

CASE LAW ANALYSIS

One Step Back for International Cooperation— Backwards or Forwards for Dolphins?

Brower et al v Daley (Secretary of Commerce) et al

(United States, District Court for the Northern District of California, Case C99/3892
TEH, Order of 12 April 2000)

The full text of the Judgment and Order is reproduced on the Online Version of the Journal or can be found on the website of the Northern District of California Court website: www.cand.uscourts.gov

Analysis by Chris Hedley, Cardiff Law School

In this case brought by a number of environmental concerns against the Secretary of Commerce, the Northern California District Court ordered that an initial finding of the Secretary that there was insufficient evidence that the use of chase and encirclement fishing techniques for tuna in association with dolphins was having a 'significant adverse impact' on depleted dolphin populations in the Eastern Pacific Ocean (EPO) be set aside. The initial finding of the Secretary, which was based on various research projects specifically mandated by Congress, would have enabled changes in US law to allow the marketing and sale in the United States of tuna caught using such techniques, provided the fish were caught in compliance with an international agreement, to which the United States and the tuna-producing countries are parties. Under current US law, tuna caught in the EPO using chase and encirclement techniques cannot be sold, even if no dolphins are actually killed or injured. Changes in the 'dolphin-safe' standard have been resisted by many, because of concerns that dolphins which are repeatedly chased and encircled, even if ultimately released without physical injury, suffer physiological stresses which may be harmful to the recovery of depleted populations. Thus, *prima facie*, the decision appears to be a positive step for the dolphins of the Eastern Pacific, in that further evidence that they suffer no physiological stresses during the fishing operations will have to be gathered before the important American tuna market is fully opened to the tuna-producing countries. However, the decision risks upsetting an international process which, since 1992, has achieved remarkable success in reducing incidental dolphin mortality in the fish-

ery. This analysis considers the implications of the Order in international terms by, first, setting the Order in context by reviewing the history of that international process and then by considering the possible impacts of the decision.

Background

The so-called tuna–dolphin controversy in the EPO is well known. Since 1959, millions of dolphins have been killed or seriously injured in a fishery for yellowfin tuna because of the particular type of fishing gear and fishing method used. Using so-called purse seine nets, fishermen chase and encircle dolphins, which, in the tropical waters of the Eastern Pacific, in particular, are known to associate with tuna.¹ Although purse seine chase and encirclement has proved to be an extremely efficient and effective method for catching the highly-prized yellowfin tuna, it has the undesirable side-effect of capturing and killing or seriously injuring dolphins. During the 1960s, these fishing operations, which were operated principally by vessels from the United States, were crudely estimated to kill in the range of 200,000 to 500,000 dolphins a year.²

Once the extent of dolphin mortality became apparent, steps to reduce it were taken by the United States. Thus, in 1972 the Marine Mammal Protection Act³ (MMPA) was introduced with the objective, inter alia, of reducing incidental mortality and serious injury to ‘insignificant levels approaching a zero mortality and serious injury rate’.⁴ The 1972 Act, and regulations promulgated under it, was successful in bringing about a significant reduction in dolphin mortality amongst the US fleet and by the late 1970s, the number of dolphins killed by US vessels was less than 20,000 a year.⁵ Despite this success, however, dolphin mortality began to rise again during the 1980s because of increased fishing effort by vessels of other countries, mainly from Latin America. Although considerably less than during the 1960s, dolphin mortality reached alarmingly high levels once again, peaking at an estimated 133,174 animals in 1986.⁶ In response to this, the United States amended the MMPA, in 1984 and in 1988, so that imports of yellowfin tuna and tuna products from countries which did not meet US standards for dolphin mortality and dolphin-associated fishing would be subject to embargoes.⁷ These measures only had a limited impact on dolphin mortality, however, which remained high throughout the 1980s, largely because the countries subject

¹ For reasons that are not well understood, schools of tuna congregate and shoal beneath schools of dolphins with the inevitable result that the dolphins, which are easily identifiable because they must come to the surface to breathe, are targeted by vessels fishing for tuna and caught in their nets. There are other methods of fishing for tuna that do not involve setting nets on dolphins, but these are less reliable and less efficient and so have never been developed on a significant scale.

² R. Allen, ‘Dolphins and the Purse Seine Fishery for Yellowfin Tuna’ in J.R. Beddington, R.J.H. Beverton and D.M. Lavigne (eds), *Marine Mammals and Fisheries* (London: George Allen & Unwin, 1985) at 243.

³ 16 USC §1361–421.

⁴ *Ibid.*, §1371(a)(2).

⁵ A table giving dolphin mortality statistics for US and foreign fleets between 1971 and 1998 is reproduced in Appendix C of National Marine Fisheries Service, *Marine Mammal Protection Act—Annual Report 1998*, (Silver Spring, MD: NMFS, 2000). The report is reproduced on the Internet at: www.nmfs.gov/prot_res/PDF_docs/1998_MMPA_Annual_Report.pdf.

⁶ *Ibid.*

⁷ Pub Law 98–364 (1984 amendments); Pub Law 100–711 (1988 amendments).

to embargoes sought other markets—principally in Europe—for their yellowfin tuna.

It was not until the 1990s that measures were introduced which produced any real effects in reducing dolphin mortality. In 1990, the United States introduced new rules on the marketing of tuna, according to which yellowfin tuna that had been harvested using purse seines intentionally deployed on dolphins could not be sold as 'dolphin-safe'.⁸ Later changes in US law went further and prohibited the sale, purchase, transport, or shipment in the United States of any tuna that was not dolphin-safe after 1 June 1994.⁹ At the same time as the United States was implementing domestic measures, measures were being developed at the international level, largely through the relevant regional organisation, the Inter-American Tropical Tuna Commission (IATTC), in the form of a voluntary agreement, known as the La Jolla Agreement.¹⁰ Under this Agreement, to which the United States and most of the foreign yellowfin tuna fishing States were signatories, the International Dolphin Conservation Programme (IDCP) was established, through which dolphin mortality was progressively reduced. Since the implementation of the IDCP dolphin mortality has been below 5,000 dolphins annually, well below even the most conservative estimates of net recruitment for dolphin populations.¹¹

Despite the successes of the IDCP, the United States continued to seek greater compliance with its own standards and the foreign fishing countries continued to seek access to US markets, which effectively remained closed to them. In 1995, however, an important breakthrough was made when the States concerned adopted the Declaration of Panama.¹² In that Declaration, a bargain was struck whereby the United States agreed to remove its embargoes on tuna products and to modify its legislation regarding the marketing of dolphin-safe tuna, in exchange for the development and formalisation of the La Jolla Agreement as a legally binding instrument. In order to implement its part of the bargain, the United States adopted the International Dolphin Conservation Programme Act in 1997, which provided for, subject to certain conditions, the removal of trade embargoes and the redefinition of 'dolphin-safe' following the adoption and entering into force of a new agreement.¹³ Under the Act, tuna could be labelled as dolphin-safe even if purse seines had been set on dolphins, provided that no dolphins were observed actually to have been killed or seriously injured during

⁸ Dolphin Protection Consumer Information Act, 16 USC §1385.

⁹ International Dolphin Conservation Act, Pub Law 102-523, codified at 16 USC §§952-53, 973r, 1361, 1411-18.

¹⁰ Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, 33 ILM 935 (1994). See on the La Jolla Agreement, J. Joseph, 'The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic and Political Impacts', 25 ODIL 1 (1994) esp at 10-15 and 22-4. See also P. Cullet and A.P. Kameri-Mbote, 'Dolphin Bycatches in Tuna Fisheries: A Smokescreen Hiding the Real Issues', 27 ODIL 333 (1996) esp. at 334-8.

¹¹ No reliable studies of net recruitment exist for any of the stocks in the EPO, but generally speaking, it is estimated that the annual net recruitment for dolphin populations is between 2 and 6%. Even the lower figure of 2% far exceeds the mortality rates of dolphin stocks in the EPO, which, with the exception of one stock, have been less than 0.1% of a minimum estimate of the population size of the stocks: see IATTC, *Minutes of the 61st Meeting*, La Jolla, USA, June 1998, Part 6.

¹² The Declaration is reproduced in C. Hedley, *Internet Guide to International Fisheries Law* (2000) at: www.oceanlaw.net/texts/panama.htm.

¹³ Pub Law 105-42, HR 408. Amendments were also introduced in the Dolphin-Safe Fishing Act, HR 1529.

the setting of the net. This differed from the previous standard, under which tuna was only dolphin-safe if no dolphin-associated fishing had occurred at all, regardless of any mortality or injury.

Thus far, the Act sought to implement the commitments agreed to by the United States at Panama. However, the 1997 Act did not exactly follow the Panama Declaration. This was because of concerns raised in the US Congress during the passage of the legislation that the use of purse seines to repeatedly chase and encircle dolphins might have physiological stress effects that impeded the ability of depleted dolphin populations to recover, even if no dolphins were actually killed.¹⁴ Accordingly, by way of a compromise in Congress, the Act required the Secretary of Commerce, prior to implementing any change in the dolphin-safe standard, to make an initial finding, in March 1999, regarding whether the intentional deployment on or encirclement of dolphins with purse seines was having a significant adverse impact on any depleted stock in the EPO.¹⁵ This finding was to be based on both population abundance surveys of the depleted stocks and various research projects into whether the physiological stress effects of purse seine fishing adversely affected depleted dolphin populations.¹⁶

The introduction of the 1997 Act opened the way for fulfilment of the other part of the Panama bargain and in May 1998 the Agreement on the International Dolphin Conservation Programme was signed in Washington, DC.¹⁷ With dolphin mortality successfully reduced under the La Jolla programme, the 1998 Agreement makes only relatively slight amendments to the operation of the IDCP. Its main significance lies in the formalisation of the Programme and the increased commitment of States entering into a legally binding instrument and in clearing the way for the reopening of the US yellowfin market to the importing States. This latter element may be seen as particularly important as, despite the successes of the original IDCP in bringing down dolphin mortality, an uneasy relationship between the United States on the one hand and the embargoed nations on the other, had always threatened to undermine the initiative. If the establishment of a stable and sustainable conservation programme is what is sought, it is clear that the reopening of the US market is a crucial factor.

As was noted above, for the amendments to the dolphin-safe marketing of tuna to enter into force, two events had to occur: the international agreement described above had to enter into force and the Secretary of Commerce had to make an initial finding that the intentional deployment on or encirclement of dolphins with purse seines was not having a significant adverse impact on any depleted stock in the EPO. The first of these two events occurred in February 1999, when, following ratification by Ecuador, Mexico, Panama and the United States, the 1998 Agreement entered into force.¹⁸ The second event occurred in

¹⁴ See Whale and Dolphin Conservation Society, *History of the Tuna/Dolphin Issue* (Bath: Whale and Dolphin Conservation Society, 1999) www.wdcs.org.uk/wdcs2/campaign/fish/tuna.html.

¹⁵ MMPA, §1385(g)(1). The Secretary is further required to make a final finding on the same question by 31 December 2002, based on the completed stress studies, information obtained under the IDCP and other relevant information: *ibid.*, §1385(g)(2).

¹⁶ *Ibid.*, §1414a.

¹⁷ The Agreement is reproduced in Hedley, *op cit.*, n 12 at: www.oceanlaw.net/texts/aidcp.htm.

¹⁸ The Agreement has since been ratified by five further States: Costa Rica, El Salvador, Honduras, Nicaragua and Venezuela.

April 1999 when, on the basis of research work carried out by the US National Marine Fisheries Service (NMFS), the Secretary of Commerce delivered the results of the initial finding. According to NMFS, although the rate of recovery of dolphins was slower than expected, there was insufficient evidence that chase and encirclement in the tuna purse seine fishery was having a 'significant adverse impact' on depleted dolphin stocks in the EPO.¹⁹ Based on this initial finding, the dolphin-safe label was, as envisaged by the participants in the IDCP, redefined, with effect from 2 February 2000.²⁰ However, less than three months after the redefinition came into effect, the District Court in *Brower v Daley* set aside the initial finding and blocked the alteration of the dolphin-safe standard, pending the completion of further research.

Overview of the Order

The principal thrust of the challenge made by the plaintiffs in *Brower* was brought under the Administrative Procedures Act (APA),²¹ under which they sought a review by the Court of the Secretary of Commerce's initial finding. In accordance with that Act, the Court had the power to determine whether the initial finding was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law' or had been made 'without observance of procedure required by law'.²² A secondary claim was also made that the Secretary of Commerce had not complied with obligations under the National Environmental Policy Act (NEPA),²³ by failing to prepare an Environmental Assessment or Impact Statement in connection with the initial finding. Both claims will be considered in turn.

APA claim

The primary thrust of the plaintiffs' case lay in their contention that the Secretary's initial finding was not in accordance with the law and constituted also an abuse of discretion because the Secretary failed both to obtain and consider preliminary data from research projects specifically mandated by Congress and to apply the proper legal standard to the scientific information available. In other words, the Secretary of Commerce and NMFS had failed to assess properly, even for the purposes of an initial finding, whether the chase and encirclement of dolphins using purse seines was having a 'significant adverse impact' on dolphin populations.

As was noted above, under the International Dolphin Conservation Programme Act, the Secretary of Commerce was specifically required to conduct a study on the effect of intentional chase and encirclement of dolphins.²⁴ This study was to consist of population abundance surveys, to be conducted in 1998, 1999 and

¹⁹ 64 *Federal Register* 24590 (1999), reproduced on the Internet at: www.nmfs.gov/prot_res/mammals/tuna-dolph/Initial Finding.pdf. The NMFS' Report to Congress is reproduced on the NMFS, Southwest Fisheries Science Centre website at: swfsc.ucsd.edu/mmd/congress/congress.htm.

²⁰ 65 *Federal Register* 3 (2000).

²¹ 5 USC §706(2).

²² *Ibid.*, §706(2)(A), (D).

²³ 42 USC §4321 et seq at §4332.

²⁴ IDCPA, §1414(a).

2000, and various stress studies, including a review of relevant stress-related research and a three year series of necropsy samples from dolphins obtained by commercial vessels; a one year review of relevant historical demographic and biological data related to dolphins and dolphin stocks; and an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement.²⁵ The study, according to the Act, was to commence on 1 October 1997.²⁶ It was significant for the Court that these requirements were expressed in mandatory and direct language, since it indicated quite clearly the intention of Congress that the various components of the study should be commenced promptly so that the Secretary of Commerce could make an initial finding ‘on the basis of research conducted before 1 March 1999’.²⁷ Thus, although it was not required or expected that the research studies should be completed by the time of the initial finding, it was intended that the initial finding would be informed by at least some preliminary data from these projects.²⁸

The problem for the Court was that, although the NMFS had conducted preliminary population abundance surveys, little effort appeared to have been made to obtain and to consider preliminary data from any of the mandated stress research projects. With regard to the first project—the necropsy study—the only action taken to carry it out prior to the initial finding was a short training exercise for the technicians which were to be placed on the survey vessels. The Secretary of Commerce contended that this was largely because it had been impossible to obtain any necropsy samples from foreign vessels because of a lack of cooperation, but this was rejected by the Court which looked at various evidence which indicated a willingness on the part of Mexico to cooperate. In any case, the Court could not find any justification as to why the NMFS could not have started the sampling itself.²⁹ As regards the chase and capture research project, the NMFS had held a planning workshop in 1997 but because the concept and execution of the project was ‘especially complex’ the carrying out of the experiment was put back to early 2001, following a further planning workshop in 1999. However, while accepting that the project may raise especially complex issues, the Court did not accept that the assertions of complexity adequately justified the lengthy delay in proceeding with the project nor explained why the NMFS could not have obtained at least preliminary results from the study prior to the initial finding.³⁰ Similarly, the Court was not convinced that preliminary results could not be obtained from the historical and demographic data research project, which was apparently underway, particularly as the project was only to last one year and should have started in October 1997.

The lack of progress left the Court ‘far from convinced’ that the Secretary had actively and diligently attempted to obtain preliminary data from the studies.³¹ In defence, the Secretary of Commerce attempted to argue that, given the scientific

²⁵ *Ibid.*, (2) and (3).

²⁶ *Ibid.*

²⁷ 16 USC §1385(g).

²⁸ See the Court’s judgment at 19–20.

²⁹ *Ibid.* at 21–2.

³⁰ *Ibid.* at 22.

³¹ *Ibid.* at 23.

complexity of their task, they should be accorded 'discretion and deference' in the specific scheduling and timing of the studies. However, although the Court accepted that this might normally be the case, as regarded the current task the defendants were subject to the specific time-frame laid down by Congress, requiring that some preliminary results must be available by a specific date.³² Consequently, the Secretary's decision to alter the dolphin-safe standard on the ground that a finding of 'significant adverse impact' could not be made for lack of sufficient evidence violated Congress' clear intent that the initial finding should be informed by at least some preliminary data from the research projects and could not withstand scrutiny under the Administrative Procedures Act.³³

Having considered whether the Secretary of Commerce had fulfilled his duty to obtain and consider relevant information, the Court turned to examine what the scientific information that was available actually indicated. Here it found that the information actually 'pointed in the direction of' capture and encirclement having a significant adverse impact.³⁴ In particular, the stress literature review, while clearly not conclusive, demonstrated that it was likely that dolphins experience a multitude of harmful stress effects from the chase and capture process and that it was scientifically plausible that such effects could be causing population level effects. The only non-fishery related explanation identified—a major shift in the ocean environment—was ruled out. As such, the NMFS' Report concluded that the information available 'suggests but by no means conclusively that the fishery has been the source of significant adverse impact' on depleted dolphin populations.

NEPA claim

The claim under the National Environmental Policy Act, which was very much a secondary claim by the plaintiffs, was dismissed swiftly by the Court on the ground that the Act was not applicable, since it applied only to discretionary federal action.³⁵ However, although the Secretary was required to review the available evidence in making the initial finding, his mandate was strictly defined by Congress and he had no discretion to make findings contrary to the results of that evidence. Accordingly, the Court found that the Secretary's initial finding was a non-discretionary act for the purposes of NEPA.³⁶

Conclusion

The decision of the Court to set aside the Secretary of Commerce's initial finding essentially rested on two main factors. First, the evidence that was available tentatively suggested, albeit far from conclusively, that the chase and encirclement of dolphins using purse seines was having significant adverse effects on depleted

³² Ibid at 24.

³³ Ibid at 24–5.

³⁴ Ibid at 25.

³⁵ Ibid at 30. See *Sierra Club v Babbitt*, 65 F 3d 1502, 1512 (1995); and *Andrus v Sierra Club*, 442 US 347, 350, 99 S Ct 2335, 2337 (1979).

³⁶ *Brower v Daley*, *ibid*.

dolphin populations. At the very least, the stress literature review indicated that such a situation was scientifically plausible. Second, that although the Secretary of Commerce had determined that this evidence alone was not sufficient to show significant adverse effect, the Secretary had failed ‘without a persuasive, much less compelling, justification’ to obtain and consider even preliminary data from any of the research projects mandated by Congress. Based on these two factors, the Court concluded that the Secretary’s decision to initiate a change in the dolphin-safe standard clearly contradicted Congress’ clear intent that the dolphin-safe label remain in force at least until preliminary data could be collected to inform an initial finding as to whether chase and encirclement was having a significant adverse effect.

Although the Court appears to have held the Secretary of Commerce to an appropriate standard in terms of US law, the fact that the decision in *Brower* is a setback for the IDCP process cannot be denied, as an important component of the bargain struck in the Panama Declaration now remains unfulfilled. Indeed, in *Brower* it was argued—on the basis that the Panama Declaration signified a new approach for Congress and that the change in the dolphin-safe standard was an integral part of that approach—that the Secretary of Commerce’s action should be sustained so as not to impede the progress towards implementation of the Declaration. This argument was rejected by the Court, however, which pointed out that the approach envisaged by the United States Administration when it entered into the Panama compromise was not exactly followed by Congress and it was the compromise in Congress which the Court had to uphold.³⁷

The *Brower* case has had a mixed response from environmental organisations. On the one hand, it would appear to be a good result for dolphins as the Court has upheld strict standards which must be applied to the question of whether dolphin populations in the EPO suffer adverse effects from the chase and encirclement techniques in purse seine fishing. In a sense, this reflects a precautionary approach because the Secretary of Commerce must do more to demonstrate that there are no significant adverse effects. On the other hand, however, the decision may hamper future negotiations on the IDCP and discourage concerned Latin American States from ratifying the Agreement. The ruling has already been fiercely criticised by Mexico, which has stated its intention to contest it.³⁸ Furthermore, although the ruling does not actually affect the lifting of embargoes on tuna caught using purse seines, the practical effect of removing these embargoes is, of course, considerably diminished by the maintenance of the old dolphin-safe standard.³⁹

The precise impact of the ruling on the IDCP and the Panama process is hard to quantify. Although it is unlikely to irretrievably upset the IDCP, the longer the US yellowfin market remains closed to the tuna-producing countries the

³⁷ In discussing whether Congress had fully followed the approach in the Panama Declaration the Court stated, *ibid* at 28–9: ‘Congress ultimately rejected this approach and instead unanimously decided that, despite the low observed mortality rates, the decision whether to change the label standard should await scientific data from mandated studies on the stress effects, if any, that result from the use of purse seine nets. It is to this Congressional compromise that the Secretary must be held.’

³⁸ See ‘US Judge blocks weakening of “dolphin-safe” label’, *Reuters News Release*, 12.4.00.

³⁹ The embargo on yellowfin tuna and tuna products from Mexico was lifted in April 2000, the first country to have its embargo lifted since the adoption of the 1998 Agreement: 65 *Federal Register* 26,585 (2000).

greater the stress and strain placed on the Programme will be. In the long-term, the good motives behind that US reluctance to change its dolphin-safe label notwithstanding, this could cause complications. Whatever its impacts, it is clear that solutions would be better sought at the international level through further cooperation in the International Dolphin Conservation Programme.