Hilary Term
[2022] UKPC 4
Privy Council Appeal Nos: 0114 of 2019
and 0121 of 2019

JUDGMENT

William Framhein (Appellant) v Attorney General of the Cook Islands (sued on behalf of the Crown) (Respondent) (Cook Islands)
William Framhein (Respondent) v Attorney General of the Cook Islands (sued on behalf of the Crown) (Appellant)

From the Court of Appeal of the Cook Islands

before

Lord Hodge
Lord Briggs
Lord Leggatt
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
28 February 2022

Heard on 17 November 2021

William Framhein
Isaac Hikaka
Jack Cundy
(Instructed by Charles Petero (Cook Islands))

Attorney General of the Cook Islands
Rebecca Rose
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LADY ROSE:

1. INTRODUCTION

1.
The applicant in these proceedings, William Framhein, is a resident of the Cook Islands. He carries out the duties and responsibilities of his father who holds the title of Apai Mataiapo, one of the

traditional leaders of the Cook Islands. Mr Framhein brings his claim against the Attorney General, sued on behalf of the Crown and the Minister of Marine Resources. He challenges three decisions that have been taken by the Minister, all concerned with the scale of fishing for tuna in the seas which comprise the Cook Islands' Exclusive Economic Zone ("EEZ"). The proceedings raise two separate but related sets of issues. The first is about the role of Akono'anga Maori, that is the customary law of the Cook Islands as it relates to the conservation and management of fishing stocks in the Cook Islands' waters and also of the role of the traditional leaders of the Cook Islands, that is the Aronga Mana, as the exponents of that custom. The second set of issues concerns the relationship between the Cook Islands law-making process carried out pursuant to the Cook Islands Marine Resources Act 2005 and the work of the international fora in which the fishing nations, including the Cook Islands, cooperate to manage and control the utilisation of the natural resources of the Pacific Ocean.

(a) The Decisions challenged in these proceedings

2.
Tuna are pelagic marine fish spending their lives near the surface of tropical, sub-tropical and temperate seas. There are two main methods of commercial fishing in the Cook Islands' EEZ. Longline fishing involves setting deep baited hooks. Longline fishers primarily fish for albacore tuna and are issued with annual licences and have unlimited access to the EEZ and unlimited catches. These proceedings concern the second main method, purse seine fishing. Purse seine fishing vessels use a large wall of netting to surround and capture a school of fish. Purse seine fishing can be controversial because it risks also catching non-target species including tuna species which are threatened or endangered. One particularly controversial aspect of purse seine fishing is the use of fish aggregating devices ("FADs"). These usually consist of buoys or floats which may be tethered to the ocean floor and which attract fish such as marlin and tuna to congregate round them. Once the school of fish has congregated round the FAD, the purse seine net can scoop up a large volume of fish.

3.
Commercial tuna fishing in the Pacific began in the 1950s but stayed at a small scale for many years. In 2011 it became apparent that a substantial fishery was present in the Cook Islands' EEZ which might properly be made a designated fishery under the Marine Resources Act 2005 ("MRA 2005"). The MRA 2005 sets out the functions and powers of the Ministry of Marine Resources which was established under the Ministry of Marine Resources Act 1984. That earlier Act established the office of the Secretary of Marine Resources to be the administrative head of the Ministry.

4.
Section 6 of the MRA 2005 empowers the Queen's Representative by Order in Executive Council to declare a fishery as a designated fishery where, having regard to scientific, social, economic, environmental and other considerations, it is determined that such fishery is important to the Cook Islands' national interest and requires management measures for ensuring sustainable use of the fishery resource. When a fishery is to be designated, a fishery plan must be prepared by the Secretary of Marine Resources. The fishery plan must identify the fishery, specify management measures to be applied to the fishery and specify also the process for the allocation of any fishing rights provided for in the fishery plan. Management measures include in particular the licensing of vessels, whether from the Cook Islands or from other nations to catch fish, limits on the amount of fish that can be caught, limits on the methods that can be used by those vessels and obligations imposed on those vessels as to the monitoring and reporting of catch sizes.

5.

In 2012 the Ministry commissioned a report from Dr Patrick Lehodey from the French Space Agency to assess the abundance of skipjack tuna so that a sustainable catch limit for purse seine fishing of skipjack tuna in the Cook Islands' EEZ could be determined. His report, Oceanography and skipjack dynamics in the Cook Islands EEZ was published in April 2012 ("the Lehodey Report"). A further development in 2012 was that the US fishing fleet operating under the treaty then in force between the USA and the Cook Islands landed its first significant catches.

6.
There are three decisions taken by the Cook Islands Government that Mr Framhein seeks to set aside in his claim. The first is the publication of the Skipjack Tuna Purse Seine Fishery Plan 2013 ("the Fishery Plan") prepared in accordance with section 6 of the MRA 2005. The Fishery Plan defines the skipjack tuna purse seine fishery as encompassing all purse seine fishing activities involved in the catching of tuna species from the fishery waters of the Cook Islands, subject to some exemptions which are not relevant here. The Fishery Plan sets out detailed objectives for the fishery, emphasising the need for the fishing to be sustainable in the long term and to protect traditional and small scale commercial inshore fishing. The management measures adopted were set out in Part 6 of the Fishery Plan. These limited the purse seine fishing vessels to a total of 1,250 effort days per year. Effort days are days on which the vessel is able to fish, regardless of whether they actually catch any fish on that day or not. The Fishery Plan also introduced a three month ban on the use of FADs in the fishery waters from July to October.

7.
The Fishery Plan also provided for future reviews of fishing levels. Para 13 provided that if the Secretary determined that the level of total purse seine catch in the fishery waters exceeded 30,000 metric tonnes in any consecutive four quarter period, he or she must review the impact of this level of catch on the achievement of the objectives of the Fishery Plan. The Secretary may reduce the total effort of purse seine fishing, or apply appropriate limits to fishing in the fishery waters, which may include time/area closures. More generally, the Fishery Plan provides that the Secretary could apply additional limits to fishing with the approval of the Minister and after consultation with the key stakeholders in the purse seine fishery when he or she is of the opinion that that would be in the interest of the sustainability or economic viability of the purse seine fishery.

8.
The Fishery Plan was brought into effect by the Marine Resources (Purse Seine Fishery) Regulations 2013 made by Order in Executive Council on 26 February 2013 under section 6 of the MRA 2005 ("the Regulations"). The Regulations declare the Purse Seine Fishery described in the Fishery Plan to be a designated fishery. The Regulations repeat the limit of 1,250 effort days for purse seine fishing vessels in the fishery and set out the scheme for licensing vessels permitted to fish. The Regulations impose conditions on the fishing vessels, including, by regulation 13 that no licensed purse seine vessel may fish within 48 nautical miles of Rarotonga (the largest and most populous island of the Cook Islands) or within 24 nautical miles of any other island of the Cook Islands. The Regulations create criminal offences for breaches of the Regulations, punishable by fine not exceeding NZ$250,000. The Regulations are also challenged by Mr Framhein in these proceedings.

9.
Finally, Mr Framhein seeks to set aside an agreement entered into between the Cook Islands and the European Union, the Sustainable Fisheries Partnership Agreement which was initialled in draft in October 2015 ("the EU Agreement"). Subsequent to Mr Framhein issuing these proceedings, the EU Agreement was formally adopted by the EU in May 2016 and ratified by the Cook Islands in October

2016. The EU Agreement allows EU vessels to catch 7,000 tonnes of tuna annually in the Cook Islands in return for a financial package of €5.3m over four years. The Fishery Plan, the Regulations and the EU Agreement are referred to in this Judgment together as "the Decisions".

(b) The basis of Mr Framhein's claim in summary

10.
Mr Framhein's challenge to each of the Decisions was broadly the same. He argued that the decision-making process was flawed in several ways. First, the Decisions had been taken without consulting the Aronga Mana, that is to say the traditional leaders of the different regions, or vaka, of the Cook Islands who are the repositories of the Maori customary law or Akono'anga Maori. This was, he said, in breach of a custom of the Cook Islands which forms part of the binding domestic law of the Cook Islands as provided for in the Cook Islands Constitution.

11.
Secondly, Mr Framhein argued that the Decisions were taken in breach of the Cook Islands' obligations under international law and were therefore in breach of domestic law because the MRA 2005 requires the Ministry and the Secretary to act in compliance with those international obligations. He asserts that there are two international law obligations imposed on the Cook Islands. The Cook Islands was required by international treaty or by customary international law to carry out a full environmental impact assessment ("EIA") before taking decisions that seriously affect the conservation and sustainability of tuna fish stocks in the Cook Islands' waters ("the EIA obligation"). He asserts that the information and opinions relied on by the Minister in adopting the Decisions did not amount to a proper EIA. Further, he argues that the Cook Islands was required when making the Decisions, to adopt what is known as the precautionary approach, as defined by the treaties to which the Cook Islands is a party. He says that the Minister has not taken a precautionary approach when deciding the limit of effort days to be set in the Fishery Plan and the Regulations.

12.
Mr Framhein argues in the alternative that if his claim that the adoption of the Decisions was unlawful failed, or if it succeeded but the Court declined to set the Decisions aside, then the way in which the Decisions had been implemented was also flawed. The Fishery Plan provided in para 12 for the Secretary to consult "key stakeholders" in the purse seine fishery at least once in each calendar year covering issues such as the licensing and conditions of fishing, investment policies and the environmental impact of large pelagic fishing, processing and marketing. The Secretary decided that the Aronga Mana were not "key stakeholders" for this purpose. Mr Framhein argues that that decision was unlawful and that the Aronga Mana must be included as key stakeholders in any consultation under the Fishery Plan. Further, para 21 of the Fishery Plan obliged the Secretary to conduct a review every two years of the conservation and management measures set out in the Fishery Plan. The Cook Islands had failed to conduct any such review in the years since the Fishery Plan was adopted in 2013.

(c) The judgments of the High Court and Court of Appeal

13.
Mr Framhein's claim was heard by Potter J and she handed down her judgment on 15 December 2017. She recorded in her judgment that during the course of the oral hearing before her, the Attorney General made an important concession on an issue that was an essential part of Mr Framhein's claim. The Crown conceded that it had been under an EIA obligation in international law. Potter J understood the Attorney General to be conceding both that the EIA obligation arose under customary

international law and that it was imposed on the Cook Islands under the international treaties governing the control of fishing to which the Cook Islands is a party: see paras 62 to 64 of her judgment. The issue for Potter J was therefore whether the materials on which the Ministry had relied, including the Lehodey Report, fulfilled this obligation. She held that they did. She also rejected Mr Framhein's claim that in adopting the Decisions, the Ministry had failed to apply the precautionary approach as required by the Cook Islands' international treaty obligations: para 108.

14.
Potter J then turned to the claim based on the failure of the Ministry to consult the Aronga Mana. She found that there had been no specific consultation with the Aronga Mana before the decisions to promulgate the Fishery Plan and the Regulations. But she held that there was no obligation to do so. She expressed her doubts about the purport of the affidavits that Mr Framhein had provided to the court from members of the Aronga Mana describing the customary law on which this limb of the claim relied. She was prepared to proceed on the basis that the statements were conclusive as to custom, but held that the custom did not require consultation with the Aronga Mana before the Fishery Plan and the Regulations were adopted: para 142. She therefore rejected Mr Framhein's claim on that ground.

15.
Finally, Potter J dealt with Mr Framhein's alternative case. She held that the Secretary has not acted unreasonably in failing to regard the Aronga Mana as key stakeholders for the purpose of para 12 of the Fishery Plan but held that the Government had unlawfully failed to conduct the biennial review envisaged by para 21. She refused any relief, however, and dismissed the claims.

16.
Mr Framhein appealed against Potter J's decision to the Court of Appeal. The Court (Williams P, Barker and Paterson JJA) handed down judgment on 26 September 2018. The Court of Appeal dealt first with the requirement for an EIA and the application of the precautionary approach. They noted that Potter J had considered only whether an EIA had in fact been carried out, not the prior question whether one was required by international law. However, the respondent had stated to the Court that counsel before the High Court "could not recall making the concession" recorded by the judge and the Crown sought leave to withdraw the concession that there was any international law EIA obligation: para 24.

17.
The Court considered the international treaty provisions in detail and concluded that a number of provisions in the different treaties imposed an EIA obligation on the Cook Islands. In those circumstances, they did not need to arrive at a conclusion as to whether customary international law also placed that obligation on the Crown. They did also not need to determine the Crown's application to withdraw the concession made before the High Court as that concession had, in their judgment, been rightly made. The Court of Appeal then went further and held that the EIA obligation was also imposed on the Crown by another domestic statute, the Environment Act 2003.

18.
The Court of Appeal differed from Potter J on the question whether the material considered by the Minister and Secretary amounted to compliance with the EIA obligation. They held that it did not and that the first ground of Mr Framhein's appeal succeeded. They also allowed Mr Framhein's appeal on the question of the application of the precautionary approach: para 129.

19.

The Court of Appeal dismissed Mr Framhein's appeal as regards the obligation to consult the Aronga Mana. They criticised the lack of guidance provided by the Cook Islands Constitution as to how a court should ascertain who are the Aronga Mana or the mechanism by which the Aronga Mana express their opinion as to the existence of a particular custom or usage. They decided that there was no relevant custom established in the evidence before the Court. They also agreed with Potter J that the Secretary was entitled to decide that the Aronga Mana are not "key stakeholders" for the purposes of para 12 of the Fishery Plan. Finally, the Court of Appeal held that the Ministry had failed to comply with the obligation to conduct a biennial review of the Fishery Plan.

20.
The Court then considered the question of relief and declined to set aside the Decisions. The Court granted declaratory relief declaring that the respondent had failed to fulfil the EIA obligation and to apply the precautionary approach. The Court also ordered the respondent within 12 months to obtain, examine and consider an EIA and set out certain matters that must be addressed in that exercise.

(d) The appeals to the Board

21.
Mr Framhein appeals against the judgment of the Court of Appeal in so far as it held that there was no custom of the Aronga Mana that formed part of the law of the Cook Islands binding the Minister to consult with the Aronga Mana before adopting the Decisions. He also appeals against the decision that the Aronga Mana are not "key stakeholders" for the purposes of para 12 of the Fishery Plan. There is no appeal by Mr Framhein against the Court's refusal to set aside the Decisions.

22.
The Crown has lodged a cross-appeal. They appeal against the Court of Appeal's conclusion that the Crown was under an EIA obligation either under international or domestic law before adopting the Decisions and against the finding that, when adopting the Decisions, the Minister had failed to apply the precautionary approach as required under international and domestic law. There is no appeal by the Crown against the decision that the Minister was in breach of the Fishery Plan by failing to carry out the biennial reviews.

23.
Before the Board, the Crown renews its application to withdraw the concession that the Cook Islands was under any international law EIA obligation. The Board was provided with the memorandum that the Attorney General had lodged with the Court of Appeal during the course of that appeal hearing on 1 May 2018. Mr Framhein has had adequate notice of the Crown's case. It is clear from the order made by the Court of Appeal that the EIA obligation envisaged by the Court of Appeal is an onerous one. The implications of the Court of Appeal's decision are that an EIA obligation will arise in future when the Cook Islands adopts or amends fisheries plans. Their ruling may have important repercussions for other island nations which are party to the same international treaties as were held to impose this obligation on the Cook Islands. The Board has decided that it is in the interests of justice that the Board consider afresh whether this obligation exists or not.

24.
The parties to the appeal provided full written cases to the Board as well as the record that had been before the courts below. Because of the Covid pandemic, it was not possible to hold the hearing in London in person. A two hour hearing before the Board was held over the internet. Those two hours were 7 pm to 9 pm on the evening of Wednesday 17 November 2021 in London where the members of the Board sat and 8 am to 10 am on the morning of Thursday 18 November in New Zealand from

where Mr Hikaka, counsel for Mr Framhein, and Ms Rose, counsel for the Attorney General, made their submissions. We wish to express our gratitude to the staff of the Board for making the arrangements for the hearing and to counsel for their concise and well-presented arguments.

25.
The appeal and the cross-appeal raise very different issues but the feature that they share is that they have to be considered against the background of the complex international treaty regime governing the management and utilisation of fish stocks in the world's oceans. We will therefore address the Attorney General's cross-appeal before considering Mr Framhein's appeal.

2. THE ATTORNEY GENERAL'S CROSS-APPEAL

(a) The international and regional mechanisms for cooperation on the management of fish stocks

26.
The Attorney General's case is at base that the Court of Appeal fundamentally misunderstood the international framework governing the fishing of tuna. They fell into error by failing to recognise that the Fishery Plan and the Regulations were only the final step in a long, multilateral negotiating process conducted at the international and regional level by which the balance between the commercial utilisation of fish stocks in the Western and Central Pacific Ocean against ensuring the sustainability of those stocks is struck. It is important therefore to set what has been done in the Cook Islands in the context of the worldwide control of fishing.

(i) The first-tier: UNCLOS

27.
The foundational international treaty is the United Nations Convention on the Law of the Sea concluded in 1982 ("UNCLOS"). UNCLOS covers a range of issues, including delineating the scope of coastal states' sovereignty over their territorial seas and their rights over the seas beyond those territorial seas. Part V of UNCLOS establishes the EEZ as an area beyond and adjacent to the state's territorial sea. The EEZ does not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured: article 57. Article 55 provides that the EEZ is subject to the specific legal regime established in that Part. According to article 56, the rights of the coastal state in its EEZ include "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed".

28.
Article 63 of UNCLOS deals with fish stocks occurring within the EEZ of a coastal state and in an area of high seas beyond and adjacent to the EEZ. It provides as follows:

"Article 63

Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it

1. …

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional

organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."

29.
Article 64 deals specifically with fish that are highly migratory species listed in Annex I to UNCLOS. These include albacore, bigeye, skipjack, yellowfin and four other species of tuna. It provides:

"Article 64

Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part."

30.
Article 64 therefore contemplates that coastal states and other states who want to fish for tuna either in the EEZ of a coastal state or on the high seas must cooperate directly or through international or regional organisations as to how such fishing is to take place.

(ii) The second tier: the World Tuna Agreement

31.
The international organisation through which states cooperate in respect of fishing for highly migratory fish such as tuna is the Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. We refer to this as the "World Tuna Agreement", although it deals with other species of highly migratory fish as well. The World Tuna Agreement was concluded in New York in mid-1995. It was ratified by the Cook Islands on 1 April 1999 and it entered into force on 11 December 2001.

32.
Article 2 of the World Tuna Agreement provides that the objective of the Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of UNCLOS.

33.
Article 5 is particularly relevant in this appeal since it is one of the provisions which the Court of Appeal held imposed an EIA obligation on the Cook Islands Ministry before adopting the Decisions. This article will be considered in more detail later. Here it is enough to say that it sets out the general principles which apply to the states in giving effect to their duty to cooperate in accordance with UNCLOS. These include the need to ensure that measures adopted to ensure the long-term sustainability of fish stocks are based on the best scientific evidence; that they prevent or eliminate overfishing and excess fishing capacity and that they take into account the interests of artisanal and subsistence fishers.

34.

Another of the general principles listed in article 5 is that states apply the precautionary approach. This is elaborated upon in article 6. Applying the precautionary approach includes an obligation to determine stock specific reference points in accordance with Annex II to the World Tuna Agreement. Annex II describes the kinds of precautionary reference points that must be set for each fish stock.

35.
Article 7 of the World Tuna Agreement introduces the next tier of cooperation. As regards highly migratory fish like tuna, it requires all states wishing to fish in a particular region to cooperate "with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction." The duty is to cooperate either directly or through the appropriate mechanisms for cooperation provided for in Part III. Part III of the World Tuna Agreement then provides more detail about the regional mechanisms for cooperation referred to in article 7(1).

36.
Part III opens with article 8(1) which provides that states must pursue cooperation in relation to tuna "either directly or through appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific characteristics of the subregion or region, to ensure effective conservation and management of such stocks". Article 8(3) provides:

"Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement."

37.
The importance of participating in the regional cooperation mechanisms is made clear by article 8(4). This provides that only those states which are members of or participate in those regional arrangements or which agree to apply the conservation and management measures established are allowed to fish in the waters to which the measures apply. Article 8(5) provides that where there is no existing regional fisheries management organisation ("RFMO") in place to establish conservation and management measures for a particular highly migratory fish species, the relevant states must set one up.

38.
The World Tuna Agreement then sets out detailed provisions about the establishment and operation of RFMOs. The members setting up an RFMO for a particular fish stock must agree the kind of fish to be covered, the area of application and the mechanisms by which the organisation will obtain scientific advice and review the status of stocks. Article 10 spells out the tasks of the RFMO both as regards the substantive rules it should adopt and the way it should go about adopting them:

"Article 10

Functions of subregional and regional fisheries management organizations and arrangements

In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States shall:

(a) agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;

(b) agree, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort;

(c) adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations;

(d) obtain and evaluate scientific advice, review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species;

(e) agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks;

(f) compile and disseminate accurate and complete statistical data, as described in Annex I, to ensure that the best scientific evidence is available, while maintaining confidentiality where appropriate;

(g) promote and conduct scientific assessments of the stocks and relevant research and disseminate the results thereof;

(h) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement;

(i) agree on means by which the fishing interests of new members of the organization or new participants in the arrangement will be accommodated;

(j) agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner;

(k) promote the peaceful settlement of disputes in accordance with Part VIII;

(l) ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of the organization or arrangement; and

(m) give due publicity to the conservation and management measures established by the organization or arrangement.”

39.
States must collect and exchange scientific, technical and statistical data with respect of fisheries and the data must be in sufficient detail to facilitate effective stock assessment: article 14. They are required to cooperate through the RFMO to develop and share analytical techniques and stock assessment methodologies to improve measures for the conservation and management of the fish. Further details on the standard requirements for the collection and sharing of data are set out in an Annex to the Agreement.

40.
The World Tuna Agreement also deals with how these conservation measures are to be implemented in the seas covered. It sets out the detailed duties of the flag State of vessels which fish on the high seas to ensure that they comply with the conservation measures in place and Part VI contains provisions dealing with compliance and enforcement by the flag state. Procedures for cooperation on enforcement at the regional level are also prescribed.

41.
Article 24 of the World Tuna Agreement makes provision to recognise the special requirements of developing states. In giving effect to the duty to cooperate in setting conservation and management measures, the State Parties must take into account in particular:

"(a) the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations or parts thereof;

(b) the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States, particularly small island developing States; and

(c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States."

(iii) The third tier: The Pacific Tuna Convention and the WCPF Commission

42.
The RFMO established under the World Tuna Agreement covering the fishing of tuna in the Cook Islands' waters is the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ("the Pacific Tuna Convention"). The Cook Islands participated in the negotiations which lasted six years before the Convention was adopted at the multilateral conference in Honolulu in September 2000. The Convention came into force in June 2004.

43.
The Pacific Tuna Convention is made under UNCLOS and under the World Tuna Agreement. Its objective is, according to article 2, to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean.

44.
Part III of the Pacific Tuna Convention provides for the establishment of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ("the WCPF Commission"). The WCPF Commission has international legal personality and its membership is made up of states who have agreed to be bound by the Convention's terms: see article 9. It takes its decisions, as a general rule, on the basis of consensus: article 20. The WCPF Commission has 32 member countries including all the Pacific Island countries including New Zealand and Australia and all the major fishing nations including the United States, the European Union, China, Japan and Taiwan. It applies in the "Convention Area" which is defined in article 3(1) by a series of geographic coordinates.

45.
The functions of the WCPF Commission are listed in article 10 of the Pacific Tuna Convention. Those functions most relevant to the present appeal are to:

"(a) determine the total allowable catch or total level of fishing effort within the Convention Area for such highly migratory fish stocks as the Commission may decide and adopt such other conservation and management measures and recommendations as may be necessary to ensure the long-term sustainability of such stocks; …

(c) adopt, where necessary, conservation and management measures and recommendations for non-target species and species dependent on or associated with the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened; …

(e) compile and disseminate accurate and complete statistical data to ensure that the best scientific information is available, while maintaining confidentiality, where appropriate;

(f) obtain and evaluate scientific advice, review the status of stocks, promote the conduct of relevant scientific research and disseminate the results thereof;

(g) develop, where necessary, criteria for the allocation of the total allowable catch or the total level of fishing effort for highly migratory fish stocks in the Convention Area; …"

46.
The measures which the WCPF Commission may adopt in performing its functions include measures relating to the quantity of any species which may be caught, the level of fishing effort, the areas and periods in which fishing may occur and the fishing gear that may be used. Article 10(3) lists the criteria which the WCPF Commission must take into account when deciding how to allocate the total allowable catch or total level of fishing effort among the members. These factors include not only the status of stocks in the Convention Area but also "the needs of small island developing States, and territories and possessions, in the Convention Area whose economies, food supplies and livelihoods are overwhelmingly dependent on the exploitation of marine living resources;".

47.
Subsidiary bodies of the WCPF Commission are established under article 11, namely the Scientific Committee, the functions of which are set out in article 12 and the Technical and Compliance Committee the functions of which are set out in article 14. These Committees provide advice and recommendations to the Commission.

48.
Article 5 of the Pacific Tuna Convention sets out the principles and measures for conservation and management. It provides that the members of the Commission shall, in giving effect to their duty to cooperate in accordance with UNCLOS, the World Tuna Agreement and this Convention abide by the principles that are set out there. The principles set out in article 5 of the Pacific Tuna Convention are almost identical in their wording to article 5 of the World Tuna Agreement, and article 6 of the Convention to a large extent mirrors article 6 of the World Tuna Agreement in elaborating on what is meant by the precautionary approach.

49.
Part IV of the Pacific Tuna Convention sets out the obligations of members of the WCPF Commission. These include the provision of data and keeping it informed of the measures the members have adopted for the conservation and management of highly migratory fish stocks in areas within the Convention Area under their national jurisdiction. The recognition of the special requirements of developing states is carried forward from article 24 of the World Tuna Agreement to article 30 of the Pacific Tuna Convention with additional provisions for funding the involvement of small islands in the work of the WCPF Commission.

(iv) The fourth tier: CMM 2012-01

50.

The WCPF Commission is therefore the body under the auspices of which all those states who wish to fish for tuna in the Western and Central Pacific Ocean cooperate to put in place the measures needed to ensure that the fishery in that region is sustainable and that each member's allocation of effort days or catch limits is set in a way which is consistent with the objectives set out in the Pacific Tuna Convention. The WCPF Commission receives and considers work from its Committees and holds annual meetings at which conservation and management measures ("CMMs") are adopted as binding on all those states, whether members or not, who wish to fish in this region.

51.
The ninth Regular Session of the WCPF Commission was held in Manila in December 2012. The Cook Islands was represented at that meeting by the Secretary of the Ministry of Marine Resources, Benjamin Ponia who acts as head of delegation to the annual governing meetings of the WCPF Commission. Mr Ponia has provided affidavits in these proceedings on behalf of the Attorney General. At that meeting in Manila, the WCPF Commission adopted a Conservation and Management Measure in accordance with article 10 of the Pacific Tuna Convention. This is referred to as CMM 2012-01. It applied to all areas of high seas and all EEZs in the Convention Area subject to some exceptions.

52.
In a series of preambles to CMM 2012-01, the WCPF Commission:

(i)
recalled that measures adopted since 1999 to mitigate the overfishing of bigeye and yellowfin tuna and to limit the growth of fishing capacity in the Western and Central Pacific Ocean had been unsuccessful;

(ii)
recognised that the Scientific Committee had determined that the bigeye tuna stock was subject to overfishing and that yellowfin tuna stocks were being fished at capacity, so that reductions in fishing mortality were required to reduce the risks that these stocks will become overfished.

53.
CMM 2012-01 set objectives for the fishing mortality rates for skipjack, bigeye and yellowfin tuna having regard to the maximum sustainable yield for those stocks. The CMM adopted interim measures for 2013 which included a three month ban (July, August and September) on the setting of FADs by purse seine vessels in EEZs and the high seas in the tropical area between 20˚N and 20˚S.

54.
The CMM 2012-01 also set limits on effort days restricting the effort days for member states. These limits were set on the basis of the advice of the Scientific Committee. Different member states were subject to different limits, with many restricted to the level of purse seine fishing effort in their EEZs which they had been permitted in earlier years. The effect of these provisions of CMM 2012-01 was that an overall limit of 64,000 effort days for purse seine fishing was set for the Convention Area.

55.
According to Mr Ponia, the Cook Islands fell within the category of members covered by para 14 of CMM 2012-01:

"14. Other coastal States within the Convention Area other than those referred to in para 12 and para 13 shall establish effort limits or equivalent catch limits for purse seine fisheries within their EEZs that reflect the geographical distributions of skipjack, yellowfin, and bigeye tunas, and are consistent

with the objectives for those species. Limits established pursuant to this provision shall be provided to the Commission by the relevant coastal States no later than 16 November 2013."

56.
The CMM went on to set up a working group to devise a multi-year management programme of work for 2014-2017 to achieve in the longer term the objective of reducing the fishing mortality of bigeye, to reduce the catch of juvenile tuna and to assess the implications of reducing the period of FADs prohibition. The working group was required to consider the special requirements of small island developing states such that the CMMs would not result in a disproportionate burden on those states: para 32.

57.
Mr Ponia says in his evidence that he wrote formally to the Executive Director of the WCPF Commission on 12 November 2013 to say that, in accordance with para 14 of CMM 2012-01, the Cook Islands declared the limits for purse seine fishing for their EEZ which he then set out in the letter. Catch limits of skipjack tuna were limited to an accumulative total of 30,000 metric tonnes in any consecutive four quarterly period and the effort limit for purse seine fishing was limited to 1,250 fishing days per year. He informed the WCPF Commission that those limits had been adopted and legislated for in the Regulations and the Fishery Plan. He asked the Executive Director to inform the other members of the Cook Islands' declaration. Mr Ponia confirms that the limits were presented to the tenth Regular Session of the WPCF Commission held in December 2013 and that subsequently the Cook Islands was granted an EEZ limit of 1,250 fishing days.

58.
That, then, is how the Decisions fit in to the overall regime governing fishing for tuna in the Western and Central Pacific Ocean. The Fishery Plan and the Regulations are the domestic means by which the Cook Islands fulfils its obligation as a member of the WCPF Commission to declare its effort limit under para 14 of CMM 2012-01 and implements the other elements in the CMM which are binding on the Cook Islands as a member of the WCPF Commission. The Fishery Plan refers to CMM 2012-01 at para 12(b), noting the three month ban on setting FADs from July to September and noting that the Cook Islands has elected to extend this ban to October as well as adopting other measures. The EU Agreement represents part of the use that the Cook Islands has chosen to make of the 1,250 days that it has declared under para 14. There is no doubt that under the international treaties, a coastal state can choose either to use its effort days for its own fleet or to generate revenue by licensing vessels of other nations to use those days. The EU Agreement does not result in the Cook Islands exceeding the 1,250 effort days allocated to it.

(b) **The existence of an obligation to carry out an EIA before adopting the Decisions**

59.
Viewed in that context, the question as to international and domestic law for the lower courts and now for the Board could helpfully be framed by asking this: when the Cook Islands establishes its effort limits for purse seine fisheries within its EEZ pursuant to para 14 of the CMM 2012-01, is it obliged under international or domestic law to carry out an EIA before adopting the Decisions which implement CMM 2012-01 in the Cook Islands' EEZ?

60.
There were a number of sources from which Court of Appeal derived the EIA obligation. The Board will consider each in turn. They are:

(i)
article 206 of UNCLOS;

(ii)
article 5 of the World Tuna Agreement and article 5 of the Pacific Tuna Convention;

(iii)
customary international law; and

(iv)
domestic legislation including the MRA 2005 and the Environment Act 2003.

(i) Article 206 of UNCLOS

61.
As described above, UNCLOS contains detailed provisions about how fishing rights in the coastal waters of states and on the high seas are to be managed through international and regional arrangements such as the World Tuna Agreement and the Pacific Tuna Convention. Those provisions are set out in Part V of UNCLOS.

62.
Article 206 is in Part XII of UNCLOS which deals with the protection and preservation of the marine environment. Part XII it is not concerned with regulating fishing but with controlling pollution and similar causes of damage to the marine environment. Section 1 of Part XII requires states to take "individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source": article 194. Section 2 requires states to cooperate on a global or regional basis through international organisations to formulate rules and standards for protecting the marine environment. Clearly these are different organisations from those set up under Part V concerning fish. There are parallel provisions about programmes of scientific research and about exchange of data and information about pollution (articles 200 and 201).

63.
Article 206 forms part of section 4 of Part XII headed "Monitoring and Environmental Assessment". The three articles that make up that section provide as follows:

"Article 204

Monitoring of the risks or effects of pollution

1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.

2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

Article 205

Publication of reports

States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

Article 206

Assessment of potential effects of activities

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of 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 assessments in the manner provided in article 205."

64.
Section 5 of Part XII then requires states to adopt laws to prevent, reduce and control pollution from various sources including land-based sources (article 207); seabed activity (article 208), dumping (article 210), or from vessels (article 211).

65.
The Court of Appeal noted at para 38 that it had been common ground before Potter J both that article 206 of UNCLOS applied and that the threshold was met because the Fishery Plan might cause significant and harmful changes to the marine environment.

66.
In the Board's judgment any such concessions by the Crown were wrong. When one looks at article 206 in context, it is clear that it has nothing to do with fish or the possible depletion of fishing stocks. That is dealt with in Part V. One must read the phrase "significant and harmful changes to the marine environment" in article 206 as covering the kind of damage, in addition to pollution, that is the subject matter of Part XII. That same phrase is used, for example, in article 196 which requires states to control the intentional or accidental introduction of alien or new species "which may cause significant and harmful changes" to the marine environment.

67.
Article 206 of UNCLOS does not apply to decisions taken by members of the WCPF Commission as to how many effort days they claim pursuant to conservation and management measures adopted by a RFMO established pursuant to articles 63(2) and 64 of UNCLOS, Part III of the World Tuna Agreement and Part III of the Pacific Tuna Convention. It did not therefore impose any obligation on the Cook Islands Ministry to carry out an EIA before adopting the Fishery Plan or the Regulations or before declaring a limit of 1,250 fishing days pursuant to para 14 of CMM 2012-01 or before licensing EU vessels to make use of some of those effort days.

(ii) Article 5 of the World Tuna Agreement and article 5 of the Pacific Tuna Convention

68.
The Board has described in some detail the structure of the World Tuna Agreement and the Pacific Tuna Convention and their roles as the mechanisms for international and regional cooperation on the management of fish stocks envisaged by articles 63 and 64 of UNCLOS. The relevant articles in the World Tuna Agreement and the Pacific Tuna Convention are in very similar terms so it is necessary only to set out article 5 of the Pacific Tuna Convention:

“Article 5

Principles and measures for conservation and management

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 [UNCLOS], the [World Tuna] Agreement and this Convention:

(a) adopt measures to ensure long-term sustainability of highly migratory fish stocks in the Convention Area 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 in the Convention Area, particularly small island 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 this Convention and all relevant internationally agreed standards and recommended practices and procedures;

(d) assess the impacts of fishing, other human activities and environmental factors on target stocks, non-target species, and species belonging to the same ecosystem or dependent upon or associated with the target stocks;

(e) adopt measures to minimize waste, discards, catch by lost or abandoned gear, pollution originating from fishing vessels, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species and promote the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;

(f) protect biodiversity in the marine environment;

(g) take measures to prevent or eliminate over-fishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;

(h) take into account the interests of artisanal and subsistence fishers;

(i) collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species and fishing effort, as well as information from national and international research programmes; and

(j) implement and enforce conservation and management measures through effective monitoring, control and surveillance.”

69.
The Court of Appeal held at para 48 that the World Tuna Agreement and the Pacific Tuna Convention imposed obligations on the Cook Islands Government before entering into the Decisions to carry out an assessment of the potential effects of the extension of the purse seine fisheries on the marine environment particularly in stocks of bigeye and yellowfin tuna, to ensure that its measures were designed to maintain the stocks of skipjack tuna at levels capable of producing a maximum sustainable yield and to apply the precautionary approach. These obligations mean that it was

necessary to determine the environmental impact of the proposed activities on the marine environment: para 64. This view was supported, the Court of Appeal held, by article 8.2 of the Pacific Tuna Convention which provides:

“2. In establishing compatible conservation and management measures for highly migratory fish stocks in the Convention Area, the Commission shall …

(b) take into account:

(i) the conservation and management measures adopted and applied in accordance with article 61 of [UNCLOS] 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.”

70.
The Board disagrees with this conclusion because it does not take into account the nature of the Decisions and their place in the international and regional framework of which they form a part. The Attorney General is right to place emphasis on the wording of the chapeau of article 5. This introduces the principles set out as those which the members of the Commission shall apply “in giving effect to their duty to cooperate in accordance with” UNCLOS, the World Tuna Agreement and the Pacific Tuna Convention. That is the primary relevance of the principles and measures envisaged by article 5.

71.
Article 5 cannot have been intended or expected by the parties to the Pacific Tuna Convention and the members of the WCPF Commission to require the members of the Commission to start from scratch in identifying how many fish there are, where they are, whether or not certain species are being overfished, what fishing mortality rate should be maintained for different species, what fishing methods should be used or banned during certain times of the year and so forth. That work has been done by the WCPF Commission. The Commission arrives at the conservation and management measures adopted at its annual meetings having regard to the data and other information provided to it by the members from across the whole Convention Area. Similarly, the Scientific Committee and its Technical and Compliance Committee is able from those data to assess the efficacy (or lack of it) of measures adopted in the past in managing the fish stocks in the Convention Area. The CMMs also take into account, one assumes, all the points made and debated by the heads of delegation instructed by their national governments, during the bargaining process in the days of negotiation at the conference.

72.
The requirement in para 14 of CMM 2012-01 that the effort limit declared needs to be “consistent with the objectives for those species” must therefore be read not as requiring the members to identify and set their own objectives but as a reference to the objectives set in the CMM itself. Those objectives include the control of FADs stipulated by the measure and the fishing mortality rates set for skipjack, bigeye and yellowfin tuna in para 1.

73.
There are other factors too that affect what is expected of the Cook Islands when adopting an effort day limit pursuant to CMM 2012-01. The Board has already referred to those provisions of the international instruments that demonstrate that the states sought to respect and protect small island developing nations to ensure that their interests were not overridden by the more powerful fishing nations. This is not simply a matter of protecting the food supply for artisanal and subsistence fishers

on the Pacific Islands but of providing a source of revenue from the licensing of fishing rights by those smaller nations to the vessels from the larger commercial fishing nations.

74.
Was the effort limit of 1,250 days declared by Mr Ponia to the Executive Committee of the WCPF Commission in his 12 November 2013 letter consistent with the objectives for those tuna species as required by para 14 of CMM 2012-01? It appears that it was. None of the other members seems to have objected and, as Mr Ponia records in his affidavit, at the 2010 annual meeting, that effort limit was confirmed.

75.
The fact that the effort day limit was consistent with the Cook Islands' international obligations was also confirmed by the evidence before the courts below from Dr John Hampton. He is the Chief Scientist and Deputy Director of the Fisheries Aquaculture and Marine Ecosystems Division of the Pacific Community. He leads and directs the work of the Oceanic Fisheries Programme which is the main provider of scientific services for oceanic fisheries in the Pacific Islands region. He recognises that although tuna are highly migratory, they demonstrate "considerable regional fidelity on scales of hundreds of nautical miles". This means, he says, that coastal states can implement effective domestic measures to promote conservation and sustainable use of tuna stocks within their EEZs in a way which is complementary to regional based and international fish stock management.

76.
Nonetheless, he makes the point that because tuna are highly migratory and do swim over hundreds of nautical miles, there is little to be gained in the Cook Islands further reducing the effort days in its EEZ. The fish will swim into the adjacent high seas area and be caught by licensed vessels there.

77.
Dr Hampton describes the Fishery Plan as:

"… fully compliant with and an integral part of this regional effort to conserve and manage tropical tunas. Furthermore, I would consider the purse seine effort limit declared by the Cook Islands (1,250 days) to be conservative by regional standards and comparable to observed levels of effort occurring in other EEZs at similar latitudes (eg Tokelau and Tuvalu). The provision in the Cook Islands Purse Seine Fishery Plan of a review of the Plan being triggered by a catch of greater than 30,000 tonnes in any consecutive four-quarter period provides an additional level of safety not seen in most other national tuna management plans."

78.
Mr Framhein's case was not a general challenge to the appropriateness of the 1,250 day effort limit or the general adequacy of the Lehodey Report or other material on which the Fishery Plan was based. Still less can it be treated as a challenge to the appropriateness of CMM 2012-01. Mr Framhein's case was that there was an obligation on the Cook Islands Government to carry out an EIA before adopting the 1,250 day effort limit. The Board concludes that the Court of Appeal was wrong to decide that the World Tuna Agreement or the Pacific Tuna Convention imposed an EIA obligation on the Cook Islands.

(iii) Customary international law

79.
Mr Framhein argued that customary international law also imposed an EIA obligation on the Cook Islands Government. Mr Framhein provided an affidavit from Dr Katherine Miles who is a Fellow of,

Director of Studies in Law and Lecturer in International Law at, Gonville and Caius College, Cambridge and a University Lecturer in International Law. Having found other sources for the EIA obligation, the Court of Appeal concluded at para 70 that it was not necessary to consider whether customary international law placed the same EIA obligation on the Government.

80.
Dr Miles' evidence describes the way that customary international law emerges over time from the practice of states. She then turns to the decisions of the International Court of Justice ("ICJ") on which this part of Mr Framhein's case depends: Pulp Mills on the River Uruguay (Argentina v Uruguay) Judgment of 20 April 2010 [2010] ICJ Rep 14 ("Pulp Mills") and Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) [2015] ICJ Rep 665 judgment of 16 December 2015 ("Costa Rica v Nicaragua"). She derives from these cases the principle that "Cook Islands is under a customary international law obligation to conduct an EIA in relation to proposed activities of transboundary environmental significance or of significant impact on a shared resource." She then expresses her view that the fishing activities contemplated by the Fishery Plan and the EU Agreement fall within that category. This view is based on the fact that: (para 15)

"… the Fishery Plan and [EU Agreement] expressly envisage fishing activities that will potentially impact in a significant manner on migratory species, non-target species and the environment of other States within the region, triggering the need for a complex and sophisticated EIA."

81.
After discussing what the content of the EIA should be, Dr Miles turns to the relevance of conventions or international agreements relating to the management of shared fisheries resources. She states:

"33. The interrelationship of treaties and customary international law is often complementary. A specific treaty regime can apply as lex specialis, but it does not automatically eliminate or override the existence of relevant customary international law obligations. Rather, it is best conceptualised as customary international law 'sitting alongside' treaties. Where there is no express contradiction between the specific treaty regime and customary international law, the customary law obligations will survive (Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Judgment, 27 June 1987)."

82.
She lists the international agreements to which the Cook Islands is a party, including the World Tuna Agreement and the Pacific Tuna Convention. Her opinion on this point is that there is nothing in the Decisions or any other relevant international agreement which contradicts the need for an EIA.

83.
We consider first the two ICJ judgments. In Pulp Mills, Argentina brought proceedings alleging that Uruguay was in breach of its international obligations by unilaterally authorising the construction of pulp mills on the left bank of the River Uruguay. It was alleged that this was in breach of the Statute of the River Uruguay concluded between them in 1975. The River marked the boundary between the two countries. Argentina objected to the pollution likely to be caused to the River by the mills, as well as to air pollution, noise and the visual and general nuisance which would have an effect on the tourism sector. The 1975 Statute contained an obligation in article 7 for one party to notify the other of a plan that might cause significant damage to the other party. The ICJ held at para 113 that the obligation to notify was "intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that

it might cause". The ICJ also recorded that the parties agreed on the need for a full EIA in order to assess any significant damage that might be caused by a plan: para 116. The ICJ held that the information provided by Uruguay did not comply with its obligations under the 1975 Statute in this regard: para 122. The ICJ also held that Uruguay had failed to comply with its procedural obligations under article 41(a) of the 1975 Statute. By article 41(a) the parties to the 1975 Statute undertook to protect and preserve the aquatic environment and, in particular, to prevent its pollution.

84.
When the ICJ came to consider whether there was any substantive failure on the part of Uruguay, it reiterated that both parties accepted that an EIA obligation arose under the terms of the 1975 Statute: para 203. The parties disagreed about the content of any such EIA. The ICJ then considered the relationship between the need for an EIA, where the planned activity is liable to cause harm to a shared resource and transboundary harm, and the obligations of the parties under the 1975 Statute:

"204. … In this sense, the obligation to protect and preserve, under article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered 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. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works."

85.
Having noted that neither the 1975 Statute nor customary international law specified the scope or content of an EIA, the Court went on:

"… it 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."

86.
That passage in Pulp Mills was confirmed by the ICJ in Costa Rica v Nicaragua. Costa Rica accused Nicaragua of dredging the San Juan River in violation of its international obligations because it failed to carry out an appropriate transboundary EIA of its dredging works. The ICJ recorded at para 101 that the parties broadly agreed on the existence in general international law of an obligation to conduct an EIA concerning activities carried out within a state's jurisdiction that risk causing significant harm to other states, particularly in areas or regions of shared environmental conditions. The ICJ cited para 204 of Pulp Mills and also an earlier passage in the Pulp Mills judgment where the ICJ had emphasised the obligation on a State to avoid activities in any area under its jurisdiction causing significant damage to the environment of another State. That was regarded as an aspect of the basic customary rule that it is every state's obligation not knowingly to allow its territory to be used for acts contrary to the rights of other states.

87.
The ICJ in Costa Rica v Nicaragua held that the EIA obligation was not limited to industrial activity of the kind in issue in Pulp Mills: “the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context”. The ICJ went on:

“Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.”

88.
The Board accepts for present purposes Dr Miles’ analysis as to how customary international law arises. The Board also assumes for this purpose that she is right to say that the Pulp Mills case establishes that there is a customary international law principle as set out in para 204 of that case and confirmed in Costa Rica v Nicaragua.

89.
However, the Board does not accept that Dr Miles is right to say the fishing activity covered by the Decisions amounts to activity having the potential to create significant transboundary environmental harm or that it falls within the scope of the rule established by those ICJ judgments.

90.
First, this is not a transboundary case of the kind considered in Pulp Mills and Costa Rica v Nicaragua because the Cook Islands’ EEZ bounds on the high seas not on the territory of another state. The fish which the Cook Islands catch pursuant to the Fishery Plan do not belong to another state; each state is entitled to declare its own catch days and license the catching of fish within the limits laid down for it by the WCPF Commission. It is true of course that each tuna caught by a vessel licensed by a member of the WCPF Commission using their own effort days or catch limits cannot then be caught by vessels using a different member’s effort days. In that sense, every member’s exercise of its rights depletes the number of fish that are available to be caught by every other member. But that does not mean that that each member’s fishing effort “adversely affects the environment” or that it “risks significant transboundary harm” of the kind envisaged in the two ICJ judgments.

91.
Even if Dr Miles is right to say that the customary international law obligation is not superseded by the international treaties governing fishing for tuna in the EEZ, those treaties and the CMM 2012-01 are relevant to an assessment of whether there is a risk of “significant adverse impact” of fishing stocks. The stated purpose of the international regime which culminated in CMM 2012-01 and the member states’ setting of their effort or catch limits is precisely to prevent or mitigate that adverse impact. Each member is entitled to act on the basis that the CMM 2012-01 has been properly devised to achieve its objective; the courts of the member states cannot assume that the CMM is inadequate or will fail. The Cook Islands Fishery Plan was regarded by the international community as being consistent with those objectives.

92.
The Board therefore rejects the submission that there is any relevant customary international law obligation which requires the Cook Islands to carry out an EIA before adopting the Decisions.

(iv) The MRA 2005

93.
The MRA 2005 states that its principal objective 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: section 3(1).

94.
Section 3(3) provides:

"(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."

95.
If Mr Framhein had established that the Ministry had acted in breach of those international or regional obligations, that would raise an interesting question whether the effect of section 3(3) made such a breach justiciable by way of judicial review in the Cook Island courts. But as the Board has decided that there is no such breach, that question does not arise.

96.
The next issue is therefore whether the MRA 2005 itself imposes an EIA obligation, regardless of whether or not there is any such obligation on the international plane. Section 4 provides:

"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 non-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;

…"

97.
Those general principles apply to all the Ministry's and Secretary's functions under the MRA 2005, not only those relating to fishing. There is no express requirement to carry out an EIA before performing any particular function or exercising any particular power under the Act and the Board considers that there is no justification for implying that there is any such obligation for all purposes.

98.
What the Ministry needs to do depends on the particular circumstances in which the function is being performed. The present context, as the Board has explained, is one where the CMM being implemented by the Cook Islands was based on extensive scientific evidence drawn from all the

members of the WCPF Commission and had been adopted having regard to, amongst many other factors, the impact of fishing on non-target species.

99.
The Board holds therefore that there is no express or implied EIA obligation imposed by section 4 of the MRA 2005 as regards the adoption of the Decisions.

(v) The Environment Act 2003

100.
Finally, the Court of Appeal held that an EIA obligation was imposed on the Crown by section 36 of the Environment Act 2003. That lays down a procedure for the grant of project permits by the permitting authority, as defined by the Act, to people who propose undertaking any activity which is likely to cause significant environmental impacts. An application for a project permit must be submitted to the permitting authority and must include an EIA along with the application fee prescribed by regulations. There is then a public consultation exercise during which the permitting authority requests comments from any government department having expertise relevant to the proposed project. If the permit application is rejected by the authority, the applicant may request a review of that decision by the Minister for the Environment. A person who undertakes an environmentally damaging project without a permit commits an offence and is subject to a fine.

101.
That section has no application here. It is true, as the Court of Appeal pointed out, that the interpretation section of the Environment Act defines “person” as including the Crown, or any government department. But looking at section 36 as a whole, it cannot have been intended that the exercise by the Minister of his statutory powers to adopt a fishery plan or to make regulations would be regarded as a “project” for which he has to apply to a different government agency for permit, being subject to a criminal penalty if he fails to do so. It is even less likely that the decision to enter into an international treaty such as the EU Agreement is such a project. The Court of Appeal was wrong to hold that section 36 was relevant to the question whether the Minister was under an EIA obligation before adopting any of the Decisions.

(vi) Conclusion on the EIA obligation

102.
In the light of the above, the Board considers that the Attorney General’s appeal on this ground should succeed and that there was no obligation on the Cook Islands Government either under international or domestic law to carry out an EIA before adopting the Decisions.

(c) **The application of the precautionary approach**

103.
The Board also considers that the Attorney General’s appeal should be allowed as regards the Court of Appeal’s decision that the Decisions were unlawful because the Crown failed to adopt a precautionary approach in setting the effort days and FADs limits in the Fishery Plan or the Regulations or in allocating days to the EU purse seine fishing vessels under the EU Agreement.

104.
Article 6 of both the World Tuna Agreement and the Pacific Tuna Convention describes the precautionary approach and more details are set out in Annex II to the World Tuna Agreement. The term “precautionary approach” is a term of art; it does not simply mean being conservative or

cautious in one’s approach to setting limits. This is explained in article 6 of the Pacific Tuna Convention, the relevant parts of which provide:

“Article 6

Application of the precautionary approach

1. In applying the precautionary approach, the members of the Commission shall:

(a) apply the guidelines set out in Annex II of the [World Tuna] 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 dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and

(c) develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans where necessary to ensure the conservation of such species and to protect habitats of special concern.

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 para 1(a) to restore the stocks.”

105.
The UN has also adopted Technical Guidelines for adopting a precautionary approach to capture fisheries and species introduction. These stress that “Management according to the precautionary approach exercises prudent foresight to avoid unacceptable or undesirable situations, taking into account that changes in fisheries systems are only slowly reversible, difficult to control, not well understood, and subject to change in the environment and human values.”

106.
An important element of the precautionary approach is the setting of precautionary reference points. Annex II of the World Tuna Agreement explains the two kinds of stock-specific reference points that must be adopted when applying the precautionary approach. These are “limit” points which constrain harvesting within safe biological limits within which the stocks can produce the maximum sustainable yield and “target” reference points which are intended to meet management objectives. The Annex stipulates at para 7:

“7. The fishing mortality rate which generates maximum sustainable yield should be regarded as a minimum standard for limit reference points. For stocks which are not overfished, fishery management strategies shall ensure that fishing mortality does not exceed that which corresponds to maximum sustainable yield, and that the biomass does not fall below a predefined threshold. For overfished stocks, the biomass which would produce maximum sustainable yield can serve as a rebuilding target.”

107.
A limit reference point, for example, is set by identifying the minimum proportion, expressed as a percentage, that the observed species biomass should bear to the unfished biomass. Thus, if the WCPF Commission sets a limit reference point of 20% for yellowfin tuna, that means that if the observed biomass of yellowfin falls below the predefined threshold of 20% of the unfished level, yellowfin is regarded as being overfished and CMMs will need to be adopted to reverse that and to restore the biomass over time. What the unfished level is, what the threshold should be and whether the limit reference point has been exceeded must be assessed on the basis of information such as the observed biomass on the one hand and the catch data on the other, drawn from all the vessels licensed to fish in the Convention Area.

108.
Dr Hampton explains in his first affidavit how these precautionary reference points are calculated. The Scientific Committee of the WCPF Commission regularly receives assessments of the stocks of tropical tuna. The information is gathered by FAME, The Fisheries, Aquaculture and Marine Ecosystems Division of the SPC (SPC being the Pacific Community, formerly the South Pacific Commission). The Commission also receives catch data from the members in accordance with their obligations under the Pacific Tuna Convention. These assessments undergo considerable scrutiny and are from time to time subject to intensive peer review. They are generally considered to be consistent with global best practice. As Dr Hampton says, most of the measures are now being incorporated into the WCPF Commission's CMMs, establishing science-based references points and levels of risk. For example, the 2014 assessment of yellowfin tuna showed that catch levels were close to the maximum sustainable yield and assessment of bigeye tuna in 2014 showed that the stock was overfished. Management action has therefore been taken in more recent CMMs adopted by the WCPF Commission to rebuild stocks and reduce mortality. These include much more stringent control of FADs as from 2015 as well as effort and catch limits. The short point for the purposes of Mr Framhein's appeal is that the application of the precautionary approach involves the gathering and analysis of data from all the members about fish stocks and catch levels and the setting of targets across the whole Convention Area not just the Cook Islands' EEZ.

109.
Witnesses on behalf of Mr Framhein have questioned some of the data on which the WCPF Commission based the conclusions set out in CMM 2012-01 and later CMMs. Dr Daniel Pauly is a marine biologist currently working as the principal investigator of the Sea Around Us Project devoted to studying, documenting and promoting policies to mitigate the impact of fisheries on the world's marine ecosystems. His evidence is that the stock assessment data published is likely to understate significantly the total catch for the reasons he explains. He also considers that the catch data from the existing purse seine fishery in Cook Islands' waters may be inaccurate. This means, he says, that recent catches of yellowfin exceed maximum sustainable yield so that there must be overfishing and that effort limits should be set accordingly. Because of these uncertainties, the adoption of the precautionary approach in accordance with article 5 of the Pacific Convention or section 4 of the MRA 2005 requires lower effort day limits than adopted in the Fishery Plan and the Regulations. Kelvin Passfield who is Vice Chair of the International Union for Conservation of Nature Commission for Ecosystem Management states in his evidence that the precautionary approach required the complete banning of FADs in the Fishery Plan.

110.

The Board does not consider that these proceedings can be a forum for examining the accuracy of the catch data which the Cook Islands feeds into the WCPF Commission analysis. It is not possible for the Cook Islands or the courts below to investigate the totality of the data gathered and used by the WCPF Commission and its Committees. The Cook Islands, and the courts, must approach this issue on the basis that the members of the WCPF Commission agreed to the adoption of CMM 2012-01 after properly applying the precautionary approach as mandated by the World Tuna Agreement and the Pacific Tuna Convention. The Commission members have accepted that the declaration of 1,250 effort days by the Cook Islands complied with that CMM and that the Fishery Plan implements the FADs ban required by the CMM and indeed goes further by banning FADs in October.

111.
Mr Framhein's case rests in part on an assertion that there were particular features of the Cook Islands' EEZ and stock requirements that obliged the Ministry to impose constraints on effort days or on FADs beyond those which would be consistent with CMM 2012-01. These include the presence of a spawning biomass of bigeye tuna in the Northern part the Cook Islands' EEZ referred to in the Lehodey Report and the needs of artisanal and subsistence fishers. The Board concludes, however, that the obligation under section 4(a)(ii) of the MRA 2005 to take account of the need to apply the precautionary approach did not preclude other factors being considered by the Ministry before adopting the Decisions. Mr Ponia's evidence is that restrictions on the use of FADs result in a significant loss of revenue from licences granted to other nations' fishing vessels to fish in the Cook Islands' EEZ. The Ministry is entitled to balance its obligations under section 4 with the need to generate income for the wider benefit of the Cook Islands population.

112.
There is also a difference of view as to whether, given the highly migratory nature of tuna, a self-denying ordinance on the part of the Cook Islands in fact has any effect on overall fish mortality in the Convention Area. Dr Hampton's view is that any further limit on purse seine tuna catches in the Cook Islands' EEZ would simply result in a transfer of activity that would occur in the adjacent high seas. Dr Pauly's opinion is that this is not a relevant factor to take into account because in applying the precautionary approach "it is not appropriate for a decision-maker to allow fishing activities on the basis that damaging or negative fishing activities are already taking place elsewhere". The Board does not accept the logic of Dr Pauly's view. It is legitimate for the Ministry to consider what, if any, beneficial effect a further reduction in fishing in the EEZ would have on fish stocks when deciding whether to sacrifice the revenue that could be earned.

113.
Both Potter J and the Court of Appeal addressed the fact that the effort limit of 1,250 days was more than the effort limit recommended in the Lehodey Report of 1,000 days. It is not entirely clear that Dr Lehodey was recommending any particular level of effort days. He says at para 6.2 of his Report that the effect of increasing fishing effort in the EEZ was tested using a model which set fishing effort of 1,000 fishing days divided between FAD and free school fisheries. Even if one reads the Report as recommending that, the Board does not accept that the precautionary approach means that that effectively set the upper limit on the number of effort days that could lawfully be included in the Fishery Plan and the Regulations.

114.
As to the spawning bigeye tuna, Dr Lehodey does not recommend a ban on FADs because of the biomass in the northern EEZ. He says in his conclusions:

“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 [WCPF Commission] 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 these 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 habitats 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.”

115.
The Ministry clearly did consider the issue of FAD fishing and applied a ban on FADs for longer than required by CMM 2012-01 in the Fishery Plan and Regulations. In the Board’s judgment there is no basis for holding that the Ministry acted in breach of either section 3(3) or section 4(a)(ii) of the MRA 2005 by failing to apply the precautionary approach when adopting the Fishery Plan or the Regulations. Since the EU Agreement is simply the allocation of some of the Cook Islands’ 1,250 days and the EU vessels will be subject to the FAD restrictions imposed, it follows that there was no breach of the precautionary approach in entering into the EU Agreement either.

(d) **Conclusion on the Attorney General’s appeal**

116.
For the above reasons, the Board considers that the Attorney General’s appeal should succeed on both grounds.

3. **MR FRAMHEIN’S APPEAL: THE ROLE OF THE ARONGA MANA**

117.
Mr Framhein’s appeal concerns whether there is an obligation to consult the Aronga Mana before taking decisions about fishing in the Cook Islands’ EEZ. The main plank of his appeal rests on article 66A of the Cook Islands Constitution. This gives the force of law to the custom and usage of the Cook Islands and provides that the opinion of the Aronga Mana is conclusive as to what that custom and usage is. His second argument is that section 4(d) of the MRA 2005 imposed an obligation on the Ministry to consult the Aronga Mana before adopting the Decisions. Finally, if the Board upholds the validity of the adoption of the Decisions, Mr Framhein argues that the Court of Appeal erred in holding that the Aronga Mana are not key stakeholders who should be consulted under para 12 of the Fishery Plan.

(a) Article 66A of the Cook Island Constitution

118.
The Constitution of the Cook Islands was first adopted in 1964. Article 66A was inserted by section 7 of the Constitution Amendment Act (No 17) 1994-95 and provides as follows:

“66A. Custom -

(1) In addition to its power 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 enactment.

(4) For the purposes of this Constitution, the opinion or decision of the Aronga Mana of the island or vaka to which a custom, tradition, usage 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."

(i) The Aronga Mana

119.
Aronga Mana is the Maori term for the governing group of traditional chiefs for each of the different districts of the Cook Islands. The districts are known in the Maori language as vaka, which word also refers to the canoes in which the Cook Islanders traditionally voyaged across the Pacific Ocean. From the evidence presented by Mr Framhein it is clear that the Aronga Mana operate on the basis of a complex hierarchical structure on the different islands which now make up the Cook Islands. Although the structures differ in different vaka, in general the Ui Ariki are the most senior chiefs. They are responsible for a number of Ui Mataiapo who are in turn senior to a number of Ui Rangatira. Some islands have more than one vaka and so more than one Aronga Mana. For example, there are three vaka on the island of Rarotonga: Te Au O Tonga, Takitumu and Puaikura. There is also the Koutu Nui, a pan-Island council which is made up of the Aronga Mana of various islands although not all Aronga Mana have joined. Each chiefly title is generally passed down by hereditary entitlement, though the precise rules of heredity may vary from vaka to vaka.

120.
There are a number of Cook Island statutes that refer to the Aronga Mana, for example by requiring the Aronga Mana to be consulted on an issue (such as the Environment Act 2003 section 4(3)(b)) or stipulating that a member of the Aronga Mana must be included in a particular committee or other statutory body (such as the Cultural and Historical Places Advisory Committee). Some of these statutes contain definitions of the Aronga Mana which refer to them being persons invested with a title in accordance with the native custom and usage of the vaka where they come from.

121.
The overall role of the Aronga Mana was described in the affidavit of Pio Ravarua. He is one of the Aronga Mana of Pukapuka, which is one of the most remote islands of the Cook Islands. The role of the Aronga Mana includes creating laws, rules and regulations necessary for good governance, delivering rulings and imposing penalties on troublemakers, adjudicating over land and boundary disputes and over domestic family disputes. Particularly relevant is their role in the creation of laws, rules and regulations based on traditional conservation principles and practices with regard to the island's flora and fauna (including birds and fish) and for the sake of food security in general. Pio Ravarua concludes by saying:

"Our Council of Chiefs, or Aronga Mana, are inherently tasked with the responsibility of spearheading the protection and preservation of our environment and cultural heritage. They are the guardians and caretakers of our traditions and customary practices."

122.
The role of the Aronga Mana which is most relevant to this appeal is their role in relation to the Moana Nui O Kiva - literally “the huge ocean of blue” - meaning the Pacific Ocean. This role was described by Ian Karika Wilmott who is holder of the chiefly title Kamoe Mataiapo and a member of the Aronga Mana of the Vaka of Te Au O Tonga on the island of Rarotonga. The Aronga Mana are the “Tiaki” (Guardians) of all the land and things on it and in it, below the sea in the Moana Nui O Kiva of the Cook Islands’ EEZ according to Akono’anga Maori (Customary Law). This includes being tiaki of the moana (sea) and the kai moana (seafood). The origins of this guardianship role were explained in the evidence before the Board from Manarangi Tutai O Pore Ariki who is one of the Aronga Mana of the House of Ariki. She describes the formation of the Cook Islands customary law from the time the islands were first populated in about 1000 CE. She states that this customary law “is also entwined with our material culture and ethnology, deeply ingrained even today in the fabric of our society. It is who we are.”

123.
The issue of identifying who are Aronga Mana has arisen in the Cook Islands in other statutory contexts and in the case law. In Hunt v De Miguel [2016] CKCA 2 the Court of Appeal determined an appeal from the Land Division of the High Court in a dispute as to who had the right to hold the Makea Nui Ariki title, that is the title of one of the three High Chiefs of the vaka of Te Au O Tonga on Rarotonga. The Court noted that there was no definition of the Aronga Mana in the Cook Islands Constitution but there were two statutory definitions in the Rarotonga Local Government Act 1988 and the Environment Act 2013. Both those definitions defined the Aronga Mana as including persons invested with the title in accordance with the relevant local custom but did not provide any further detail as to how the court should identify that custom or determine who has been properly so invested.

124.
The Court in Hunt v De Miguel described the purpose of article 66A in the following terms:

“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.” (Emphasis in the original)

125.
The Court of Appeal in Hunt v De Miguel also addressed the application of article 66A(4). The Court said that in every case the court must determine custom on the basis of the evidence presented to it: “the Court cannot simply make up custom out of thin air”: para 55. They drew an analogy with the proof of foreign law before a court. 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”. Once the Aronga Mana in a vaka has made a finding on a point of custom as to the appointment of a chiefly title in that area, the court’s role is limited to determining whether the

asserted custom is consistent with Cook Islands statutory enactments or the Constitution and if so whether the custom has been complied with in the instant case before it.

126.
In determining the appeal before it, the Court of Appeal in Hunt v De Miguel was not satisfied that the evidence presented to it established the custom of who comprised the Aronga Mana or which was the appropriate Aronga Mana to advise on custom of appointing the Makea Nui Ariki. In the absence of any clear and validly enunciated opinion or decision on custom in Te Au o Tonga from any verifiably established Aronga Mana, the Court determined for itself who should be appointed as the new chief.

127.
The same problem was noted by the Board in Browne v Munokoa [2018] UKPC 18 which stated that it was highly unsatisfactory that there was no legislation identifying the Aronga Mana, determining its composition or declaring how its acts are to be recognised: see para 34.

(ii) The evidence presented by Mr Framhein

128.
Mr Framhein has clearly been anxious to avoid what happened in Hunt v De Miguel where, in the event, the Court took upon itself the task of identifying the customary law. The evidence before the courts below and now before the Board was gathered by Mr Framhein following an interlocutory hearing. At that hearing, the judge raised the question as to how the views of the Aronga Mana at a national level could be assembled and communicated to the Court and also who would be liable for any adverse costs award made against the Aronga Mana. In accordance with that direction, Mr Framhein filed a series of affidavits by members of the Aronga Mana of vaka on different islands, confirming the extent of support for the proceedings from the Aronga Mana throughout the Cook Islands. As mentioned at the outset, Mr Framhein himself exercises the responsibilities of his father who is one of the ten Ui Mataiapo of Te Au O Tonga on Rarotonga.

129.
Potter J referred to the difficulties that the Court of Appeal had raised in Hunt v De Miguel as continuing to loom in the present case. The Court of Appeal also referred to the regret expressed by the Court in Hunt v De Miguel about the lack of definition in the Constitution of what comprises the Aronga Mana. The Court recognised the considerable trouble and expense to which Mr Framhein had gone to collect the views of many groups self-identifying as Aronga Mana from across the Cook Islands. The Court, however, noted that there was no evidence of custom from some of the other islands, raising the question of what majority of the Aronga Mana is necessary and whether a majority decision is sufficient. The Court considered briefly the reasons given by Potter J for rejecting the evidence provided and dismissed Mr Framhein's appeal on this ground.

130.
The Board has concluded that the Court of Appeal erred in rejecting the need to evaluate more thoroughly the substance of the evidence presented by Mr Framhein. It may be frustrating that the Cook Islands Parliament has not taken up the challenge of previous judicial rulings about the difficulty of applying article 66A. But the task of the courts is to work out what the law is and where to find it and then to apply the law to the case before it. In undertaking that task, the court must bear in mind the purpose behind article 66A as articulated by the Court of Appeal in Hunt v De Miguel. The court must adopt an approach that is pragmatic and that facilitates rather than hinders the ability of those seeking to rely on customary law to establish to the court's satisfaction what that law is.

131.
The Board recognises that the problems of ascertaining the law for the purposes of article 66A are different from the everyday task facing courts across the world in deciding what the law is. A court habitually engages in the exercise of deciding which of two parties' conflicting arguments about what the law means (either statute or case law) is correct. There is usually no dispute about where the law can be found or its authenticity. Sometimes, as here, the sources of the law are less straightforward than simply looking for legislation passed by the Parliament or for cases in the published law reports. However, the exercise that the Cook Islands courts must undertake is not a unique exercise. The analogy that the Court of Appeal drew in Hunt v De Miguel with the court's task in applying foreign law is not an exact analogy because the custom binding pursuant to article 66A is certainly not foreign law. There are closer analogies in the United Kingdom legal framework where the courts may receive evidence about where binding law is to be found. One example is section 3 of the European Communities Act 1972 (now repealed). That specified various ways in which the courts might ascertain whether a document purporting to be an EU instrument was to be treated as such, in which case the court was required to take judicial notice of it as forming a binding part of our law. Another analogy would be that the English courts regularly receive evidence about the content of constitutional norms that have not been reduced to writing, for example the evidence of the Speaker of the House of Commons as to the scope of Parliamentary privilege: see R v Chaytor [2010] UKSC 52; [2011] 1 AC 684 although, as the Supreme Court stressed there, the ultimate decision as to that scope is for the court not for the Speaker.

132.
The Board does not agree with the reasoning of Potter J and the Court of Appeal in holding that the Minister could not be bound by customary law because the existence of the custom had not been drawn to his attention before the Decisions were adopted. There is nothing in article 66A that makes the application of the law conditional on the awareness of the person affected by it of that law. It would be unusual to provide that part of the body of law governing those within the jurisdiction only applied to those who knew about it or were under some duty to investigate whether it existed or not. Decisions of the executive are often struck down as unlawful because they are contrary to an obscure statutory instrument or earlier authority. It has never been regarded as an excuse to say that the decision-maker did not know what the law was and could not be expected to find out.

133.
It is difficult to see what more Mr Framhein could have done. To require a party seeking to rely on customary law to file evidence from every Aronga Mana from every island would render article 66A inoperable. As the Court of Appeal noted, the Aronga Mana system does not apply on two islands and some islands are currently in a state of uncertainty about who the Aronga Mana are. Given those circumstances, it cannot be right to construe article 66A as requiring exhaustive evidence of that kind as a pre-condition for the application of the provision. The Court of Appeal should have examined carefully the evidence as to custom before it to see what custom was established and the Board will now proceed to do so.

(iii) The custom and usage of the Aronga Mana as tiaki over kai moana

134.
What emerges clearly from the evidence filed by Mr Framhein and what the Board fully recognises is the deep and sincere concern that many of the Aronga Mana express at the extension of purse seine fishing. Pa Tepaeru Teariki Upokotini Marie Ariki who is a member of the Aronga Mana of Takitumu vaka on the island of Rarotonga expressed this movingly in her evidence:

“15. … our children and grandchildren are heirs to the ocean and all that is in it, just as much as to our land. They should be able to set out confidently on the vaka of our ancestors upon an ocean that is filled with the fish that I have seen with my own eyes, be able to catch that fish as we have caught it.

16. I fear for them having to sail out over an ocean emptied of fish - our waters deserted of the rich life that has been our heritage for hundreds of years.

17. We are guardians of that abundance; I call on Government to obey its own legislation. I am sure, in their heart, Cabinet know that these purse seiners will seriously damage our marine resources - but because it will happen beyond the horizon, and not next to Rarotonga, they think it does not matter.

18. I challenge them to do as I have done; climb aboard a voyaging canoe, take a long ocean voyage; come face to face with our ocean and its marine resources. See it with your own eyes, see it as our ancestors saw it - and then explain to our young people how they can justify allowing this purse seining to proceed.”

135.
The Board also acknowledges that the relationship between the Cook Islanders and the kai moana is not simply a matter of food supply. As Jon Tikivanotau Michael Jonassen, one of the Aronga Mana of the vaka of Puaikura expresses it:

“15. There is a deep physical, emotional and spiritual link between Tangata Maori of the Cook Islands and their land, which is all inclusive of soil, sand, streams, lagoons, islets, reefs, rocks, trees, fishes, seabed, Te Moana Nui A Kiva and te ki katoa (all that is within). Indeed, the ocean resources are sometimes described as ‘te moana teta’i o to tatou kauvai ora’ (the ocean is another of our river of life), implying connectivity between islands and food source for survival. Te moana is also called our kete kai (food basket) or more recently our kaparata kai (food cupboard), implying food storage ownership with inherent rights to kai moana resource.

16. For Tangata Maori, the connection to the moana is real, comprehensive, eternal and attached through families over generations. It is a living connection that is represented by the Aronga Mana as tiaki (guardians and protectors). The Aronga Mana must be consulted in matters concerning food resources of the sea including fisheries activities of any kind.”

136.
He cites traditional chants and prayers from pre-European times which highlight the ownership of the land, sea and sky resources by the Aronga Mana and the Tangata Maori. Another witness, Takingaiva Eitiare, who is one of the Aronga Mana of Aitutaki also describes traditional legends in which sea creatures, as messengers of the gods, mete out punishment for human transgressions. The legends show that restrictions placed on certain methods of fishing or certain places of fishing have always been the preserve of Aronga Mana and they show also the vast distances over which these obligations and the authority of the Aronga Mana extended.

137.
Manarangi Tutai O Pore Ariki describes the evolution of custom over time:

“27. Listening to old people when I was growing up, and from reading over the years, I understand that custom has changed over the years, that some customs have died out and others grown up. However, all my life custom has encouraged respect for nature and sustainable living. I do not think the Crown could point to anything different.

…

29. The reasons for this are simple - and my understanding as a woman with both Pukapukan and Aitutakian blood confirms this. The resources of a small island (especially an atoll) are limited and precious. The ability of a small island to support the people on it is limited.

…

31. And so I state with confidence that our customs and usages were wrapped around, this basic, fundamental, reality - on atolls especially, human existence depended on this undeniable truth - if you eat everything, take everything ... then you starve and die.”

138.
A number of witnesses describe the ways in which the Aronga Mana exercise their powers as tiaki in their implementation of custom. Matapo Paiere Mokoroa is one of the Ui Mataiapo of the island of Atiu hence one of the Aronga Mana of Atiu. According to his evidence, supported by some of the other deponents, the conservation measures traditionally practised include:

(i)
Taporoporo which can be ordered by the Aronga Mana to save or preserve an area and the things in it for an indefinite time. For example, Takutea island precinct is a place where taporoporo is applied by the Aronga Mana so that any harvesting of kai moana requires the consultation and consent of the Aronga Mana.

(ii)
Raui which sets out to conserve an area or the things in it for a set period of time. It is applied by the Aronga Mana to replenish the resource or to reserve the resource for a planned event. Raui imposes a restriction on harvesting anything in a particular section of land, lagoon or ocean. A raui can be confined to certain things, for instance a particular fish or shellfish. The period can vary from one month to a year or two and is applied by a Taunga or high priest. Raui has also been applied to improve commercial activity and prices for example in 1897 when the Aronga Mana of the island of Mangaia applied raui on coffee so they could get a better price.

(iii)
A prohibition on certain methods of fishing such as ora papua. Thus, poisoning or stunning fish was prohibited by the Aronga Mana because it damages fish stocks and the environment.

139.
The key evidence for the purposes of the application of article 66A in this case was provided in the statement of the Aronga Mana of Te Au O Tonga, Takitumu, and Puaikura (that is the Aronga Mana of the three vaka of Rarotonga island) as to custom. This was exhibited to the second affidavit of Manavaroa Philip Marama Nicholas. He holds the traditional title Manavaroa Mataiapo Tutara (Independent High Chief) of Vaka Takitumu according to Maori custom.

140.
Their description of the custom must be set out in full:

“11. As a matter of traditional Maori custom, the Aronga Mana are the tiaki (guardians) of the moana (sea), including the kai moana (seafood).

12. The Aronga Mana are responsible for preserving kai moana, not only for present generations but also for future generations.

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

1. The placing of ra'ui over certain areas to prevent fishing or gathering kai moana in those areas;

2. The placing of ra'ui over certain fish species or types of kai moana to prevent taking of those fish or kai moana;

3. The granting of permissions or approvals to take fish or kai moana;

4. 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); and

5. Monitoring the status of kai moana and the taking of kai moana.

14. 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.

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

141.
That statement is signed by eight out of the ten Ui Mataiapo of Te Au O Tonga and 30 out of 32 of the Ui Mataiapo of the Takitumu vaka.

142.
Statements in very similar terms were signed by:

(i)
The majority of members of the Aronga Mana of Aitutaki island including all three current Ariki and 55 Ui Mataiapo. This statement was exhibited to the affidavit of Takingaiva Eitiare dated 22 December 2016 who is one of the Aronga Mana of Aitutaki.

(ii)
All but one of the 23 Aronga Mana of the island of Atiu, exhibited to the affidavit of Henry Marama Maka Ngamaru Ariki who is one of the Aronga Mana of Atiu.

143.
The courts below should have accepted this evidence. It was consistent evidence provided from a large number of members of a wide range of Aronga Mana. That does not mean that the court must accept the substance of the custom put forward in such evidence uncritically. But there was no basis on which the courts below could conclude that the evidence did not constitute the opinion of the Aronga Mana of the islands or vaka to which the custom was said to relate. Given the comprehensive coverage of the evidence, there was also no reason for the Court of Appeal to reject the custom as not covering the Cook Islands generally.

144.
The evidence was largely unchallenged by the Government save as to a point about the application of the Aronga Mana's authority in relation to the ocean beyond the reef. There was conflicting evidence about this before the courts below. Retire Leave Puapii, then chairman of the Aronga Mana of Aitutaki, provided an affidavit on behalf of the Crown. He responded to the three statements of custom by stating:

“It is my understanding of the customary authority and continuing influence of the Aronga Mana that it assists to manage the uses of the land, up to the point of the reef which ends at the sea facing the particular district which an Aronga Mana speaks for.”

145.
This evidence was countered by the second affidavit of Takingaiva Eitiare, one of the Aronga Mana of Aitutaki who says:

“7. At paras 14 Mr Puapii states that his understanding is that the customary authority of the Aronga Mana extends from the land and ends at the reef. In fact, since time immemorial, the Aronga Mana have, as a matter of traditional custom, exercised authority ‘mei te Maunga ki te Moana’ (from the mountain to ocean). The tiaki role of the Aronga Mana in relation to the Moana (sea) and Kai Moana (seafood) has never been restricted to the area between the reef and the land.

8. That view is shared by most of the members of the Aronga Mana on Aitutaki, including all of the Ariki.”

146.
The Court of Appeal should not have dismissed this evidence as they did in para 148 of their judgment, saying that “it strains belief that longstanding custom could have application so far away from the actual Cook Islands”. This evidence was more than “vague statements” about the Cook Islands being oceangoing people. Had the extent of the authority of the Aronga Mana been critical to the outcome of the case, the court would have been bound to decide what the custom in fact was and then apply it as the law of the Cook Islands in accordance with the Constitution. The Board does not regard article 66A(4) as proscribing the conventional role of the court of deciding what the law is before applying it. The final words of article 66A(4) stipulating that a custom, once identified, shall not be questioned in any court of law is not intended to prevent a court from deciding a dispute before it as to what the custom is. It is intended to prevent that custom being attacked or discounted for some extrinsic reason other than that provided for in sub-para (3), namely an inconsistent enactment.

147.
The question to be addressed is therefore whether the custom so established obliged the Government to consult with the Aronga Mana before taking the Decisions. In the Board’s judgment, it does not. It is clear from the evidence that any entitlement of the Aronga Mana to be consulted or informed about plans for harvesting kai moana is ancillary to the exercise of their powers as tiaki. The evidence does not establish that the Aronga Mana have a customary right to be consulted or informed about fishing plans for any other purpose.

148.
According to section 3 of the MRA 2005, it is the Ministry of Marine Resources that now has “the principal function of, and authority for the conservation, management and development of the living and non-living resources in the fishery waters” in accordance with that MRA 2005 and the Ministry of Marine Resources Act 1984. “Fishery waters” are defined in section 2 as the waters of the territorial sea of the Cook Islands and of the exclusive economic zone and other internal waters, including lagoons, as defined in the Territorial Sea and Exclusive Economic Zone Act 1977 and includes any other waters over which the Government of the Cook Islands has fisheries jurisdiction.

149.
This is therefore a case in which article 66A(4) applies because the former customary role of the Aronga Mana as tiaki moana is inconsistent with that provision of the MRA 2005. Whether or not the

custom originally extended beyond the reef to the ocean as the Aronga Mana claim, the rules for fishing in the Cook Islands' EEZ are now set out in legislation and those statutory provisions override any former powers and responsibilities that the Aronga Mana had over kai moana in the EEZ.

150.
This does not prevent the Aronga Mana from continuing to exercise their role as set out in the three statements lodged by the Aronga Mana as a matter of custom. But that custom is no longer part of the law of the Cook Islands pursuant to article 66A and it cannot affect the functions of the Ministry in participating in the World Tuna Agreement or the Pacific Tuna Convention or in implementing CMMs set by the WCPF Commission for the Cook Islands.

151.
The Board therefore considers that Mr Framhein's appeal against the Court of Appeal's decision that there was no duty pursuant to article 66A of the Constitution to consult the Aronga Mana before taking the Decisions should be dismissed, although the Board arrives at that conclusion for different reasons.

(b) Consultation under section 4(d) of the MRA 2005 before the adoption of the Decisions

152.
The Board has considered section 4(a) of the MRA 2005 in the context of the environmental and information principles that the Minister and Secretary must take into account when exercising his functions under the Act. Section 4(d) sets out the social, cultural and equity principles that also apply:

"Section 4 …

(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."

153.
The Attorney General argued at the hearing before Potter J that there had been consultation with the Aronga Mana before the Decisions were adopted but the judge rejected this on the facts.

154.
On this part of Mr Framhein's appeal, the Board agrees with Potter J and the Court of Appeal that there was no express or implied obligation to include the Aronga Mana in any consultation that the Ministry conducted before adopting the Decisions. Section 4(d) is expressed in general terms, stipulating that one of the social, cultural and equitable principles that the Ministry must take into account is the desirability of "broad participation" by Cook Islanders in activities related to the sustainable use of marine resources. As Potter J said at para 146, engagement with the Aronga Mana might have been one way for the Crown to discharge their obligations under section 4(d) but it was ultimately for the Ministry to decide whether to involve the Aronga Mana or not.

(c) Consultation with the Aronga Mana as "key stakeholders"

155.

Para 12 of the Fishery Plan provides that the Secretary must organise consultations with key stakeholders in the purse seine fishery at least once in each calendar year. Mr Framhein asserts that the Secretary was required to include the Aronga Mana as key stakeholders for this purpose.

156.
The Board agrees with the Court of Appeal's conclusion that since the term "key stakeholders" is not defined in the Fishery Plan, the Ministry has a discretion as to whom should be consulted under para 12 of the Fishery Plan: para 157 of the Court of Appeal judgment. It would certainly have been open to the Secretary to consult the Aronga Mana but it does not follow from that that it was unreasonable for him not to have done so.

(d) Conclusion of Mr Framhein's appeal

157.
The Board therefore concludes that Mr Framhein's appeal should be dismissed for the following reasons:

(i)
The custom of the Aronga Mana established by the evidence provided to the Board for the purposes of article 66A(4) of the Cook Islands Constitution does not extend to a custom that the Aronga Mana be consulted and informed otherwise than for the purpose of exercising their traditional jurisdiction as tiaki over the kai moana in the Moana Nui O Kiva.

(ii)
That jurisdiction has been superseded by the powers and functions conferred on the Ministry of Marine Resources and now set out in the MRA 2005.

(iii)
The custom is therefore inconsistent with the provisions of the MRA 2005 within the meaning of article 66A(3) of the Cook Islands Constitution.

(iv)
The Minister was therefore not subject to an obligation to consult, arising from the incorporation of any custom, tradition or usage which forms part of the law of the Cook Islands in accordance with article 66A(4).

(v)
Section 4(d) of the MRA 2005 did not impose an obligation on the Ministry to consult the Aronga Mana before adopting any of the Decisions.

(vi)
The Secretary was entitled to conclude that the Aronga Mana were not key stakeholders whom he was required to consult in accordance with para 12 of the Fishery Plan.

4. CONCLUSION

158.
The Board reiterates its thanks to counsel for their cooperation in the arrangements to have this appeal heard in the context of the pandemic and for the very valuable assistance they provided to the Board in this fascinating case.

159.

The Board will humbly advise Her Majesty that the Attorney General’s appeal should be allowed and that Mr Framhein’s appeal should be dismissed.