THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

In the consolidated matter of:

ELAT 1502/17

ASSOCIATION OF HOTELIERS AND RESTAURANTS (AHRIM)

APPELLANT

v.

1. MINISTRY OF SOCIAL SECURITY, NATIONAL SOLIDARITY AND ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

2. MINISTER OF SOCIAL SECURITY, NATIONAL SOLIDARITY AND ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

RESPONDENTS

In the presence of:

1. **GROWFISH INTERNATIONAL (MAURITIUS) LTD.**
2. **MINISTRY OF OCEAN ECONOMY, MARINE RESOURCES, FISHERIES AND SHIPPING**
3. **MINISTRY OF TOURISM**

CO-RESPONDENTS

And

ELAT 1507/17

1. **THE SEA USERS ASSOCIATION**
2. **VIRGINIA LAMARQUE**
3. **XAVIER KOENIG**
4. **CHRISTOPHE PELLICIER**
5. **GAEL BECHARD**

APPELLANTS

v.

1. **MINISTRY OF SOCIAL SECURITY, NATIONAL SOLIDARITY AND ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

2. **MINISTER OF SOCIAL SECURITY, NATIONAL SOLIDARITY AND ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

RESPONDENTS

In presence of:

1. **GROWFISH INTERNATIONAL (MAURITIUS) LTD.**
2. **MINISTRY OF OCEAN ECONOMY, MARINE RESOURCES, FISHERIES AND SHIPPING**
3. **MINISTRY OF TOURISM AND EXTERNAL COMMUNICATIONS**
4. **BOARD OF INVESTMENT**

CO-RESPONDENTS

Determination

This determination is given in the consolidated appeals lodged by AHRIM against Respondents No.1 and 2 for having granted an EIA licence to Co-Respondent No.1 and the Sea Users Association and four other Appellants against the same Respondents and in presence a Co-Respondents, three of which are the same as above appeal and the Board of Investment as the fourth. At the very outset, one observation is called for. The appeal has been lodged against the Ministry as Respondent No.1 and the Minister as Respondent No.2. We note with approval the submission of the Respondents that this Tribunal derives its jurisdiction under section 54 (1) of the Environment Protection Act (hereinafter referred to as EPA) and this section enables the Tribunal to hear appeals against decisions of the Minister. At any rate, section 23 of the EPA empowers the Minister to make a decision on an application for EIA after taking into consideration the recommendations of the EIA Committee. Therefore the presence of the Ministry as Respondent No.1 is unwarranted and any prayer against Respondent No.1 cannot be entertained under the present appeal. This determination proceeds below in relation to the decision of Respondent No.2, the Minister.

1. Preliminary points

Two preliminary points have been raised by Co-Respondent No.1, firstly, that the grounds of appeal are vague and improper, and secondly, that the Appellants in the two cases have no locus standi to enter the appeal.

1.1 Vagueness:

A perusal of the grounds of appeal of AHRIM shows the basis of the challenge of the EIA licence which has been described with details. In essence they place before the Tribunal the grounds which have raised their actual concern against the proposed development. The drafting of these concerns may not reflect the classic way of presenting grounds of appeal. Yet we do not find that the requirements of section 5 sub-sections (4) (a) and (ab) of the Environment and Land Use Appeal Tribunal Act (hereinafter referred to as ELUAT Act) have not been met. It is not

our view that the intention of the Legislator could have been to raise such procedural hurdles in the lodging of appeals just for the sake of formalism. The purpose of these provisions could only have been to enable the other parties to know what case they have to meet and to answer accordingly. The Respondents and Co-Respondents have filed their respective replies to the statement of case. The grounds must have been sufficiently clear to them for the replies to have been filed.

Sea Users Association and Others have dropped a number of the grounds of appeal. The remaining grounds are elaborate ones. As stated above, had there been lack of precision in the grounds, the other parties would not have replied to the grounds. We do not perceive this preliminary objection as a reason enough to set aside the appeal without hearing the merits of the grounds of appeal as raised. This preliminary objection raised is therefore set aside.

1.2 <u>Locus standi of the Appellants:</u>

Co-Respondent No.1 raised the lack of standing of the Appellants in the two consolidated cases as a preliminary point. Reference has been made by the Appellants in Sea Users & Others to the case of ***Ex Parte National Federation of Self Employed and Small Businesses Ltd***[1]., as per the dictum of Lord Wilberforce, cited in the cases of ***J.F. Chaumiere & Anor. v. The Government of Mauritius & Ors ipo BBHM Holdings Ltd & Anor*** [2], and the case of ***Kishan Quedou v. The State of Mauritius***[3], where the principle laid down is that '*standing should not be treated as a preliminary issue but must be taken in the legal and factual context of the whole case*'. In the present case, the parties have rightly taken the stand to proceed with the hearing of the merits of the appeal and reserve the arguments on the locus standi for submission stage.

Evidence adduced in the course of the hearing has established that AHRIM is an association of hotels in Mauritius and Sea Users Association has presented itself as an association of pleasure craft operators, divers and other sea users. They have

[1] [1982] AC 617
[2] [2001] MR 177
[3] [2005] MR 123

entered the present appeal in the name of the members whom they represent. It has been submitted that this does not meet the criteria laid down by the law which has imposed a necessity for the 'aggrieved person' to show that a legitimate personal right or interest. Co-Respondent No.1 relied on the case of ***Ricot v Mauriplage Beach Resort Ltd.***[4] to support its position. We note that firstly, in the case of Ricot (supra) the prayer sought was an injunctive relief and, secondly the judgment laid emphasis on the fact that '*Although the Act (EPA) was passed to ensure adequate protection of the environment for the general public benefit, there is nothing which prevents a particular member of the public who suffers special prejudice from a decision ....to seek relief for the protection of his legitimate personal interest*[5]. Our reading of this dictum is that the need to protect the environment for the general public benefit is recognized whilst not precluding someone to raise a personal grievance. The recognition of the responsibility of the citizens in general is contained in **section 2 of the Environment Protection Act** which provides for '*Environmental Stewardship: It is declared that every person in Mauritius shall use his best endeavours to preserve and enhance the quality of life by caring responsibly for the natural environment of Mauritius'*. This provision places the onus on every person to play a role in the protection of the environment. The case of *Ricot* (supra) provides recognition that the purpose of the Environment Protection Act is to protect the environment for the general public and emphasizes that this does not preclude someone to aver that he is personally aggrieved. It does not, as suggested, restrain the standing to personal grievance only.

AHRIM, by virtue of its membership and mandate would be better placed than any entity to express the voice of the hotel industry in relation to the proposed development. Does this represent a class action 'per se' and does this appeal represent an attempt to introduce public interest litigation before this jurisdiction? We do not subscribe to the submission that it is. The objective sought by AHRIM is the protection of the tourist industry, in which its members are the main protagonists. The general public may be impacted upon by the outcome of the appeal, yet the remedy sought is for the benefit if its members. We concur with the

[4] [2004 SCJ 329

[5] Ricot & Ors v Mauriplage Beach Resort Ltd. 2004 SCJ 329

submission made on behalf of Sea Users Association & Others that the appeal has been lodged by the association on behalf of its members. It is what has been referred to as 'associative standing'. First and foremost, it would be practically unreasonable for each and every hotel to lodge a separate appeal thus burdening the Tribunal with a succession of appeals, bearing in mind that these would eventually be consolidated for the same reasons given in a ruling allowing the consolidation of the two appeals in the present matter. The same observation holds for the Appellants in the Sea Users case. Co-Respondent No.1 has relied on the authority of the cases of ***Tengur v The Ministry of Education and Scientific Research & Anor***[6] **and** ***IUS Ad Vitam Association v The State of Mauritius & Ors.***[7] to submit that there is no public interest litigation in Mauritius, as such, the appeal cannot proceed. We take a different approach and accept the submission that the case of *IUS Ad Vitam Association* (supra) was a 'surrogate standing' in as much as the Appellant in that case was an association which brought the appeal on behalf of an unborn child and the appeal was brought under section 17 of the Constitution which requires that the constitutional right breached be personal to the appellant. The case of *Tengur* (supra) also concerned a constitutional redress sought under section 17 of the Constitution, requiring the Appellant to be personally aggrieved. We hold the view that the associative standing of both AHRIM and Sea Users is in line with the liberal approach to locus standi taken in English case law: ***R v HM Inspectorate of Pollution, ex parte Greenpeace***[8] where the Court held (among other things) that Greenpeace could be said to be representative of persons having a direct interest in the matter. The evolution of the position in English law was referred to, with acquiescence, in the case of ***Quedou K v The State of Mauritius*** (supra). To conclude on this preliminary objection on locus standi, we refer to the case of ***Betsy v Bank of Mauritius***[9] where the Court quoted from Wade's Administrative law: '*The law will now focus on public policy rather than private interest*' (The relevant issue in Betsy was whether the Court was right to have ruled ousting the appeal at the preliminary stage on the ground of

[6] 2002 MR 166
[7] 2017 SCJ 1
[8] [1994] 4 All ER 329
[9] 1992 MR 231

lack of locus standi). This stand takes particular significance in the realm of environmental law being given that environmental stewardship rests on the shoulders of every person in Mauritius[10]. The significance of this 'pledge' has been lengthily highlighted in the case of ***Tacouri Preetam & Ors. v Mohamud Feroze & Ors.***[11]

Based on the above, we hold that AHRIM has locus standi to lodge the appeal in the present matter. The singularity of Sea Users Association is that the association came into existence, at least legally, after the appeal was lodged. The representative of the association, who deposed on its behalf, has explained and was lengthily cross examined on the status of this association and its incorporation. It has come out in her evidence that the members were raising their voice on the project prior to the legal entity being created. In fact the entity was created for the very purpose of objecting to the aquaculture project in that region. We are of the view that this raises an academic issue only being given that the appeal in the Sea Users case has been lodged by the association as well as four other persons. These persons have deposed on the prejudice they claim to suffer, the merits of which are assessed after hearing evidence. The preliminary point raised on locus standi is therefore set aside.

2. Background of the case:

AHRIM, which is an association of hotels in Mauritius, has through its Chairman, Mr. Kwok, lodged an appeal before the ELUAT, challenging the EIA Licence granted by Respondents No.1 and 2 to Growfish International (Co-Respondent No.1). The subject matter of the EIA Licence is for the setting up of an aquaculture farm off the west coast of Mauritius, in a location referred to as Bambous I and Bambous II.

In relation to the location of the proposed project, two points are observed at the very outset. One is that Bambous I and Bambous II are prescribed fish farming

[10] Section 2 of the EPA
[11] [2010] SCJ 132

zones. Second is the fact that the promoters had initially earmarked four sites along the west coast, 'Le Morne I' and 'Le Morne II' and Bambous I and Bambous II. The project has been re-engineered to locate it to only the two latter sites. Growfish stated that it is a decision taken following the concerns expressed by AHRIM on the impact of the proposed project on the tourism industry. It came out in evidence that the developer had requested for two alternative sites so that the economies of scale of the project be met if the project is implemented on four sites.

What is of relevance for our consideration is that there has been a downsizing of the project at this stage (with a proviso that future sites are to be identified so as not to affect the economies of scale for such a project). When questioned as to the whether there was a need for another EIA application for the proposed two additional sites, no clear answer has been provided. Also, the assessment of the impact of this downsizing, in terms of the required resources and other relevant factors do not seem to have been done, so much so that this aspect was not sent back to the EIA Committee to review and approve.

3. <u>The grounds of appeal relied upon by AHRIM:</u>

1. The first ground is in relation to risk of increase in the number of predators, including sharks, who will be attracted to the project area and that the mitigating measures proposed by Co-Respondent No.1 (hereinafter referred to as Growfish) do not address this identified risk and that condition 6 of the EIA licence is insufficient and derisory in addressing this risk. Furthermore, the EIA licence was given on fallacious grounds being given that Growfish gave a false undertaking that the project would be a 'zero-risk' one.
2. The second ground is to the effect that (a) Growfish's application fails to abide by the requirements of the EPA, (b) The application is insufficient and lacks material information, in particular in respect of (i) the stated viability of the project, (ii) The impact of wave climate and sea conditions on the project, (iii) The impact on the environment, (iv) The impact on other stakeholders. (c) The application contains numerous inconsistencies and

inaccurate statements, (d) The conditions imposed by the Respondents fail to address the risk factor associated with the project.

3. The Respondents have granted the EIA licence to Growfish in breach of its consultation obligations.
4. Growfish has failed in its obligation to consult with all the stakeholders including the relevant ministries.
5. The Respondents, in granting the EIA licence, have ignored the adverse impact of the project on the tourism sector.
6. There is a conflict of interest and/or lack of independence whether actual or potential.

4. Ground 1 of AHRIM's grounds of appeal

AHRIM raises the issue of the risk of the increase in the presence of predators, including sharks, who will be attracted by the project, the fact that Condition 6 imposed in the EIA licence is insufficient and derisory in addressing the risk of an increase in predators: (Condition 6: *'Prior to the implementation of the project, the promoter shall inform the Ministry of Ocean Economy, Marine Resources, Fisheries and Shipping of the methodology for the placing and mooring of the cages at sea as well as any shark repelling methods to be used. The Ministry... shall also be informed of the use of any electromagnetic shark repelling deterrents'*). Furthermore, Growfish Ltd. had given a false undertaking that the project would be a 'zero-risk' project, as contained in its application. Thus the grant of EIA licence is made on fallacious grounds.

The Respondents, in their submission, have responded on this aspect by saying that they relied on the comments received from the Ministry of Tourism '*relating to shark deterrent devices, impact of cobia fish on the local marine fauna and flora, impact of chemicals to be used on the water quality, waste water management plan, design of fish cages which are escape proof and predator proof, navigational aids...*'[12].

[12] Submission of Respondents at page 6

The response of Co-Respondent No.1, Growfish, is that :(i) this Tribunal has no jurisdiction in assessing the policy of the Government in declaring aquaculture as its objective, nor in declaring the zones as being Fish farming zones.. (ii)The issue of increase in predators is a mere apprehension of the Appellant as no scientific evidence has been ushered to establish this. It is our observation that the declaration of the zones as being fish farming zones was not part of the grounds of appeal nor made an issue by the Appellants.

Co-Respondent No.2, the Ministry of Ocean Economy, has throughout maintained the position that there is no scientific evidence demonstrating the incidence of sharks near fish farms and therefore there is no direct correlation between aquaculture in floating fish cages and occurrence of sharks.

Co-Respondent No.3, the Ministry of Tourism , whilst highlighting that it was a co-opted member of the EIA Committee by virtue of section 22 and the sixth schedule of the EPA, and providing details on the Fish Farming zones and dolphin and whale watching activities, decided to abide by the decision of the Tribunal.

Co-Respondent No.4, the Board of Investment, submitted that it will abide by the decision of the Tribunal.

Under Ground 1 three issues are identified: (1) the significance of shark risk and (2) The inadequacy of condition 6 of the EIA licence and (3) the false undertaking of Growfish.

1. The major concern of the Appellants under this ground, as contained in the evidence adduced by Mr. Kwok and the expert Mr. De San, focuses on the increase in the prevalence of predators in the region due to the presence of the FAD that the fish farms will create. Although the expert acknowledges, as highlighted by the Ministry of Ocean Economy, that the ocean is the ecosystem of fish generally including sharks, it is the attracting effect of the FAD that creates the concern of the Appellant. Mr. Kwok highlighted the adverse impact that an increase in shark presence in the seas surrounding Mauritius, particularly the west coast, will have on the tourist industry. A

parallel drawn with the occurrence of shark presence and shark attacks in the neighboring island of Reunion and its consequences on the tourist industry, there is the cause for a cry of alarm on behalf of AHRIM. Two points call out attention here, first is the difference in the topography of the reef surrounding Reunion as opposed to Mauritius that calls for a different approach as highlighted by both the Ministry of Ocean Economy and Growfish. Second, the unequivocal position repeatedly taken by AHRIM, to the effect that it is not against the aqua-farming industry, but is against the size of the proposed project. AHRIM's dispute is in relation to the significance of the shark risk and the impact of such risk. Evidence adduced by Mr. De San has raised concern on the correlation between the fish farm and the FAD effect created by it and the increase of shark presence. Dr. Blaison has come up with a different opinion. According to his evidence, there is no such correlation. The Ministry of Ocean Economy has repeatedly stated that there is no evidence of shark attack in our jurisdiction and that the position of the Appellant is based on mere apprehension. To this stand, our response will be that the precautionary principle[13] demands that in the absence of concrete data (because it has been stated that there is a lack of research on the presence of sharks in the region) the Ministry ought to take a cautious approach to this issue. One cannot turn a blind eye to the potential harm that can occur by the increased circulation of sharks in our region due to such activity beyond the normal presence due to the ecosystem balance. To await for evidence (namely await the occurrence of the shark attacks) before adopting a cautious approach amounts to an unreasonable defiance to the precautionary principle.

Having said this, fish farming is an economic activity which exists and flourishes in different parts of the world. The stated policy of the government in the BOI report is to encourage fish farming. AHRIM has been involved in consultative process of the Government for the

[13] Principle 15 of the Rio Declaration on Environment and Development (1992): "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

development of this economic sector. AHRIM's appeal as stated in ground 1 is about the insufficiency in the mitigating measures proposed by Growfish. In this respect we note that all the evidence adduced on the AKVA technology in the project is geared towards the protection of the aqua farm, both the fish and the equipment. This is acknowledged by the expert for Growfish himself (the Blaison report). Growfish has mitigated the impacts of an increase in predators on its farm. The concern of AHRIM is that the mitigating measures provided by Growfish do not address the risk of an increase in predators including sharks in the project area and its surroundings. Apart from the use of shark repelling technology, which is again meant to protect the net and the fish contained therein) and the use of 'Polarnickel EcoNet' there is no mechanism that can eliminate the FAD effect produced by the nets. Mr. De San, expert for AHRIM, described the FAD created underneath the nets as being a 'FAD manger' and the largest FAD in the Indian Ocean. Dr. Blaison, expert witness for Growfish, in his testimony stated that sharks will get used with the fact that the fish in the nets are not accessible, thus they will move on along their route. Such evidence, in our opinion, can only lead to one observation: It does not mitigate the fact that sharks will be attracted and, being unable to feed themselves, they may represent a real risk for other users of the sea, as outcried by both AHRIM and Sea Users Association & Others. Mr. De San has highlighted that the fish farms, although offshore, are close to the coasts and their location would be likely to place visiting sharks close to lagoons and touristic areas and areas of sea water activity. We have also taken note of the unrebutted expert opinion of Mr. de San that due to overfishing of coastal sharks, an ecological niche has been created whereby pelagic sharks such as bull sharks and tiger sharks have taken advantage of this niche and migrated closer to the coasts. If this is the case, we recognize that it is the ecosystem itself that allows for the movements of the predators: the Growfish project would not be responsible for this, yet, the FAD effect created by this huge presence of fish could accentuate this effect.

2. We agree with AHRIM that condition 6 of the EIA licence is derisory in dealing with the abovementioned risk. This condition simply requires the promoter to inform the Ministry of Ocean Economy of the methodology for the placing and mooring of the cages as well as any shark repelling methods used. In the face of the size of the project, which Mr. De San described as being comparable to the size of the production in China, which was a gradual one which spanned over two decades, the mitigating measures provided in the EIA report, which have been approved, are derisory.

We are alive to the position of Growfish that the sea is the ecosystem of sharks and predators, and that sharks already exist in our oceans. This is not disputed by AHRIM. As such, the promoters on one hand, and the respective Ministries who sit on the EIA Committee on the other, ought to have addressed their minds to the impact of an increase, or potential increase, of such predators in the region. The fact that the fish farms will be located in designated fish farming zones as approved by the Government and the fact that there is a presumption that there would be no sea users' activities around those zones do not necessarily prevent the occurrence of, or increase in shark presence. Both Growfish and the Ministry of Ocean Economy have taken the position that this occurrence is a mere apprehension on the part of AHRIM and the Appellants in the Sea Users case. It has been acknowledged by the parties that there has been no, or insufficient, data collected in Mauritius on the shark presence in our waters. There is lack of knowledge on the correlation between fish farms and sharks. Studies carried out in Reunion are revealing but there exist differences in coastal topography between the two islands. It may not be accurate to transpose the presence of sharks in the waters of Reunion on our lagoons which are protected by reefs. Nonetheless the proximity between the two islands , the likelihood of shark migration, the fact that sharks can traverse coral reefs are matters that shift the shark issue from the sphere of apprehension to serious potential risk. It calls for a cautious approach. As per Dr. Blaison's statement[14] studies are recommended on the spatial and temporal movement of sharks in Mauritius,

[14] Doc H, page 7 Sitting of 13 September 2018, p.79-80

the interaction of sharks with humans around Mauritius and the population status of sharks. It has been submitted that as long as this knowledge remains unacquired, the adequacy of a risk management plan and the mitigating measures cannot be properly assessed and in light of the void of knowledge on sharks and the lack of scientific certainty on the correlation between shark presence and fish farms, the EIA Licence ought not have been granted. Does the precautionary principle require that a project of this nature should not be embarked upon at all? The economic imperatives are matters that any decision making body would inevitably look at. Yet, the precautionary principle calls that all parameters be taken into account and the impact on the environment of such a large scale project be analysed.

One aspect that calls for concern is that in the face of the acknowledgement by the promoters of the absence of knowledge on the shark risk attached to the project (what is referred to as the 'point zero') the Respondent nevertheless granted the EIA licence with the conditions as described above. In its submission, it is stated that Growfish shall undertake a zero point study which will start when Growfish starts its business. They go on to say that "should Growfish be authorized to proceed with the project, then over and above the studies already effected for the purpose of the EIA report, Growfish will start the point-zero study, i.e. at a time when there are no cages at sea". We question ourselves on how have the Ministries especially, the Respondent and Co-Respondent No.2, been satisfied that an EIA Licence can be granted in such voidness as regards the risk of sharks being attracted to the fish farms and thus to our coasts. Growfish has raised in submission that the lack of baseline study is not a ground of appeal or an arguable ground of appeal and that this contention does not fall within any of the grounds of appeal raised by AHRIM. We find no difficulty to read that this issue can be addressed under Ground 1(a) of the AHRIM's grounds of appeal which refers to the 'identified risk that there will be a material increase in the number of predators...'. It is our view that the grounds raised as Grounds 1(a) and (b) are not unfounded. They call for a revisiting of the

EIA licence by the Respondent in the light of the above observations. These two limbs of the first ground are upheld.

3. It is denied by Growfish that it had given a false undertaking that the project would be a 'zero- risk' one. The reference made to what had been said in a meeting dated 6 September 2018 (to the effect that the promoter gave an undertaking that there would be zero-risk in respect of shark risk) is neither here nor there: no evidence is before us to establish that the Respondent had based itself on such an undertaking to reach its decision. Besides, Growfish has itself acknowledged that there is no such zero risk. The EIA could not possibly have been given by relying on this undertaking only, the EIA Committee is a meeting with representatives of many Ministries who would require more that such an 'undertaking' to accept the application on this sole ground. Ground 1(c) does not stand and is set aside.

5. Ground 2 in AHRIM's case

Ground 2 comprises of four limbs as follows:

(a) Co-Respondent No.1's application failed to abide by the requirements of the Environment Protection Act

(b) Co-Respondent No.1's application is insufficient and lacks material information in particular in respect of: (i) The viability of the project, (ii) The impact of wave climate and sea conditions on the project, (iii) The impact on the environment (iv)The impact on other stakeholders

(c) Because the Co-Respondent No.1's application contains numerous inconsistencies and inaccurate statements.

(d) Because the conditions imposed by the Respondents fail to address the risks factors associated with the project.

Re 2 (a): Failure to abide by the provisions of the EPA

The evidence adduced by AHRIM under this ground has been carefully analysed. AHRIM places reliance on two documents, the Aquaculture Master Plan of 2007-2008 (Annex 1) and the Board or Investment (BOI) Report (Annex 2 and Documents AB and AD) ,these two documents laying down the government targets in aquaculture production for the years to come, namely up to 2030. The figures mentioned in these two documents revolve around a target of 20,000 tons annually based on two sites i.e. Mahebourg and the west coast (these two sites targeting 5,000 tons each off lagoon). It is the contention of AHRIM under this ground of appeal that the Growfish project radically departs from the government policies. Our observation to this is that the vision of the Government as expressed in the BOI report and the Master plan are the projection targets for this sector of activity. They are by no means mandatory limits placed on such production, any attempt to do so would be an economic absurdity. Section 24(1) (a) of the EPA as rightly pointed out by the Appellant, lays a mandatory requirement for policies and governmental guidance published in respect of an undertaking to be taken into account when considering an EIA approval. The Appellant's evidence falls short of establishing that no consideration has been given to those targets, which were by no means statutory limitations. On this score no breach of section 24(1) (a) of the EPA has been established.

AHRIM also raises that there has not been compliance with section 18(2) of the EPA in as much as the EIA report did not contain a true and fair statement and description of the undertaking as proposed to be carried out by the proponent.

It has come out in the course of the hearing, through the representative of Growfish that, although their initial business model was based on four sites, two sites have been relinquished for the time being. They will now operate on two sites, namely Bambous I and Bambous II. The project has been downsized. This has led AHRIM to react to this development by saying that the EIA report submitted by Growfish depicts a project which is diametrically different from the description of the project as made out before the Tribunal: the EIA report referred to 100,000 tons on four sites in 8 to 10 years, the target is now said to be 40,000 tons over 10 years, the number of cages has been reduced from 48 to 24 cages per site, with cages of smaller diameter (38 m instead of 50m) and circumference (120m instead of 160).

AHRIM's position is that none of these elements have been placed before the EIA Committee. This reveals a remodeling of the business that was not submitted to the EIA committee and put for the first time before the Tribunal. We agree that this is a matter that calls for concern. It has been submitted on behalf of Growfish that this should have been to the satisfaction of AHRIM being given that one of their major concerns has been the magnitude of the project. However, this ought to have been the contained in the EIA report. Section 18 sub-section (2) of the EPA lays down specific details that the EIA report should contain. Furthermore, the substantial change/modification of that nature ought to have been the subject matter of a direction from the Minister (Respondent No.2) and placed before the EIA Committee for it to impose conditions accordingly for the phased approach to the operation, in compliance with section 25 sub sections (1) and (2) (b) of the EPA. There is no evidence put before us that this has been done. We accordingly uphold this limb of the second ground of appeal.

Re 2 (b): Insufficiency of information.

(i)The viability of the project is a matter for Growfish to assess in line with its economic plan and the economic risks that it is willing to take. We agree with Co-Respondent No.1 that detailed business plans and information is in the realm of commercially sensitive information. The representative of Growfish explained in some detail the phased approach that it will now take in the implementation of the project. Despite the downsizing by half, he had no doubt on the viability of the project.

(ii)The impact of wave climate and sea conditions on the project: The witnesses for AHRIM agree that there is a lack of data on climate wave and sea conditions. This is why the proponent proposes to carry out studies through its expert AKVA in this highly technical and specialized area. Mitigating measures to be taken in the case of high wave movement (e.g in cyclonic conditions, which is a regular feature in this part of the world) need to be explained and assessed by the EIA committee. The issue of sinking the cages in such climatic conditions has come out in the cross examination of the representative of Growfish and the depth has been raised, to

which it was agreed that a deeper sinking mechanism would be more appropriate. It is our view that the adequacy of the mechanism is a matter ought to be disclosed, discussed and reviewed by the EIA committee and not simply raised in the course of a hearing before the Tribunal. AHRIM has also raised concern on the water quality and waste disposal as well as fish escape and the lack of mitigating measures provided in case of cobia fish escape from the farms. It has remained unclear as to the actual status of cobia fish in our waters, whether they are endemic or have been introduced, and if so, the impact of large escape of cobia on our marine life. However, this is a matter which ought to have been clarified at the level of the EIA committee. In this respect, we agree that there is insufficiency of material information and a call for clarity is justified.

(iii)In relation to the impact on the environment, the representative of Growfish, Mr. Robinson, has lengthily explained the measures to be taken 'to keep the potential impact on the environment to the minimum'. These measures range from the stock density of the fish in the cages, the feeding of the fish, the adoption of the Best Aquaculture Practices and the use of the latest technology by AKVA, a leader in its field and the compliance with the 'Norwegian Standards' which are better than ISO in terms of aquaculture practice. Emphasis is placed on the pollution that would occur at the site of the fish farm and the technology that Growfish is prepared to use. It is noteworthy that the possibility of disease outbreaks in the fish farms has been identified by Growfish, which has recognized the potentially major adverse impact on the marine ecosystem. Growfish has proposed some mitigating measures, like surveys and risk management strategies to detect disease at an early stage as well as a low density farm as a means of prevention of disease. We note that no reference whatsoever has been made in the EIA conditions to the potential environment hazard that diseases may cause. Protection of the marine environment is provided in the EIA conditions 8, 10, 11 and 12. These are conditions that operate after the implementation of the project (e.g. monitoring of water quality and the marine ecosystem at the aquaculture site, removal of waste from the fish farm, prevention of dispersion of debris, disposal of waste water). Condition 15 is the sole condition that provides for directives that may be issued by the Ministry of Ocean Economy before, during and after the implementation of the project and

calls for compliance with same by the promoter. The conditions for the protection of the environment have been expressly laid down, and logically, the implementation of the conditions would be assessable when the operation starts. We find that Ground 2 (b) on insufficiency of material information is justified and we uphold this ground of appeal.

Re 2(c): Inconsistencies and inaccurate statements:

No evidence has been adduced under this ground, nor any submission made. It is therefore set aside.

Re 2(d): Failure to address the risk factors associated with the project.

This ground is a repetition of the issues raised under paragraphs 1(a) and 2(b) and (c) and we have considered the issue of risk above. We find no need to consider this as a separate ground.

At this juncture, we find it appropriate to make one observation on the EIA process itself. It had been submitted on behalf of Growfish that any matter '*which have not been addressed in detail in the EIA report will be addressed in the Environment Monitoring Plan. All Growfish's operations are subject to monitoring by the EIA Monitoring Committee. To that effect, Growfish will submit its detailed Environmental Monitoring Plan for the implementation of the project describing among others the environmental management plan, the environmental monitoring process, preventive and mitigation measures etc. to be taken during the implementation and operation phases*'. The evidence of the representative of the Respondents, Mrs. Kanhye, takes a similar stand, namely that of placing the onus on the EMP to deal with matters that are not contained in the EIA report but which call for action. In this respect, whilst we accept the EIA process is a dynamic one, we uphold the concern expressed by AHRIM on this course of action. The conditions of the EIA licence are subject to the objective review of the Tribunal, while the Environment Monitoring Plan is not. There is a dire need for clarity in the process, the law has set up a mechanism to appeal against a decision to grant (or refuse) and application for EIA. Such an appeal process can work when there is clarity in the process and finality in the decision.

Having said this, we reiterate that this paragraph (d) of ground 2 is superfluous, the 'risks' having been considered under the other grounds.

6. Grounds 2(b) (iv) and Grounds 3 and 4

The issues raised under these three grounds are closely related and they can be dealt with together.

The impact on other stakeholders: An attempt was made by AHRIM to submit that the other stakeholders are those operating in the side economy to the Tourism industry, in particular the diving business. At no point has AHRIM shown that it is mandated to represent that sector in the present proceedings. Evidence in relation to other stakeholders referred to would amount to hearsay evidence. Ground 2(b) (iv) is accordingly set aside.

The issue of the consultation process:

Ground 3 raises that there has been failure by the Respondents in its consultation obligations and Ground 4 raises that Growfish has failed in its obligation to consult with all stakeholders including the relevant ministries. It has been submitted on behalf of Growfish that AHRIM has failed to identify any provision in the law imposing an obligation on the part of the Respondents to consult anybody whatsoever. The provisions of the EPA do not impose such a condition on the Respondents. Nonetheless, the established practice is for policy makers, here the Respondents, to hold consultations with stakeholders before the adoption of any policy in the area falling under their administrative jurisdictions. There is evidence on record that AHRIM requested for a meeting, which was granted and held, and where the proposals made by it were taken into consideration and implemented. There is also evidence that consultations had been held in a meeting organized with registered fishermen. As regards consultation with other ministries, evidence shows the Ministry of Ocean Economy (Co-Respondent No.2) had set up a meeting with AHRIM and Growfish and the other ministries. The views expressed by the said ministries were taken on board at the level of the EIA committee. There

has been also the public consultation process done in accordance with section 20 of the EPA. The dispute as to who were the attendees of the fishermen's meeting (i.e. the failure of fishermen to, either be registered or be in attendance) cannot negate the fact that the consultation was held. We accordingly find that the arguments put forward by AHRIM at this stage on the lack of consultation do not hold. Grounds 3 and 4 are set aside.

7. Ground 5: Adverse impact of the project on the tourism sector

This ground of appeal reads as follows: '*Because the Respondents, in granting the EIA licence, have ignored the adverse impact of the project on the tourism sector*'. We agree with the submission of Co-Respondent No.1that the drafting of this ground does not specify in what respect the decision of the Respondent is challenged. By ignoring the impact on the tourism sector in its decision making can hardly be assimilated to an arguable ground of appeal. In addition, we note that the only 'evidence' put forward by AHRIM under this ground is that the '*impact of the materialization of a shark risk in Mauritius would have a catastrophic impact on the Mauritian economy' and the 'negative impacts on the marine environment resulting from fish escape, disease outbreaks, pollution of the marine environment, drop in water quality, which are factors which influence the reputation of Mauritius*...'. The latter issues have been dealt with under the second ground of appeal among others. The issue of potential shark increase and attack has been dealt with as well. The impact on the tourism industry, as the witness for AHRIM attempts to describe under this ground, expresses the apprehension of the industry. Nonetheless, we agree that the precautionary principle requires caution in the approach adopted for this industry being introduced for the first time in Mauritius. But we note that AHRIM has expressed time and again that it is not opposed to the development of this new sector. Their call is for the adoption of policies that would not threaten the tourism industry and that a proper assessment of the aquaculture industry be made so that it constitutes a measured risk. This is a call for a policy position. AHRIM has challenged the conditions of the EIA licence as being inadequate. The challenge has been dealt with under the other grounds mentioned

above. The policy position as regards the balancing of interests of two economic sectors is a matter that is not within this Tribunal's scope. It remains within the competence of bodies like Co-Respondent No.4, where incidentally, AHRIM has participated in the consultation held by it on the development of the aquaculture industry. For these reasons, we find no basis to entertain Ground 5, it is accordingly set aside.

8. Ground 6: The issue of conflict of interest and/ or lack of independence

AHRIM raises this issue as its sixth ground of appeal which reads as follows: '*There is a conflict of interest and/or lack of independence whether actual or potential*'. Sea Users & Ors. raise the same issue as ground 5 of their notice of appeal as follows: '*The EIA Licence is tainted by a manifest conflict of interest existing within the organs forming part of Respondents Nos. 1 and 2 for making recommendations and taking decisions on the EIA Licence*'.

The Ministry of Ocean Economy, Marine Resources, Fisheries and Shipping, (styled as Co-Respondent No.2 in the appeal) maintains its position that its involvement in the application made by Co-Respondent No.1 (Growfish) is a legal obligation by virtue of its statutory duties as a Ministry responsible for the subject matter. It has also denied that there had been any agreement between the Ministry and Growfish. The evidence placed before this Tribunal shows the following: (i) Co-Respondent No.2 is the Ministry that has the technical expertise that sits on the EIA Technical Committee and the EIA Committee[15] (ii) It had sat on the technical committee for the Growfish project (iii) It had been consulted throughout the process and supported the project (iv) there has been a memorandum of understanding (MOU) signed by Growfish and Co-Respondent No.2 whereby the Ministry is agreeable to provide a number of services within its premises and laboratory, through the Albion Fisheries Resource Centre (letter dated 22 June 2017, Annex E1 to the statement of defence of Growfish refers) (v) The Respondents have relied on the work of the EIA Committee, which prepared the

recommendations for the Ministry of Environment, and this Committee is heavily reliant on the expert views of Co-Respondent No.2 (vi) It has imposed many of the EIA conditions and is the body that is responsible for the monitoring of the project through conditions 15, 16 and 17. All the above would go to the credit of Co-Respondent No.2 as a Ministry which is providing the technical arm to a project which falls within the objectives which the Government wants to promote, save that in spite of its thorough involvement in the decision reached by the EIA Committee which led to the granting of the EIA licence, Co-Respondent No.2 also has an interest and is itself involved in the undertaking. We are alive to the fact that the Albion Fishing Resource Centre (AFRC) is the expert within the Ministry to deal with issues relating to fisheries, aquaculture and related matters. Yet, the project indicates that the involvement of AFRC is well beyond the mere technical advice and is meant to involve the AFRC fully in the land based operations as per the MOU. By being part of the EIA Committee, and by exercising its voting rights for the recommendation in favour of the Growfish project, Co-Respondent No.2 held itself in a position of conflict of interests. Furthermore, questions can be raised on the subsequent role of Co-Respondent No.2 in monitoring the compliance by Growfish of the EIA conditions, in particular conditions 6, 15, 17 and 18. Good governance policy requires that the regulatory agency should not be, in any manner whatsoever, involved in a decision relating to the subject matter that they have to regulate! For these reasons, the EIA licence is tainted and ground of appeal 6 in the AHRIM's case (which is also in essence the same as ground 5 of the Sea User's appeal) is upheld.

9. <u>The appeal lodged by Sea Users Association & 4 others:</u>

This appeal has been consolidated with the appeal lodged by AHRIM by a ruling given by the Tribunal on the 7th June 2018. The grounds of appeal raised in this case, although drafted differently, address in substance the same issues as raised by the AHRIM appeal (Grounds 1, 2(f), 4(c), (d), (f), (g) and (h) having been dropped):

Ground 2 raises a failure by Co-Respondent No.1 to provide a true and fair statement and a true and fair description of the undertaking as required by section 18 (2) of the EPA.

Ground 3 raises that there has been failure of the Respondents to adequately assess the undertaking as they have failed to request for missing information, failed to consult stakeholders, failed to ascertain the relevant expertise of the consultants.

Ground 4 raises that the EIA is tainted by the non-compliance of the Respondents to sections 24(a) and 24(d) of the EPA.

Ground 5 raises the issue of conflict of interest existing within the organs that made recommendations to the Respondents and taking decisions on the EIA licence.

The issues addressed under the grounds forming the basis of the appeal lodged by the Sea Users Association & Others have been considered above, in the assessment of the grounds lodged by AHRIM. We do not propose therefore to make a separate assessment of each of them, the cases having been consolidated, and the grounds being substantially of the same nature. We also note with approval the position of Sea Users & Others, relying on the authority of *Re Maharani Restaurant v The Commissioners of Customs and Excise [1999] STC 295* where the High Court dismissed an appeal and held that the first instance Tribunal had taken an entirely rational position by deciding that all the relevant witnesses in one case were witnesses in the other, and the decision of *First Class Communication Ltd v Revenue and Customs Commissioners [2014]* the concept of avoidance of 'chinese wall' in the mind of the Tribunal was coined, submitted that : "*Once two cases have been consolidated, evidence in one case is admissible as evidence in the other, owing to the substantial overlap of evidence in the two cases and the need to avoid inconsistent decisions if evidence in one case was not admitted in the other case". This position takes significance in the conduct of the present appeal, where the Respondents and Co-Respondents No.1, 2 and 3 gave evidence in the two cases at once. Sea Users also cross-examination the witnesses in the AHRIM case, ... "all parties were entitled to address the evidence in the other case".*

Grounds 2, 3, 4 and 5 of Sea Users' appeal embody substantially the same issues raised in the grounds in the case for AHRIM. We do not propose to embark in an academic exercise of reiterating our observations in respect of the same issues raised. For the reasons as lengthily explained above, our conclusions apply in the appeal of Sea Users & Others as well. We uphold Ground 2, which embodies the same concerns as Ground 2 in the AHRIM case. Ground 3 is set aside for the same reasons as under Ground 3 in the AHRIM case. Ground 4 is set aside for lack of evidence adduced in support thereof. Ground 5 is upheld for the same reason as given under Ground 6 of the AHRIM case.

For all the reasons given above, the appeal is allowed.

Determination delivered by:

Mrs. Vedalini Phoolchund-Bhadain, Chairperson

Dr. Ranjeet Bhagooli, Assessor .....

Mr. Pravin Manna, Assessor .....

Date: 30th April 2019