79. In summary, the only evidence before the High Court of the steps taken by the Government, the Secretary and MMR which led to the promulgation of the Regulations and the Fishery Plan is that the Lehodey Report was commissioned to assess the abundance of skipjack tuna. The Lehodey Report and the Longline Report led to the MMR proposing a catch limit of 1,250 days. The respondent had access to the 2012 CMM and was presumably influenced by it and that there was the limited consultation referred to in paragraph 78(b) above.

80. Against this background, the respondent contended that even if the Cook Islands was required to conduct an EIA, it complied by considering or receiving the four reports referred to in paragraph 8 above. Potter J determined that the Lehodey Report, the OFP and the Longline Report were not sufficient to comply with the respondent's obligations. She placed greater reliance on the 2012 CMM and concluded that an EIA was sufficiently conducted by the respondent's receipt and consideration of these four reports.

81. The Lehodey Report is dated 13 April 2012. It notes that there had only been occasional catches of skipjack by the purse seine method in the Cook Islands EEZ despite that the specie was likely to be present in abundance. Also it noted that the MMR was conducting an exploratory study to assess the potential of development associated to this resource in a sustainable way and that the MMR would like to explore fishing effort scenarios. The final two paragraphs of the report read:

> A fishing scenario based on a total of 1,000 fishing day per year predicted a catch of 27,000 metric tonnes. However, this scenario is based on the fishing effort deployed in the WCPFC between 2004-08. The actual catch would be influenced by the most recent level of catch and effort in the region and the natural variability of the skipjack stock. In addition, there are several sources of uncertainty in the estimates coming from the model and the necessary simplification used.
>
> But most importantly, the development of skipjack purse seine fishery in the northern part of the Cook I. EEZ should consider the issue of FAD fishing, since this region is also one of the most favourable spawning habitat known for Pacific bigeye tuna. The development of skipjack fishing using free school sets rather than FAD sets should be a priority to sustain the WCPFC effort for reducing juvenile bigeye mortality.

82. It is apparent from the Lehodey Report that it was commissioned as part of an exploratory study in 2012, basing its suggestions on catch figures in the WCPO from 2004 to 2008. The report itself noted several sources of uncertainty in the estimates and also recommended developing the skipjack fishing using free skill-sets rather than FADs because the region is in one of the most favourable spawning habitats known for bigeye tuna. This latter recommendation was aimed at reducing juvenile bigeye mortality.

83. The OFP considered the potential for interactions between commercial tuna fishers and Cook Islands artisanal fishers. It noted that for the most part the industrial and artisanal fleets were targeting different species and interaction was more likely to emerge between the fishers over the main shared species, yellowfin tuna and wahu. This report stated that "*quantitatively assessing the impact of the local commercial fishery on local artisanal catch rates, versus environmental and recruitment effects, is not possible at this stage*". The report also noted that although most of the tuna stocks were not fished beyond maximum sustainable yield, the availability of those fish to artisanal fishermen had significantly declined and continues to decline. The report was to be updated in 2014 but there is no evidence that it was and, in any case, if there had been an updating, it would have been after the Regulations and Fishery Plan came into effect.

84. The Longline Report was the 2012 annual report for the longline fishery. There is only a passing reference in this report to skipjack, noting that skipjack catches were largely from the US Treaty purse seine fishing in the north western area of the EEZ north of Pukapuka and also around Penrhyn.

85. This Court agrees with Potter J in her assessment that the Lehodey Report, the OFP and the Longline Report could not constitute compliance with the EIA requirements. In this Court's view they were not complete assessments under the requirements of the WCPO Convention. Her Honour, however, considered that when the 2012 CMM is taken into account, there had been compliance. The appellants' position is that there is nothing in these four reports which could amount to conducting an EIA. There is no evidence that the impact on bigeye and yellowfin stocks was considered, there was no consideration of the impact on artisanal and subsistent fishers, nor was there any consideration of alternatives on whether or not the Purse Seine Fishery should be established. Particular points made in support of this submission included:

    (a) There was almost a complete lack of consultation with interested parties;

(b) Mr Ponia was not correct when he referred to a catch limit being imposed. There was only a review provision as is noted in paragraph 74(c) above.

(c) Consideration of the effect of FADs in Cook Islands waters was not given and the Fishery Plan merely adopted an WCPO Convention recommendation which was a regional recommendation.

(d) The Lehodey Report itself implicitly identified the need for an EIA and suggested further investigations.

(e) Neither the OFP or the Longline Report contained material information on the skipjack stocks or the effect on artisanal and subsistent fishers. In fact, the OFP said it was not possible to quantitatively assess those matters at that stage.

86. The 2012 CMM was issued in December 2012 at the ninth regular session of the WCPFC. It set out the conservation and management measures required for bigeye, yellowfin and skipjack tuna in the WCPO. An objective for this document was to ensure that compatible measures for the high seas and EEZs were implemented for these three species of tuna so that the species were maintained at levels capable of producing their maximum sustainable yield as qualified by relevant and environmental and economic factors including the special requirements of developing States. Relevant provisions of this 2012 CMM are:

(a) FADs were to be prohibited for three months from July to September for all purse seine vessels fishing in an EEZ (this was later increased to four months).

(b) The Cook Islands was in a category which was required to establish effort limits or equivalent limits for purse seine fisheries within its EEZ that reflect the geographical distribution of skipjack, yellowfin and bigeye tuna and are consistent with the objective for those species. The limits so set were to be advised to the WCPFC by November 2013. As noted above, Mr Ponia did give this advice on 12 November 2013.

(c) The preamble noted that previous measures to mitigate the overfishing of bigeye and yellowfin tuna and that the measures have been unsuccessful in reducing the fishing mortality of bigeye or juvenile yellowfin tuna. It also noted that the bigeye stock was subject to overfishing and yellowfin tuna was currently being fished at capacity.

87. In her judgment, Potter J put weight on the 2012 CMM since it had been produced by an inter-governmental body to which the Cook Islands is a party; the Cook Islands is a small and developing country with comparatively limited resources on which it can draw and it was thus entitled to place reliance on it; and the primary environmental impact of an expanded purse seine fishery was likely to be regional rather than restricted to the Cook Islands EEZ, and it had been developed in direct response to the regional overfishing of bigeye and yellowfin tuna. Her Honour accepted that the WCPFC had the best available information to set these measures. Her Honour did not accept that the MMR had a separate obligation to carry out a full EIA in relation to the impact of purse seining within the Cook Islands EEZ. The information and reports received from the WCPFC inform and guide decisions in the exercise of the Cook Islands' sovereign rights to explore and exploit those stocks which were in its EEZ, such as tuna.

88. The issue on this ground of appeal is whether, as the respondent contended, the four reports fulfilled the Cook Islands' obligations under international and domestic law or whether they failed to do so. Initially, this assessment will be made against the criteria under the WCPO Convention as such criteria is stated in paragraph 42 above. This Court accepts that the Cook Islands has the sovereign right to regulate within its territorial waters and its EEZ for the benefit of the inhabitants of the Cook Islands and cannot be criticised for wanting to develop its resources from its fishing stocks. The question is whether it observed its legal requirements in doing so.

89. The Purse Seine Fishery is a "Designated Fishery" under the Regulations. The evidence of Mr Hampton, a scientist called on behalf of the respondent, categorised the Purse Seine Fishery as a "new fishery". Mr Ponia referred to a proposal for an "exploratory purse seine fishery of 500 days" in 2011 but there is no evidence that this proposal was fully implemented. The Regulations do not apply to an exploratory fishery. Thus, it is necessary to consider the Cook Islands' obligations in respect of a Designated Fishery and not an exploratory fishery. It was therefore necessary for the Fishery Plan to contain the mandatory provisions set out in s 6(3) of the MRA (see paragraph 30 above).

90. Matters relevant to the Cook Islands obligations prior to promulgating the Regulations and the Fishery Plan are:

    (a) Was it in order to rely upon the 2012 CMM to the extent suggested?

(b) Was there a duty to consult and a related issue was whether the best scientific evidence was utilised?

(c) Was there consideration of the effects on byspecies?

(d) Was there consideration of the maintenance of the maximum sustainable yield in setting the catch limits and the fishing day limits?

(e) Was there sufficient consideration of the use of FADs?

(f) Do any of these matters suggest that the Regulations and Fishery Plan were adopted prematurely?

91. The 2012 CMM adopted conservation and management measures with regard to bigeye, yellowfin and skipjack tuna in the WCPO. It is an important document and required each State to adopt limits for effort management. The Cook Islands' obligation was to establish effort limits or equivalent catch limits for purse seine fishers within their EEZs that reflected the geographical distributions of skipjack, yellow fin and bigeye tuna. The obligation was to set appropriate limits within the Cook Islands EEZ. The 2012 CMM did not suggest what those limits should be for each State and it was therefore the Cook Islands' obligation to assess those limits. It did fix limits and advised the WCPFC of those limits within the required time. However, as noted above, the letter of advice wrongly stated that there was a fixed catch limit whereas it was only an obligation to review once a certain tonnage was reached.

92. Another obligation under the 2012 CMM was to impose a three months' FAD prohibition. This was done. However, the 2012 CMM did not make any appraisal of the effect of FADs in the Cook Islands EEZ and in particular whether the bigeye spawning areas in these waters would be seriously adversely affected. Nor did the 2012 CMM refer to maximum sustainable yield, nor to the effects of FADs on artisanal and subsistent fishers.

93. While there is no explicit obligation to consult under the requirements set out in paragraph 42 above, or in s 39 of the Environment Act, consultation was obviously necessary in finalising the Fishery Plan and the activities which it permits. Consultation was in this Court's view obviously required with representatives of the artisanal and subsistent fishers and also with others in the fishing industry in respect of the protection of bycatch species. There is no evidence that the necessary consultation took place and the inference from Mr Ponia's evidence is that it did not. It is not clear to this Court

whether the best scientific advice available was taken as there is no evidence on this point and no finding is made in respect of this requirement. Potter J found that the WCPFC had the best scientific evidence available.

94. It is difficult to understand how the Secretary fixed the fishing days at 1250 days in view of the provisions of the Lehodey Report and the lack of any other report which would indicate a basis for exceeding the recommendation of 1000 days in the Lehodey Report. The Ministry of Marine Resources and the Secretary did have a discretion and did make a decision which they were entitled to make. There has been no challenge to the decision on the grounds of reasonableness.

95. FADs and their effect on spoiling bigeye tuna was an important issue. Lehodey said:

> Given the strong issue of FAD-related fishing mortality of juvenile bigeye tuna and other bi-catch species, the scenario has privileged the use of free school fishing over FAD fishing with 650 days and 350 days respectively. Spatially, the effort was distributed homogeneously within the northern part of EEZ (north of 12°S) . The catchabilities and selectivities were those estimated from actual fish effort and catch, and the scenario keeps and change the fishing effort outside of the Cook Island EEZ.

96. The Fishery Plan in fact accepts the 2012 CMM recommendation in respect of FADs. From an economic point of view this is understandable. The evidence shows that during the stand-down period, purse seine fishers do not fish in the Cook Islands waters. Any further restriction on the use of FADs may have reduced the economic advantage expected from the Purse Seine Fishery. However, there appears to have been no direct consideration of the effect of FADs in Cook Islands waters and in particular, upon the possible effects both on the bigeye spawning waters and artisanal and subsistent fishers.

97. The other area of concern is that the further investigations suggested by the Lehodey Report were not carried out. Probably for economic reasons the Regulations and the Fishery Plan were brought into existence fairly soon after the receipt of the Lehodey Report. The Report contained a note of caution having been based on 2004-2008 catch figures and noted that there are several sources of uncertainty in the estimates coming from the model and the necessary simplification used. No steps appear to have been taken to remove those sources of uncertainty.

98. The precautionary approach is discussed below when the second ground of appeal is considered. However, it is this Court's view that in adopting the Fishery Plan based to a large extent on regional assessments rather than local assessments, without adequate consultation, without adequate consideration of the effect on artisanal and

subsistent fishers, and without apparently adequate consideration on the effect of FADs and in particular, their effect on bigeye spawning waters, the respondent did commit an error of law and did not comply with the obligations under UNCLOS, UNSFA and the WCPO Convention, nor with its obligations imposed by customary international law to conduct an EIA, nor with its obligations under the provisions of section 36 of the Environment Act.

99. The first ground of appeal succeeds, namely the respondent failed to carry out an EIA in respect of the proposed extension of purse seine fishing and, as a result, failed to act in a manner consistent with the Cook Islands' international obligations, as required by s 5 of the MRA.

Second Ground of Appeal – Failure to apply the Precautionary Approach

100. The appellants allege that the respondent failed, in breach of s 4 of the MRA, to comply with the precautionary approach, or to have any or proper regard to the impact of bycatch species and on artisanal and subsistent fishers in making their decisions.

101. The relevant portion of s 4 of the MRA reads:

> 4. Principles and Measures – The Minister, or Secretary, as appropriate, when performing functions or exercising powers under this Act, shall take into account the following:
>
> (a) environmental and information principles in relation to achieving the sustainable use of fisheries and the need to adopt measures to ensure the long term sustainability of the fish stocks –
>
> (i) decisions should be based on the best scientific evidence available and be designed to maintain or restore target stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors;
>
> (ii) the precautionary approach should be applied;
>
> (iii) impacts of fishing on on-target species and the marine environment should be minimised;
>
> (iv) biological diversity of the aquatic environment and habitat of particular significance for fisheries management should be protected.
>
> (Underlining added)

102. Both UNSFA and the WCPO Convention contain articles requiring the application of the precautionary approach. The provisions are similar and in this Court's view, it is sufficient to consider this ground against the provisions of Articles 5 and 6 of the WCPO Convention.

103. Article 5 of the WCPO Convention includes the following:

> In order to conserve and manage highly migratory fish stocks in the Convention Area in their entirety, the members of the Commission shall, in giving effect to their duty to cooperate in accordance with the 1982 Convention, the Agreement and this Convention:
>
> …
>
> (c) apply the precautionary approach in accordance with this Convention and all relevant internationally agreed standards and recommended practices and procedures.

104. Article 6 of the WCPO Convention refers to the application of the precautionary approach. Portions of that Article read:

> 1. In applying the precautionary approach, the members of the Commission shall:
>
> (a) apply the guidelines set out in Annex II of the Agreement, which shall form an integral part of this Convention, and determine, on the basis of the best scientific information available, stock-specific reference points and the action to be taken if they are exceeded;
>
> (b) take into account, inter alia, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distributions of fishing mortality and the impact of fishing activities on non-target and associated or independent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and
>
> …
>
> 2. Members of the Commission shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.
>
> 3. Members of the Commission shall take measures to ensure that, when reference points are approached, they will not be exceeded. In the event they are exceeded, members of the Commission shall, without delay, take the action determined under paragraph 1(a) to restore the stocks.
>
> 4. Where the status of target stocks or non-target or associated or dependent species is of concern, members of the Commission shall subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. They shall revise those measures regularly in the light of new information.
>
> 5. For new or exploratory fisheries, members of the Commission shall adopt as soon as possible cautious conservation and management measures, including, inter alia, catch limits and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment be implemented. The

> latter measures shall, if appropriate, allow for the gradual development of the fisheries.

105. The Annex II referred to in Article 6 of the WCPO Convention is the Annex to UNSFA which deals with the application of precautionary reference points in conservation and management of straddling fish stocks and highly migratory fish stocks. A portion of that Annex reads:

> 1. A precautionary reference point is an estimated value derived through an agreed scientific procedure, which corresponds to the state of the resource and of the fishery, and which can be used as a guide for fisheries management.
>
> 2. Two types of precautionary reference points should be used: conservation or limit, reference points and management, or target, reference points. Limit reference points set boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce maximum sustainable yield. Target reference points are intended to meet management objectivities.
>
> 3. Precautionary reference points should be stock-specific to account, inter alia, for the reproductive capacity, the resilience of each stock and the characteristics of fisheries exploiting the stocks, as well as other sources of mortality and major sources of uncertainty.

106. In the judgment appealed from, Potter J interpreted the words "shall take into account" in s 4 MRA as meaning that the respondent's obligation in applying the precautionary approach was to turn their minds to the requirements of that approach when making the Decisions but they were free to adopt, reject or attribute as much weight to them as they saw fit. The obligation under s 4 was not a substantive requirement which the respondent was required to give effect to when making the decisions. Her Honour then considered each of the matters raised by the appellants in support of the submission that the approach had not been followed and determined that the respondent had taken into account every such matter when entering into the Decisions.

107. The appellants' position at paragraph 58 of its submissions was that there were five reasons why the precautionary approach was not followed, namely:

(a) the recommendations in the Lehodey Report were disregarded;

(b) there was a failure to consider the impacts that purse seine fishing would have on bigeye tuna and other non-targeted species;

(c) the adoption of ineffective restrictions on FADs that were unlikely to achieve their stated aim of conserving bigeye stock;

(d) there was a failure to consider the interests of artisanal and subsistent fishers; and

(e) the making of the decision to enter the Partnership Agreement.

108. The respondent's position was that it was not mandatory to apply the precautionary approach but in any case, regard was had to it because the Crown took into account all relevant environmental information principles including:

(a) the best scientific evidence available, and the impacts on non-targeted species; and

(b) the interest of artisanal and subsistent fishers.

The meaning of "take into account"

109. The appellants' interpretation of the term "take into account" is based on an interpretation of the wording in s 4 MRA and is reinforced by the Crown's obligations under the WCPO Convention and UNSFA. On the appellants' interpretation, the phrase imposes a mandatory obligation. They do not rely on case authorities while the respondent cited several authorities in support of the submission that the term does not impose a mandatory requirement.

110. Having considered the authorities cited and noting that there has sometimes been a suggestion that "take into account" and "have regard to" are not synonymous, this Court accepts that "take into account", unless further qualified by its statutory context, means that a decision-maker must consider the matters which are required to be taken into account, give due weight to them, but ultimately having done so, has a discretion in coming to a decision.

111. The appellants submitted that the word "should" in s 4(a)(iii) MRA and in the other subsections of s 4(a), makes those provisions including the application of the precautionary approach mandatory. There is merit in the submission. In this case however, it is not necessary to come to a definite conclusion because of the provisions of the WCPO Convention and UNSFA. In Article 5 of the former, the Cook Islands has agreed that to give effect to its UNCLOS duty to co-operate it "shall" apply the precautionary approach. The word "shall" has a mandatory meaning and therefore the obligation of the Cook Islands in matters relating to the conservation and management of highly migratory fish stocks, such as tuna, is a mandatory obligation. UNSFA has similar mandatory obligations.

Was the precautionary approach complied with?

112. The appellants' first point is that the Lehodey Report was disregarded. It identified the potential for 1,000 fishing days per annum with only 350 of those days allowing FADs in order to protect bigeye tuna. The only evidence for the limit of 1,250 days in the Fishery Plan was from Mr Ponia who said the limit was fixed on the basis of the Lehodey Report and the Longline Report. It is the appellants' position that the Crown could not have increased the limited nor increased the day on which FADs could be used unless it had a basis to do so and there is no evidence of such a basis. In fact the evidence was to the contrary.

113. In response, the respondent said that the Crown generally turned its mind to the precautionary approach and the available science/data when it set the limit at 1250 days. Mr Ponia also said in his evidence that "*the limits … were determined after careful consideration of science and catch history*", with consideration also given to "*geographical distribution of stocks*" and "*future fishery developments in mind*". Reference is also made to the WCPFC accepting the Cook Islands limit when it was advised of such in November 2013. However, it is noted that such an acceptance by the WCPFC cannot have a bearing on the decision-making process in respect of decisions made in February 2013.

114. On this point the respondent also relied upon the evidence of Mr Hampton who states that the purse seine tuna fishery in the Cook Islands falls within the WCPO Convention's definition of a "new fishery", and in the circumstances, the limits on catch days is both precautionary and conservative (although this is an assertion unsupported by evidence.) Article 6(5) of the WCPO Convention (see paragraph 99 above) requires members of the WCPFC to adopt, as soon as possible, cautious conservation and management measures for new or exploratory fisheries. Mr Hampton in his evidence does say that purse seine fishing in the Cook Islands EEZ would fall into the category of "new fishery". However, there is not a definition of that term in the WCPO Convention and it is arguable that the Cook Islands Purse Seine Fishery is a new fishery, albeit that there was not extensive purse seine fishing until 2012. The fact that the Cook Islands has declared the Purse Seine Fishery to be a Designated Fishery means by definition that it cannot be an exploratory fishery. Section 5 MRA states that an exploratory fishery cannot be a Designated Fishery.

115. The appellants' second point is that the respondent failed to apply the precautionary approach to design decisions to restore target stocks to a maximum sustainable yield

and to minimise the impact on non-target species as required by s 4 MRA. The appellants' position is that these matters required specific assessment of the impact that the proposed activities would have on bigeye tuna which were known to spawn in the area where purse seining would take place in the Cook Islands EEZ. The risk to bigeye stock had been specifically drawn to the respondent's attention in the Lehodey Report.

116. The respondent adopted the reasoning in the High Court judgment, namely that sufficient weight was placed on the findings of the WCFPC as expressed in the 2012 CMM. These specifically address the impact of purse seine fishing on the non-target species, particularly bigeye tuna. Further, paragraph 10 of the Fishery Plan specifically noted the concerns of the impact on bigeye tuna. The respondent also rejected the appellants' contention that the Crown was required to conduct a specific bigeye assessment because, for some time, tuna stocks had been managed at a regional level and the WCPFC was the relevant regional body with access to the best scientific data available.

117. The third point raised by the appellants was that, while the Cook Islands had committed to an annual four-month ban on setting FADs in order to conserve bigeye tuna stock in the region, it is unclear how the measure can be effective when there is nothing in the Regulations, the Fishery Plan and the Partnership Agreement requiring any fishing without FADs. Further, the evidence shows that there is no rational or logical connection between the respondent's obligation to meet the requirement to maintain and restore target stocks and to apply the precautionary approach on the one hand and the restrictions on the use of FADs on the other.

118. In reply, the respondent's position was that the Crown was entitled to depart from the scenario modelled in the Lehodey Report in setting its 1,250-day effort limit and that there is nothing in s 4 or elsewhere which required a complete FAD ban. The Crown was entitled to weigh the FAD use as it thought fit. It also relied on the FAD restriction imposed by the WCPFC.

119. The appellants' fourth point is that the High Court erred when it determined that the OFP which was commissioned and considered by the MMR discharged the respondent's obligation to consider the interests of artisanal and subsistent fishers. The OFP Report raised concerns about the impact of the longline fishery on such fishers but did not consider or address the impact of expanding purse seining. No evidence was led to show that the respondent considered or addressed the impact on

the species. In particular there is no mention of such fishers in the "impacts and interactions" section of the Fishery Plan. In Mr Ponia's evidence, the only reference to such interest was a suggestion that there will be future "*scientific monitoring of the catches of local fishermen to ensure in order to assess if there is an impact on commercial fishing*". There was evidence that catches in the subsistence and artisanal sectors had declined substantially over the last 20 years as a consequence of foreign fishing vessels. There is no evidence that the Secretary considered this decline. The respondent relied upon the OFP Report and said that the respondent assessed the impact and, after monitoring the extension of the Purse Seine Fishery, closed out an area of 50 nautical miles from the shores of each island. Further, the Fishery Plan identified protection of "*traditional and small scale commercial inshore fishers*".

120. The final point relied upon by the appellants is that the Partnership Agreement fails to impose any target limits on the amount of fishing that EU vessels can carry out. It simply provides for consultation when the reference tonnage of 7,000 tonnes per annum was approached. Nor is there evidence of consideration of the fact that the Spanish fleet heavily relied on FADs and the history of FADs catching an unusually high bycatch of bigeye tuna. The appellants said that s 4 MRA required the Crown to comply with the precautionary approach when entering the Partnership Agreement and that it failed to comply with either that section or the provisions of the WCPO Convention when it failed to consider the target limit and the effect of FADs on bigeye tuna.

121. In response, the respondent relied on the findings of Potter J which include that in the preamble of the Partnership Agreement, the parties noted their awareness of the importance of:

(a) the principles established by the Code of Conduct for Responsible Fishing (adopted at the Food and Agricultural Organisation (FAO) Conference in 1995), under which the parties undertook to promote responsible fishing in the Cook Island waters as provided in the Code of Conduct for Responsible Fishing; and

(b) the Protocol, which provides that a joint committee made up of representatives from both parties may reassess and review the fishing opportunities in the Protocol itself.

122. Further, the respondent said that while on the face of the Partnership Agreement, there is no cap on tonnage, other than by way of a review at 30,000 metric tonnes per annum

and impliedly through the usual operation of economics, access given under the Partnership Agreement is well within the Cook Islands (precautionary) effort limit approved by the WCPFC. Across the WPCO, growth in the total commercial tuna catch appears to have flattened out and Articles 7(2) and 30 of the WCPO Convention qualify the Cook Islands obligations.

123. In assessing the second ground of appeal, on the basis that the application of the precautionary approach is mandatory, this Court is applying a different standard to that applied in the High Court. While accepting that the Secretary and MMR had a discretion, they were obliged to apply the precautionary approach and not merely "take it into account". This placed a more onerous obligation on the respondent. It is necessary to consider individually and cumulatively the five issues raised by the appellants under this ground of appeal.

124. Lehodey Report and Catch Limit

(a) This report noted that the fish stocks are strongly linked to weather, noted a strong variability in the dynamics of skipjack stock and concluded with the paragraphs referred to in paragraph 81 above. The scenario in the report which was based on dated catch figures, noted the natural variability of the skipjack stock and noted that there were several sources of uncertainty in the estimates coming from the model and the necessary simplification used. In other words, there was considerable uncertainty in the recommendation of a catch limit of 1,000 fishing days.

(b) As noted above, the Longline Report cannot be the basis for settling the catch limit. There was no evidence before the High Court to justify a party placing a limit on the purse seine catch or adopting a system which placed a higher limit on the total catch.

(c) Neither the Lehodey Report or the Longline Report, whether taken individually or cumulatively, was a substitute for the obligation to adopt measures to ensure the long-term sustainability of highly migratory fish stocks (Article 5(a) of the WCPO Convention). They raised the uncertainties which should have been taken into account under the provisions of Article 6 of the WCPO Convention but there is no evidence that these matters were taken into account to remove any uncertainty.

(d) On the basis that there was no evidence of consideration of any data which would justify going above the recommendation of a lower level catch total, against the background which stressed several sources of uncertainty on the suggested lower level of 1,000 fishing days, it is considered that the Crown did not apply the precautionary approach in setting the catch limits. This is not undermining the Secretary's right to exercise his discretion on settling the limits but is a determination that there was no evidence to justify a decision of a higher catch limit.

125. Impact on bigeye tuna and non-target species

(a) The respondent relied on the OFP which it commissioned to consider the potential for interactions between commercial tuna fisheries and Cook Islands artisanal fisheries. It was not specifically commissioned to consider the impact on bigeye tuna and non-target species and even in the task it reported on, it noted that "*quantitatively assessing the impact on the local commercial fishery or local artisanal catch rates, versus environmental and recruitment effects, is not possible at this stage*". Such an assessment was however necessary to assess the effect on bigeye tuna.

(b) Under paragraph 14 of 2012 CMM, the Cook Islands was required to establish effort limits or equivalent catch limits for purse seine fishers within the Cook Islands EEZ, "*that reflect the geographical distribution of skipjack, yellowfin and bigeye tuna and are consistent with the objectives for those species*". The OFP cannot be relied upon to fulfil this obligation.

(c) The Fishery Plan does contain provisions relating to bigeye tuna. Paragraph 7(b) provides for limiting the size of the purse seine fleet in the fishery waters to avoid local depletion, particularly of skipjack tuna and yellowfin tuna. Under the "Impacts and Interactions" heading, paragraph 10(b) notes the relatively high catch rates of juvenile bigeye tuna in waters north-east of the northern Cook Islands. It noted that bigeye tuna bycatch arising from FADs were known to be moderately high in waters adjacent to the Cook Islands EEZ but that there is little information available on bigeye tuna bycatches in Cook Islands waters. Further, no information was available on the impact of purse seine fishing on non-target species. These provisions show an intention to protect bigeye catches as a by-product but nowhere in the Fishery Plan is there a statement as to how this is to be done.

(d) It is accepted that the WCPFC had the best information available in this respect, but it is noted that this was regional information and not information specific to the Cook Islands.

(e) It is accepted that it may have been difficult to assess the impact of fishing on target stocks and non-target species further, but this was not an Exploratory Fishery and, by declaring it a Designated Fishery, the Cook Islands had an obligation under Article 5(d) of the WCPO Convention to put in place measures to assess the impact of fishing on target stocks and non-target species. There is no evidence in either the Regulations or the Fishery Plan that this assessment was made. The provisions of this Article are relevant to the next issue, namely FADs.

126. Fish aggravating devices

(a) There was a clear warning in the Lehodey Report as to the danger that FADs posed on the bigeye spawning areas in particular. It recommended that the development of skipjack fishing using free school sets rather than FADs, should be a priority to sustain the WCPF Convention effort for reducing juvenile bigeye mortality. However, there is no restriction imposed on FADs in either the Regulations or the Fishery Plan or the Partnership Agreement. While the respondent can take comfort in the WCPO Convention, that information was regional information and not local information.

(b) In this Court's view, reliance on the WCPO Convention was not sufficient in view of the Lehodey warning. The respondent was entitled to depart from the Lehodey Model, but there is no evidence to satisfy the departure, particularly when the departure increased the proposed limits against a warning about the need for a proper assessment. It is accepted that reliance on the WCPO Convention does infer that consideration was given and understandably the respondent would be guided by the WCPO Convention. However, there is no evidence to suggest that in February 2013, the respondent had taken steps to make the assessment required under Article 5(d) of the WCPO Convention.

127. Artisanal and subsistent fishers

(a) The respondent was required to assess the impact of the Fishery Plan on artisanal and subsistent fishers. The OFP Report was no doubt designed for that purpose. In part, it fulfilled the respondent's obligations.

(b) However, a complete lack of consultation is a concern in this respect. It is difficult to understand how the interest of a group can be taken into account without consultation with representatives of that group. The evidence discloses that there were only two public meetings to consider the Fishery Plan before it was implemented and these meetings were within six weeks of the Fishery Plan being implemented. It is considered that the respondent failed in the Crown's obligations to assess the effect on these fishers. It is suggested that the increase of the no-fishing zone to 50 nautical miles from the shore confirms that the respondent was complying with the Crown's obligations. However, this was done after the decisions relating to the Regulations and Fishery Plan were made. The statement in paragraph 5(d) of the Fishery Plan, relied upon by the respondent states the future intention and is not evidence of an assessment being carried out.

128. Partnership Agreement

In respect of this point it is noted that:

(a) It is correct that there is no catch limit and in this Court's view, the review position is insufficient to comply with the catch limit requirement.

(b) There are other controls in the Partnership Agreement which will assist the respondent, particularly the review provision. However, this may not be sufficient if there are no reference points as required by Article 6(b) of the WCPO Convention and Annex II of UNSFA. There is no evidence that any reference points were considered, although there appears to have been regional reference points set by the WCPFC.

(c) This breach may or may not have consequences as the EU at this stage has not taken up all the fishing days available to it.

(d) In view of this Court's view on remedies it is not necessary to consider further whether the Partnership Agreement should be set aside.

Conclusion

129. For the reasons in the five previous paragraphs, it is this Court's view that the respondent failed to apply the precautionary approach as required. The factors which are most important in this assessment are the lack of any evidence on which to base a higher catch limit than recommended by the Lehodey Report which the respondent

had commissioned, assessing the effects of the Fishery Plan on bigeye tuna and its biomass in particular, plus insufficient effort to assess the adverse effects of FADs, and the failure to consult with the artisanal and subsistent fishers.

130. The second ground of appeal is therefore made out.

Third Ground of Appeal – Failure to consult with the Aronga Mana

131. The first appellant next submitted that the Minister and the Secretary had a duty to consult the Aronga Mana before promulgating the Regulations and the Fishery Plan and before initialling the Partnership Agreement and Implementation Protocol. This duty is said to arise from "*custom, tradition, usage or value*" which applies because of Article 66A(3) of the Constitution and s 4(d) of the MRA when read together.

132. Article 66A of the Constitution provides as follows:

> **66A. Custom –**
>
> (1) In addition to its powers to make laws pursuant to Article 39, Parliament may make laws recognising or giving effect to custom and usage.
>
> (2) In exercising its powers pursuant to this Article, Parliament shall have particular regard to the customs, traditions, usages, and values of the indigenous people of the Cook Islands.
>
> (3) Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any other enactment.
>
> (4) For the purposes of this Constitution, the opinion of the Aronga Mana of the island or vaka to which a custom, tradition or value relates, as to matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom, shall be final and conclusive and shall not be questioned in any court of law.

133. Section 4 of the MRA provides as follows:

> **4. Principles and Measures**
>
> The Minister, or Secretary, as appropriate, when performing functions or exercising powers under the Act, shall take into account the following –
>
> …
>
> [(d)] social, cultural and equity principles –

> (i) the maintenance of traditional forms of sustainable fisheries management;
>
> (ii) protection of the interests of artisanal fishers, subsistence fishers and local island communities, including ensuring their participation in the management of fisheries and of aquaculture; and
>
> (iii) broad participation by Cook Islanders in activities related to the sustainable use of marine resources.

134. The Constitution does not define the term "Aronga Mana". We were given references to the Parliamentary debates where some legislators considered the term to be so well understood by Cook Islanders so as to not to require definition. But as Lord Sumption observed in the recent Privy Council appeal of *Munokoa v Browne* (judgment of 16 July 2018) such a comment is "*helpful so far as it goes but falls well short of a definition*" (see [33] of judgment).

135. The statements from Hansard cannot sit well with the terms of the Constitution which require the Aronga Mana to state what is the particular custom which is to "*have effect as part of the law of the Cook Islands*" unless there is an inconsistent statute. The Aronga Mana of a particular island or vaka is created as a law-defining body by this provision in the Constitution. As such, it needs to have some statutory recognition of its membership and also of the mode of delivering its rulings on questions of custom, etc.

136. This Court has already considered s 66A of the Constitution in the case of *Hunt v de Miguel* (CA 2/14, 19 February 2016) where the following statements were made in respect of Article 66A(3).

> 11. These definitions speak of including 'persons vested with a title in accordance with the native custom and usage of that part of Rarotonga …' or 'of the Islands of the Cook Islands'. This rather implies that there might need to be some evidence of the investiture of the persons in question. Under these definitions, there seems to be no limit on the number who may be appointed or invested. These provisions are devoid of any details as to the appointment and operation of Aronga Mana. This may be contrasted with the extensive procedural mechanisms contained in the House of Ariki Act 1966 dealing at length with matters of appointment of Arikis to that House.
>
> 56. Reading Article 66A as a whole, it is clear that the intention of Parliament in inserting Article 66A in 1995 was to provide for greater

> recognition and protection of custom and usage in the Cook Islands – or, as the Crown put it, "to acknowledge the worth and dignity of traditional Cook Islands custom". Indeed, the effect of related Article 66A(3) is that custom and usage shall take precedence in the Cook Islands, unless expressly ousted by statutory law, or else inconsistent with the Constitution. Thus the idea that the people themselves (collectively, through their relevant Aronga Mana) would determine the custom to be followed pursuant to Article 66A(4) (unless otherwise ousted by statute or the Constitution) is entirely consistent with the elevation of customary law under the related sub-articles of Article 66A.
>
> 63. Rather, the correct interpretation to be given to Article 66A(4) is that espoused by the Crown in its submissions: that Article 66A(4) is to be interpreted in accordance with the distinction between, on the one hand, the binding status of evidence regarding custom given by the Aronga Mana and, on the other, the Court's jurisdiction (as affirmed by Article 66A(3)) to apply that custom in a way that is consistent with the Constitution and other statutory enactments.
>
> 64. Thus in practice, if the relevant Aronga Mana gives satisfactory evidence as to its properly formulated opinion on the precise content of local custom or usage, then as an evidentiary matter that evidence must, pursuant to Article 66A(4), be treated by the Court as 'final and conclusive'. However, the Court must still, if called upon to do so, determine whether that custom is consistent with the Constitution or 'any enactment'. If it is not, then notwithstanding the binding evidentiary submission of the Aronga Mana, the relevant statute or provision of the Constitution will prevail pursuant to Article 66A(3).

137. The Court both in *Hunt v de Miguel* and also in *Browne v Munokoa* [2017] CKCA 1 at [35]–[39] expressed regret that Parliament has not defined how any Aronga Mana is to be constituted nor the mechanism by which it is to express its ruling on a particular custom. Potter J, in the present case, added her voice to the plea for enlightment.

138. The Privy Council in *Munokoa v Browne* adopted this Court's views where Lord Sumption said at [34]:

> The uncertain identity of the Aronga Mana has given rise to difficulty in a number of cases decided in the courts of the Cook Islands: see *Hunt v De Miguel* (19 February 2016) [CA 2, 3, 7, 8/14], paras 10-11; *Framheim v Attorney General* [2017] CKHC 37, para 141. The Appellants submitted that the Aronga Mana is synonymous with the combined membership of the House of Ariki and the Koutu-Nui. However, the Board has no material before it to support that suggestion, and notes that the statutory functions of the House of Ariki and the Koutu-Nui differ significantly from those of the Aronga Mana as described in the Constitution. The former are consultative and advisory assemblies, while the latter is the final authority on matters of custom. The Board is bound to observe that in circumstances where the Aronga Mana has important constitutional and legal functions, it is highly unsatisfactory that there should be no legislation identifying it, determining its composition or declaring how its acts are to be recognised as such. Without such legislation, it is difficult for the courts to give effect to section 66A(4) of the Constitution. The matter does not, however, need to be resolved on this appeal because there is nothing

> which in the Board's opinion can be described as a definitive opinion from any of these bodies on the points of customary law at issue on this appeal.

139. It would have been relatively easy for the Legislature to have defined Aronga Mana on any island or vaka and to have specified how the Aronga Mana was to express its opinion as to custom as required by Article 66A(4). These provisions could have been articulated either by specifics in the Constitution itself or by some general statement in the Constitution to the effect that the Legislature is empowered to pass a statute regulating the make-up and procedures of Aronga Manas.

140. Potter J noted, as this Court also noted in *Hunt v de Miguel* that there had been some attempts in some statutes to define Aronga Mana. These definitions seem to lack the necessary specificity. This Court has suggested that a helpful precedent for a mechanism for ascertaining titled personages is to be found in the House of Ariki Act 1966.

141. Faced with the statements in *Hunt v de Miguel*, the first appellant went to considerable trouble and no doubt expense to collect the views of many groups self-identified as Aronga Mana from across the Cook Islands. We note that Article 66A(4) refers to an island or vaka so that there may be several Aronga Mana on a particular island.

142. A common statement was obtained from groups on a number of islands, including all but one of the alleged 23 Aronga Mana said to be on the island of Atiu. For the island of Rarotonga, only 2 out of 10 Mataiapo of Teau Otonga and 2 out of 32 Mataiapo of Takitunu declined to sign. The majority of self-described Aronga Mana on Aitutaki had signed, including all 3 of the current Ariki and 55 Mataiapo.

143. The opinion of the various signatories reads:

> 1. As a matter of traditional Maori custom, the Aronga Mana are the tiaki (guardians) of the moana (sea), including the kai moana (seafood).
>
> 2. The Aronga Mana are responsible for preserving kai moana, not only for present generations but also for future generations.

3. Examples of how the Aronga Mana exercise customary rights and responsibilities include:

   (a) the placing of a ra'ui over certain areas to prevent fishing or gathering kai moana in those areas;

   (b) the placing of ra'ui over certain fish species or types of kai moana to prevent taking of those fish or kai moana;

   (c) the granting of permissions or approvals to take fish or kai moana;

   (d) considering what steps are appropriate to ensure that the kai moana resource is used in accordance with principles of preservation and protection of its inherent value (mauri);

   (e) monitoring the status of kai moana and the taking of kai moana.

4. As a matter of custom, the Aronga Mana must be informed of proposals in relation to kai moana so that they can carry out their rights and responsibilities in relation to the resource.

5. As a matter of custom, the exercise of these rights and responsibilities by the Aronga Mana extends out beyond the reef and includes the Moana Nui a Kiva (the Pacific Ocean).

6. This statement represents the opinion of the undersigned Aronga Mana on the custom relating to kai moana and the role of the Aronga Mana as tiaki of that resource."

144. In each case the groups making the statement assert that they are the Aronga Mana for the particular island or part thereof. This may be so but there is no official recognition of that status. As indicated earlier, if as the Constitution requires, Aronga Mana pronouncements on custom etc are conclusive and take effect as part of the law of the Cook Islands, in the absence of any contrary statute, then there must be some legislative recognition of the law-maker and not a self-defining statement. The Privy Council approves such an approach.

145. There can be disagreement as to the constitution of a particular Aronga Mana, as was shown when counsel for the appellant in final submissions advised the Court that there was no statement of custom from two Islands because there was no agreement as to who were the members of the Aronga Mana. Consequently, there was no evidence as to custom available from those two Islands. Nor is there any from the island of Mauke. There is no evidence from the islands of Penrhyn and Palmerston because

the Aronga Mana system does not apply in those islands. No guidance is offered by the Constitution as to how one proves custom in relation to Penrhyn and Palmerston.

146. Potter J considered there was no evidence that specific consultation with Aronga Mana had occurred before the impugned decisions were made. She rejected submissions that the signed statements meant that the custom had been proved in terms of Article 66A(4). The Judge made a side reference to the decision of the New Zealand Court of Appeal in *Takamore v Clarke* [2011] NZCA 587; [2012] 1 NZLR 973 which stated that at common law, the Court has to be satisfied that a claimed custom of longstanding has continued without interruption since its origin and that its terms have not been displaced by a clear statutory wording. The Judge considered that the Article in the Constitution allowed these criteria to be displaced by the provision of the conclusiveness of Aronga Mana's opinion. Therefore, this is all the more reason for requiring the Aronga Mana to be put beyond contention by a statute as to its membership and as to its mode of expression of opinion.

147. Potter J considered that there was no evidence that, despite the great lengths to which the first appellant and his advisers have gone, problems in the cases continued to exist. What majority of the Aronga Mana is necessary? Is a majority decision sufficient to comprise a conclusive opinion? However, Potter J held that, even if the statements were conclusive as to custom, she did not find that custom required the respondent to consult specifically with the Aronga Mana about decisions to expand the Purse Seine Fishery into the Extended Economic Zone which starts its 200 nautical miles outreach at the end of the 50 nautical miles limit from in-shore territorial waters.

148. It strains belief that longstanding custom could have application so far away from the actual Cook Islands, at the furthest boundary of an EEZ, introduced for the first time by the UNCLOS in 1977. One could imagine that inshore fishing may well be affected by activities in territorial waters but there seems to be no evidence that the Purse Seine

Fishery up to 250 nautical miles from any Cook Island, could affect the artisanal and customary fishers in those islands. Vague statements as made during submissions such as "*Cook Islanders are oceangoing people*" are insufficient to counter this.

149. Potter J also held that the Respondent did not know about the claimed custom before it made the challenged decisions. The Deed and Statements were not produced until late 2016 or early 2017, after all the decisions were finalised and the proceedings commenced. To accept the need for custom to be known before the Crown is required to engage in consultation would be effectively to impose a duty on public bodies proactively to investigate.

150. The Judge was not aware of any Cook Island laws which required recognition of such a duty nor did she read such a duty into s 4(d) of the MRA, commenting that the practical difficulties of such an obligation could be immense. She considered and accepted the Crown submission that there is nothing to indicate that the Minister or Secretary should possibly have contemplated the existence of a custom whereby the Aronga Mana exercised tiaki over kai moana more than 50 nautical miles off any island coast. Custom did not mandate that Aronga Mana be consulted in respect of proposals in relation to kai moana in such distant waters; nor could the Minister or Secretary have been expected to contemplate that there was established such a custom across all vaka and islands transcending local and geographical boundaries. We agree with Potter J's approach.

151. The Judge also held that s 4(d) of the MRA did not take the case further, although it required decisionmakers to consider certain cultural matters which might have been within the Aronga Mana's purview. It did not mandate specific consultation with the Aronga Mana so that, whilst engagement with the Aronga Mana might have been one of the ways for the Minister and Secretary to have discharged their obligations, it was ultimately for them to decide whether the Aronga Mana should be consulted. When

one sees the number of self-asserting Aronga Mana, including a large number like 23 in an island with a small population like Atiu, one can see the magnitude of such a requirement. This would place an unreasonable burden on administrators in seeking to make what is essentially a policy judgment in the interests of the Cook Island economy.

152. For the sake of completeness, we note that Potter J held that the first appellant had standing to bring this cause of action and that finding was not challenged on appeal. As the Judge noted, the public interest aspect of the claim outweighs the concerns as to any shortcomings of personal standing. The first appellant had raised valid concerns as to the Aronga Mana's rights to consultation and these concerns were of general and constitutional importance. For the reasons given, we reject this ground of the appeal, sustained in our view by the recent comments from the Privy Council.

Fourth Ground of Appeal – Failure to consult with the key stakeholders and to review the Fishery Plan

153. On the fourth ground of appeal, the appellants submitted that the Aronga Mana and the second appellant were "key stakeholders" and sought orders requiring the Secretary to comply with two of its obligations under the Fishery Plan, as set out below:

(a) Consultation with key stakeholders (pursuant to paragraph 12 of the Fishery Plan); and

(b) The biennial review of the conservation and management measures set out in the Plan to determine whether the Plan should be amended and/or revoked (pursuant to paragraph 21 of the Fishery Plan).

154. As noted by the appellants, this ground of appeal operates in the alternative to the other causes of action, in the event that the Court declines to set aside the Fishery Plan.

Consultation with "key stakeholders"

155. Paragraph 12 of the Fishery Plan provides as follows:

> **12. Stakeholder Consultation**
>
> (a) The Secretary shall organise consultations with key stakeholders in the purse seine fishery at least once in each calendar year.
>
> (b) The scope of the consultations shall include matters –
>
> (i) related to the management and regulation of fishing including licencing and conditions of fishing;
>
> (ii) related to the development of fishing and fish processing including investment policies, financial arrangements and projects to promote purse seine fishing, marketing or processing;
>
> (iii) related to socio-economic or environmental impacts of large pelagic fishing, processing and marketing; and
>
> (iv) such other issues related to the large pelagic longline fishery as the Secretary may decide.

156. The terms "key stakeholders" and "stakeholders" are not defined in the Act. The word "stakeholder" has evolved since the traditional legal concept of an impartial person who holds money or goods on behalf of two or more disputants over or claimants to money or other goods. The term "key" seems more suited to a PR statement than to legislation.

157. It is for the Secretary to decide who are "key stakeholders". Obvious candidates include those intimately involved in the fishing operation, such as international fishers, together with various administrators and officials involved in the Pan-Pacific surveillance for fishing. The second appellants were not obliged to be consulted. It might have been reasonable for the Secretary to have done so, but there was no obligation. It is hard to see that the first appellant as an individual – albeit one representing one of many Aronga Mana – was required to have been consulted as a "key stakeholder".

158. It is hard to see that the appellants are "stakeholders" in the fishing industry when they are, in essence, interested observers and self-appointed guardians of the environment. Whether these self-imposed duties entitle them to be called "stakeholders", let alone "key stakeholders" is open to argument. Potter J rightly considered that they did not fall into this category but, considering the sensitivity of the Purse Seine Fishery issue, she indicated that the Crown may include them in a wider consultation.

159. This aspect of the fourth ground of appeal is accordingly dismissed.

Biennial review of the Fishery Plan

160. Paragraph 21 of the Plan provides as follows:

> **21. Biennial Review of the Fishery Plan**
>
> (a) The Secretary shall, prior to the expiry of every 2-year period from the commencement date of the Fishery Plan, conduct a review of the conservation and management measures set out in this Fishery Plan, and determine whether the Fishery Plan should be amended and/or revoked.
>
> (b) In reviewing the Fishery Plan the Secretary shall have particular regard to, amongst others –
>
> (i) the objectives of the Act and this Fishery Plan;
>
> (ii) the effectiveness of the data collection, observer and monitoring;
>
> (iii) control and surveillance programmes;
>
> (iv) the status of the stocks (both target and non-target or associated species), including changes in yield, species, size composition or distribution;
>
> (v) the status and economic viability of the fishery and associated fishing industry;
>
> (vi) the appropriateness of fees and charges;
>
> (vii) the effectiveness of the conservation and management measures.
>
> (c) Having conducted the analysis, the Secretary shall make recommendations to the Minister as to the continued management of the purse seine fishery. In particular the Secretary may make recommendations regarding the amendment, revocation or continuation of the Fishery Plan.

> (d) The Secretary shall consult with key stakeholders prior to making any recommendation to the Minister as a result of the review.

161. Consistent with paragraph 21(a) above, the Secretary is required to conduct a review of the Fishery Plan within every two-year period from the commencement of the Fishery Plan. Following consultation with key stakeholders, the Secretary must then make recommendations to the Minister as to the continued management of the purse seine fishery.

162. Bearing in mind that the Fishery Plan came into force in February of 2013, at least two biennial reviews should have taken place by now. Potter J noted that Mr Ponia's evidence made no suggestion that biennial reviews in accordance with paragraph 21 of the Fishery Plan had taken place. Mr Ponia's evidence only went as far as referring to annual reviews undertaken by the Scientific Committee and the Technical Compliance Committee of the WCPF Commission. These annual reviews do not release the Secretary from the separate obligation to carry out biennial reviews and make appropriate recommendations under paragraph 21 of the Fishery Plan.

163. Potter J observed that, not only are the reviews of the Fishery Plan important, but they are also consistent with and support that the EIA obligations is an ongoing process. Accordingly, she noted that the biennial review procedure must be observed and implemented. As to these observations, we agree. While ultimately declining the relief sought by the appellants in relation to this cause of action, Potter J referred her comments to the Secretary for consideration.

164. In this Court, the respondent submitted that a biennial review under paragraph 21 need only consider the Fishery Plan's "*conservation and management measures*" (under Part 3 of the Fishery Plan) which, in its view, "*very much reflect[s] and expressly acknowledges the Cook Islands international obligations*". It is not clear how this argument advances the respondent's case. Such an argument has seemingly no

relevance to the question of whether the obligation to undertake a biennial review exists.

165. During the hearing, the respondent submitted that there is already a framework in operation within which most (if not all) of the material identified in paragraph 21(b) would be (and is) subject to ongoing review. This framework comprises the documents prepared in relation to the conservation and management measures produced by all members of the WCPFC as well as the MMR's annual reports. On this basis, the respondent submitted that it would serve no useful purpose to require the Secretary to carry out an unnecessarily repetitive exercise. In the Court's view, regardless of whether the exercise will be largely repetitive in nature, there is a clear duty under the Fishery Plan that may not simply be ignored.

166. The Court agrees with the appellants that there are no circumstances that justify declining to order the relief sought that the Secretary carry out the biennial review process set out in paragraph 21 of the Fishery Plan. Accordingly, the Court finds the appellants are successful on this aspect of the fourth ground of appeal.

Relief

167. The appellants are successful on their first two grounds of appeal. The Court has found that:

(a) the respondent failed to act in a manner consistent with the Government's international obligations. The obligation breached was the requirement to carry out an EIA in respect of the proposed extension of purse seine fishing; and

(b) the respondent failed, in breach of s 4 of the MRA, to comply with the precautionary approach, or to have any or proper regard to the impact on bycatch species and on artisanal and subsistent fishers when making the Decisions.

168. The appellants are also partially successful in relation to their final ground of appeal. As noted above at paragraph 154, this ground of appeal was in the alternative, if the Court decided not to set aside the Fishery Plan.

169. Accordingly, it has been established that the respondent has acted improperly in the manner in which the Decisions were made. The question now, having made that finding, is whether the Court should intervene and, if so, what relief is appropriate.

170. The appellants sought the following relief:

(a) That the decisions to enact the Regulations and to enter into the Fishery Plan and Partnership Agreement be set aside; and

(b) In the event that the above relief sought is declined, orders requiring the Secretary to carry out consultation with key stakeholders, including the Appellants, and to review the Fishery Plan, as required by paragraphs 12 and 21 of the Fishery Plan.

171. The appellants submitted that, if a reviewable error is established, the position at law is that relief ought to be granted subject to special circumstances otherwise being shown. In their view, no such circumstances exist in this case.

172. The appellants also noted that Article 13 of the Partnership Agreement allows for that agreement's suspension in the event of "unusual circumstances" that prevent fishing in the Cook Islands' fishing areas, or a significant change in the policy guidelines which led to the conclusion of the Partnership Agreement. The appellants remarked that the respondent would be able to invoke Article 13 if the appellants' claim to set aside the Partnership Agreement is successful.

173. The respondent submitted that, if this Court determines that the High Court erred in finding none of the appellants' causes of action were established, the appropriate remedy is a declaration or reconsideration of the Decisions, as opposed to any setting aside.

174. In many cases, and especially in judicial review proceedings where there is no high policy content in the decision concerned, "*although relief in judicial review is discretionary, courts will generally consider it appropriate to grant some form of relief where they find a reviewable error*" (*Ririnui v Landcorp Farming Ltd* [2016] NZSC 6,

[2016] 1 NZLR 1057 at [112]). However, notwithstanding that general statement, it is clear that the Court may nevertheless exercise its discretion to refuse to grant the relief sought (*Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZCA 613, [2018] 2 NZLR 453 at [59]).

175. The correct approach to be taken in each case involves an overall assessment in light of all of the circumstances including the nature and importance of the provision, the degree and effect of non-compliance (or the gravity of the error), the prejudicial effect on third parties and the utility in granting the relief sought (*Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZCA 613, [2018] 2 NZLR 453; *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549; *Rees v Firth* [2012] 1 NZLR 408 (CA)).

176. Even where there are significant defects in the decision-making process, the Court may nevertheless exercise its discretion to refuse to set aside a decision. Discretion should be exercised in favour of refusal of relief where to grant it would work such an injustice as to be disproportionate to the ends secured by enforcement of the procedural requirements. This will include situations where to grant the latter would bring about unacceptable administrative consequences or inequity to third parties (*Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [74]). Indeed, alternative relief is often favoured where it will prevent "*any real prejudice resulting to others*" (*Hauraki Catchment Board v Andrews* [1987] 1 NZLR 445 (CA) at 458 per Henry J). Similarly, in *Franz Josef Glacier Guides Ltd v Minister of Conservation* HC Greymouth CP 14/98, 13 October 1999, Panckhurst J held that, where quashing a decision reached in breach of natural justice would be "inequitable" to commercial parties other than the applicant, it was appropriate to instead order reconsideration (at [55]).

Nature and importance of the provisions

177. In *New Zealand Institute of Agriculture Science Inc v Ellesmere County* [1976] 1 NZLR 630 (CA), the Court of Appeal noted at 636:

> Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance.

178. In the view of the House of Lords in *R v Soneji* [2005] UKHL 49, [2005] 4 All ER 321 at [23], the "*emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity*".

179. As the Court recognised above at paragraph 27, the Minister and the Secretary in making decisions under the MRA have a discretion and the Court should be cautious in setting such decisions aside. The purpose of the EIA is to ensure that the decision-maker has sufficient information to justify the decision. The respondent argued during the hearing that the present case involves an allocation decision. There is a limited (albeit renewable) resource, with 1,250 days to allocate as part of a wider regional fixed number of 64,000 days under the 2013 WCPFC Regulations (Conservation and Management Measure for Bigeye, Yellowfin and Skipjack (CMM 2013-01). As noted in paragraph 10 above, the total level of purse seine catch is to be determined by the Secretary (who also has the power in specified circumstances to reduce the total fishing allowance).

180. The Supreme Court of New Zealand in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 6, [2016] 1 NZLR 1057 accepted that some exercises of public power are not suitable for judicial review because of their subject matter (at [89]). Decisions about the allocation of national resources or involving national political or policy considerations have, on occasion, been held to be not reviewable by the courts. However, the court went on to find that the decision in that case was susceptible to review where the Ministers were given incorrect information on which they based their decision (at [97]). The present review concerns whether the decision-makers had sufficient information to justify the Decisions as well as whether required procedures had been taken by the respondent.

181. The Court finds that both the requirement to carry out an EIA and the requirement to take the precautionary approach are important obligations. This view is particularly strengthened considering the inclusion of these obligations within various binding treaties (to which the Cook Islands is a State party) as well as under customary international law.

Degree and effect of non-compliance

182. Turning to the degree of non-compliance, courts have generally distinguished between a mere defect or irregularity and something that is fundamentally deficient. In the

context of an EIA, there is no standard of absolute perfection required. There must be a concept of reasonableness involved in the assessment.

183. In its submissions at paragraph 145.3, the Respondent cited *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314 (CA) at 324 for the principle that:

> [I]n addition to materiality, the gravity of any error found is relevant and can be determinative where other factors are evenly balanced.

184. At paragraph 98 above, the Court summarised its findings on the degree of non-compliance with respect to the requirement to carry out an EIA. The non-compliance included:

(a) adopting the Fishery Plan based predominantly on regional assessments (rather than domestic);

(b) the lack of adequate consultation;

(c) the lack of adequate consideration of the effect on artisanal and subsistent fishers; and

(d) the lack of adequate consideration on the effect of FADs and, in particular, their effect on bigeye spawning waters.

185. At paragraphs 124 to 129 above, the Court has summarised its findings on the degree of non-compliance with respect to the requirement to apply the precautionary approach. The most important factors in the Court's assessment included:

(a) The lack of any evidence on which to base a higher catch limit than recommended by the Lehodey Report;

(b) The lack of any evidence assessing the effects of the Fishery Plan on bigeye tuna and its biomass in particular;

(c) Insufficient efforts to assess the adverse effects of the use of FADs; and

(d) The failure to consult with artisanal and subsistent fishers.

186. In considering the effect of non-compliance, the Court will assess the consequences that might be said to flow from the aspects of non-compliance identified above. This will involve consideration of whether and to what degree any parties would be (or have been) prejudiced as a result of the respondent's non-compliance with its statutory obligations.

187. In *Rees v Firth* [2012] 1 NZLR 408 (CA) and *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZCA 613, [2018] 2 NZLR 453, the fact that the claimant would suffer no real prejudice was a significant factor in the court's assessment of what relief would be appropriate (at [49] and [61] respectively).

188. In paragraph 17 above, it is noted that there is are no substantial concerns about the risk of over-fishing of the skipjack stock which was expected to make up the bulk of the purse seine catch. The primary concern is in relation to the yellowfin tuna and bigeye tuna stocks, as well as the impact (if any) on artisanal and subsistence fishers.

189. In its submissions at paragraph 145.4, the Respondent submitted that "*changed circumstances can weigh against the granting of relief*". In this regard, the Respondent referred to the updated science regarding bigeye tuna stocks as well as the introduction of the Marae Moana Act 2017. The Court agrees that, in the present case, it would be unrealistic to assess prejudice without regard to the changed circumstances.

190. With respect to the lack of any evidence on which to base a higher catch limit than that recommended by the Lehodey Report and the failure to set target or catch limits in the Partnership Agreement, the Court notes that, as at February 2017, a majority of the 1,250 fishing days provided for in the Fishery Plan remained unutilised (671 fishing days). The Court also notes that, as far as it is aware, only two licences have been granted to date pursuant to the Partnership Agreement.

191. Additionally, the impact on small-scale fisheries in the Cook Islands is not likely to be significant, given the protection offered to such fisheries by the exclusion zone imposed around the islands. Indeed, as noted at paragraph 75 above, reported artisanal catches were at an all-time high (see the Cook Islands Offshore Fisheries Annual Report of 2016). Further, the introduction of the Marae Moana Act 2017 has extended the protective zone from 24 to 50 nautical miles to further protect the interests of artisanal fishers.

192. The Court also notes that updated science indicates that bigeye tuna stocks and yellowfin tuna stocks are not experiencing overfishing and are not in an overfished condition, despite the impact of the Decisions. In the WCPFC Reference Document for Review of CMM 2016-01 dated 15 November 2017, it says that, in relation to Bigeye Tuna, "*the stock is not experiencing overfishing (77% probability) and it appears that the stock is not in an overfished condition (84% probability)*". For completeness, in relation to Yellowfin Tuna, the report notes that "*the stock is not experiencing overfishing (96% probability) and it appears that the stock is not in an overfished condition (92% probability).*"

193. In summary, the Court is not convinced that the effect of non-compliance has been significant.

Prejudicial effect on third-parties

194. The Court should also assess the effect of granting the remedies sought and, in doing so, give considerable weight to arguments that relief should be withheld because of the harm to innocent third parties (*Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* at [61] citing *Ririnui v Landcorp Farming Ltd* at [132]). The New Zealand Supreme Court remarked at [130] in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 6, [2016] 1 NZLR 1057:

> [T]he fundamental issue where an applicant for judicial review seeks to have a contract set aside in a case where the contracting public body has capacity to make the contract is the existence of prejudice to third parties. It is that consideration that should be the focus of the analysis, rather than the nature of the relief sought per se.

195. As noted in Philip A Joseph 'Constitutional & Administrative Law in New Zealand' (3rd ed, Brookers, 2007) at [21.9.3]:

> When set aside, a condemned decision or order is not retrospectively deprived of all existence and effect. Third parties may build legally binding (albeit defeasible) rights in reliance on a presumptively valid but defective decision. The consequences of invalidating a decision remain a matter for the court's discretion. The courts take particular account of the effect of invalidation on transactions involving third parties.

196. The respondent submitted that the interests of many third parties would be affected. These included licence holders, vessel owners, investors in assets related to the industry relying on the licences granted as well as the Cook Islands population

generally who would suffer a great loss of revenue. The respondent also referred to the additional complication of having entered into an international treaty with the European Union.

197. During the hearing, the appellants recognised that there may be economic harm suffered if the Decisions were set aside but noted that such harm would need to be balanced against the potential harm caused by the fishing. Further, the appellants submitted that the reference to the value of the financial package of the Partnership Agreement being €5.3 million over four years may be overstated. Instead, the appellants conceded that at least €2.87 million was fixed over four years with the possibility of further contributions from fishing vessels in return for fishing days under the licences granted. Regardless of the exact value of the economic harm, the Court finds that these are substantial payments to the Cook Islands which would be forgone.

198. There was a lack of detailed evidence proffered by the parties on the issue of the anticipated impact of relief sought on third parties. Indeed, it was not clear whether the Court's decision to set aside the Decisions would affect the Cook Islands' international treaty with the United States.

199. As far as the Court has been made aware, licenses in relation to the Partnership Agreement have been issued to at least two European Union vessels, Aurora B and Rosita C. There is no evidence of any other licence holders operating under the Partnership Agreement.

200. The Court acknowledges the point raised by the appellants that the licences only run for one year, commencing in February of each year.

201. It was put to the appellants' counsel during the hearing that a decision to set aside the Partnership Agreement with the European Union would not be regarded very highly by the European Union and that strong international relations were in the Cook Islands' interests. In response, the appellants submitted that, if the Partnership Agreement was set aside because of a breach of law, the European Union would not be too troubled because it is committed to upholding the rule of law. In this regard, the appellants noted that the Cook Islands and the European Union were subject to the Cotonou Agreement (signed on 23 June 2000 and entered into force in 2003). Article 9 of that agreement provides, in part:

> Respect for … democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.
>
> The Parties reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms.
>
> The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means to legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.
>
> Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.
>
> In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of the law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.
>
> Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement. The Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97 constitute a violation of that element.

202. Additionally, the appellants referred to Article 5 of the Partnership Agreement, where the parties have agreed that the amount of financial contribution under the Partnership Agreement may be revised by the joint committee in respect of a reduction in the fishing opportunities granted to European Union vessels where necessary for the conservation and sustainable exportation of resources on the basis of best available

scientific evidence. The appellants have said that there is therefore a mechanism within the Partnership Agreement to recognise that that situation might occur.

203. Under Article 46(1) of the Vienna Convention on the Law of Treaties, a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of tis internal law of fundamental importance. Article 46(2) clarifies that manifest means it would be "*objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith*".

204. Under Article 54, the treaty may only be terminated or withdrawn from either in conformity its provisions or with the consent of the parties after consultation. Further, under Article 56, a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so may be implied by the nature of the treaty.

205. In the Court's view, it is simply unrealistic to suggest that the European Union's relations with the Cook Islands would not be tarnished were the Decisions to be set aside.

206. The Court also considers that there will be considerable hardship to various third parties if the Decisions are set aside or suspended pending the preparation and consideration of an EIA.

207. In this regard, the Court notes the views of McGechan J in *Talley's Fisheries Ltd v Minister of Immigration* HC Wellington CP201/93, 10 October 1995 at 45:

> I am prepared to accept the industry, and in particular foreign vessel owners, would be confused and perturbed. Any immediate concerns extending to legality of the vessel operations and ownership of catches might be allayed; but a period of uncertainty (as for example during any appeal period) could put plans on hold, and generate distrust in relation to the reliability of the New Zealand government and local joint venture partners for the future. … It is against the public interest to throw confusion and doubt into a significant element of an important export industry, without good reason.

208. After noting that "*[a]ny benefits to individuals which might accrue from retrospective declarations probably would be rendered futile by fresh permits granted*", His Honour concluded that, "*[t]he ultimate outcome would be that futility, plus industry confusion and distrust*" (at 45). Accordingly, the retrospective order sought was considered inappropriate on the basis that it would have created confusion and uncertainty for overseas joint venture partners, resulting in distrust of the New Zealand fishing industry and flow-on economic losses for New Zealand.

209. In the present case, the Court finds that there would inevitably be significant effects on third parties were the Decisions to be set aside.

Utility in granting the relief sought

210. Additionally, any benefits which might accrue from setting aside the Decisions could well be rendered futile by an extension in the future.

211. That the Respondent is presently in breach of its duties does not mean that it could not properly make the same Decisions in the future (after following the correct procedure). As the Respondent submitted, an EIA merely "*prohibits uninformed – rather than unwise – agency action*". Indeed, the Land and Environment Court of New South Wales observed in *Bailey v Forestry Commission of NSW* (1989) 67 LGRA 200 at 210:

> It is well settled that an environmental impact statement is designed to serve the ultimate decision making process, not to replace it. It is not a decision making end in itself; its purpose is to ensure that activities carried out by a public authority or with its consent and which are likely to significantly affect the environment are properly considered and exposed to public comment.

212. The Court is persuaded that, it is likely, after compliance with the obligations, it would be open to the Respondent properly to determine that the Decisions could and should be approved. The Court assumes that the Cook Islands wishes to continue with expanding the purse seine fishing industry and, as a consequence of this judgment, it will now take all necessary steps to properly discharge its duties.

213. As McGechan J noted in *Turners & Growers Exports Ltd & Ors v Moyle* HC Wellington CP 720/88, 15 December 1988 at 72:

> Parliament to this point at least appears to intend to validate any improprieties in the Regulations concerned. A declaration now that the Regulations are ultra vires, and an

> order they be set aside, probably would be cured in short order by validating legislation, and while producing considerable confusion would produce only fleeting benefits. However, my ultimate decision in this regard, based to some extent on pragmatic considerations, should not be taken as any approval of the course which events have taken.

214. In that case, McGechan J saw nullification of the regulations as creating a risk of throwing an important export industry into confusion at a time when immediate remedial action might have been difficult. Additionally, His Honour considered that the benefits which might flow to the applicant exporters from a chance to be heard on the question of compensation before new regulations were made would inevitably be speculative in nature. This was because there could not be any certainty or even assumption of probability that the compensation policy would be altered.

215. There can be no doubt that the expansion of purse seine fishing promotes the economic interests and is generally in the national public interest of the Cook Islands. The area is specifically zoned for such commercial purposes and purse seine fishing is being carried out there already (as it has done for many years). The Court recalls that US purse seiners have had access to the Cook Islands waters under the United States Multilateral Treaty with Certain Pacific Island Countries since 1988.

216. However, whilst the Court has found breaches by the respondent of its obligations to carry out an EIA and to take the precautionary approach, the effects of are unlikely significantly to threaten the fish stocks or other third party interests pending completion of an EIA.

217. For completeness, various alternative remedies were discussed during the hearing. These included the possibility of reconsideration without quashing the Decisions as well as suspending the Partnership Agreement pending the completion of an EIA.

218. The possibility of suspending the Partnership Agreement is available under the provisions of the Partnership Agreement. In this regard, McGechan J noted in *Turners & Growers Exports Ltd & Ors v Moyle* in relation to possible adjournment pending legislative solution (at 72):

> It is not a solution which appealed to either side in this case, both preferring the certainty of finite decision. Nor does it appeal to me. It merely defers a problem which requires urgent present resolution.

219. The concern about merely deferring a problem also arises in the present context. To the Court's mind, it would be more appropriate to address the situation now to reduce the prejudicial effect or uncertainty for third parties.

Overall assessment

220. The Court does not think it would be justified in creating a certainty of present confusion and prejudice to the important fisheries industry merely to preserve the speculative possibility of the respondent not ultimately making the Decisions.

221. Accordingly, the Court considers that whilst it should make declarations with respect to the validity of the existing Decisions, it declines to make orders setting aside the Decisions. This view is only strengthened by the evidence of recent developments including the latest assessments of bigeye and yellowfin tuna stocks and the introduction of the Marae Moana Act 2017.

222. In *Talley's Fisheries Ltd v Minister of Immigration*, McGechan J considered that, whilst it was inappropriate to make a retrospective order in the circumstances of that case, it was "*desirable there be some form of guidance, formally expressed*." (at 46). A prospective declaration spelling out specifics was considered appropriate.

223. Prospective relief is justified where a retrospective order such as setting aside would have serious repercussions for third parties or an immediate negative impact on the public interest, and where that public interest supports curial direction governing future official action (Philip A Joseph 'Constitutional & Administrative Law in New Zealand' (3rd ed, Brookers, 2007) at [26.3.1]).

224. The parties have disagreed on the extent of the international obligations of the Cook Islands and, in particular, whether the Respondents required an EIA before making the Decisions (see above at paragraph 32). Given the confusion as to the Respondent's procedural obligations in making the Decisions with respect to its EIA obligations and the precautionary approach, the Court finds that prospective relief is appropriate here to enable overall justice to be done and to achieve a socially optimal outcome.

225. The Court recalls that paragraph 21 of the Fishery Plan provides:

> **21. Biennial Review of the Fishery Plan**
>
> (a) The Secretary shall, prior to the expiry of every 2-year period from the commencement date of the Fishery Plan, conduct a review of the conservation and management measures set out in this Fishery Plan, and determine whether the Fishery Plan should be amended and/or revoked.
>
> (b) In reviewing the Fishery Plan the Secretary shall have particular regard to, amongst others –
>
> (i) the objectives of the Act and this Fishery Plan;
>
> (ii) the effectiveness of the data collection, observer and monitoring;
>
> (iii) control and surveillance programmes;
>
> (iv) the status of the stocks (both target and non-target or associated species), including changes in yield, species, size composition or distribution;
>
> (v) the status and economic viability of the fishery and associated fishing industry;
>
> (vi) the appropriateness of fees and charges;
>
> (vii) the effectiveness of the conservation and management measures.
>
> (c) Having conducted the analysis, the Secretary shall make recommendations to the Minister as to the continued management of the purse seine fishery. In particular the Secretary may make recommendations regarding the amendment, revocation or continuation of the Fishery Plan.
>
> (d) The Secretary shall consult with key stakeholders prior to making any recommendation to the Minister as a result of the review.

226. In the present circumstances, there is no evidence that the Cook Islands has completed the required biennial review of the conservation and management measures set out in the Fishery Plan since its inception.

227. In these circumstances, the Court finds that it is appropriate to order declaratory relief in the form of an order that the Cook Islands complete the biennial review in order to address the effects of non-compliance with its obligations when making the Decisions.

228. For all of the foregoing reasons, the Court makes the following declarations:

(a) The respondent has failed in its obligation to conduct an environmental impact statement so as to act in a manner consistent with the Cook Islands

international and regional obligations relating to the conservation and management of living and non-living resources in the fishery waters.

(b) The respondent has failed in its obligation to apply the precautionary approach when enacting the Regulations and entering into the Fishery Plan and Partnership Agreement.

(c) Consistent with its obligation under paragraph 21 of the Fishery Plan to conduct a biennial review, within 12 months of the date of this judgment, the Government of the Cook Islands is directed to obtain, examine and consider an EIA in accordance with the requirements of s 36(3) of the Environment Act (which sets out what Parliament considers to be required by an EIA).

(d) Without in any way restricting the matters to be taken into account when carrying out the EIA, the following matters must be addressed:

(i) The impact of the project upon the environment and in particular:

1. The adverse effects that the project will have on the environment;

2. a justification for the use or commitment of depletable or non-renewable resources (if any) to the project;

3. a reconciliation of short-term uses and long-term productivity of the affected resources;

(ii) The proposed action to mitigate adverse environmental effects and the proposed plan to monitor environmental impacts arising out of the project; and

(iii) The alternatives to the proposed project.

(e) In accordance with Articles 205 and 206 of UNCLOS, the Government of the Cook Islands is directed to publish reports of the results of the EIA to the competent international organizations (including the WCPFC), which should make them available to all States.

(f) The Minister for the Environment is directed to give public notice that the EIA is available for inspection on the official website of the Ministry of Marine Resources and publish it accordingly.

Costs

229. The respondent should make a reasonable contribution to the costs of the appellants in both the High Court and the Court of Appeal. However, the appellants have only been partially successful on appeal. Accordingly, the appellants cannot recover costs associated with the third or fourth ground of appeal in either court relating to the Aronga Mana and Article 66A of the Constitution.

230. The appellants are directed to file a memorandum as to costs in this Court within 20 working days following the delivery of this judgment. The respondent may file a memorandum in opposition within 10 working days of receipt of the appellants' memorandum. The appellants shall have 5 working days after receipt of any memorandum from the respondent in which to file a memorandum in reply.

231. Costs in the High Court are to be determined by that Court.

End Note

232. The Court directs that a copy of this Judgment be served on the Prime Minister's Department and the office of the Attorney-General with a respectful request that the Government urgently addresses the need to enact a Statute which provides a clear definition of the Aronga Mana: (see the discussion in paragraph 139 and 140 above). Too much valuable Court time and cost in legal and other expenses has been expended in recent years in this and other cases considering legal arguments trying to define what constitutes Aronga Mana. As pointed out in paragraph 140 above, there are obvious sources available to provide definitions and, in particular, there is the helpful precedent referred to in paragraph 140 of this Judgment to be found in the House of the Ariki Act 1966.

Williams P

Barker JA

Paterson JA