

AGREEMENT ON THE INTERNATIONAL DOLPHIN CONSERVATION PROGRAM

INTERNATIONAL REVIEW PANEL

41ST MEETING

BUSAN, KOREA

20 JUNE 2006

DOCUMENT IRP 41-06

RESOLVING A VESSEL'S POSSIBLE INFRACTIONS BEFORE A CHANGE OF FLAG

One of the unresolved special cases that the IRP has considered, Case 37-03, is an especially egregious one involving sets on dolphins after the vessel's DML was reached, physical attacks and threats against the observer on board the vessel, and an attempt to bribe the observer by the captain of the vessel. However, following the trip in which these events occurred, the vessel changed flags, and the original flag Party advised the Secretariat that consequently it could not sanction the vessel. The new flag Party advised the Secretariat that it also could not sanction the vessel because the possible infractions did not occur when the vessel was under its jurisdiction. As a result of these developments, the Panel decided at its 40th meeting to remove this case from the list of special cases, as there was nothing more that could be done. However, the Panel asked the Secretariat to examine the options available to address what appears to be a loophole in the Agreement: that a vessel can avoid sanctions for violations of the Agreement by changing flag before the investigation is initiated or completed. It was decided that this issue should be considered at the next meeting of the Panel.

There is nothing in the AIDCP which addresses this problem. Given the issues of legal jurisdiction involved, it seems that, once a vessel has changed flag, there is little that can be done in terms of addressing an infraction that might have occurred when the vessel was flying a previous flag. Governments can pledge to cooperate, share information, *etc.*, but, in the end, it likely would prove exceedingly difficult for any effective action to be taken against such a vessel. The following options could be used to close this loophole.

One option would be to not allow a vessel to change flag if it has a possible infraction or a sanction pending, *i.e.*, the flag government involved has been notified of a possible infraction but has not begun or finished its investigation, or has imposed a sanction which has not yet been settled. This approach is the most straightforward and likely would be the most effective; it is clearly within the sovereign right of any government, and legally feasible, to attach such a condition to flag transfers. For some Parties, it seems likely that an internal procedure could be developed, through a regulation or some similar means, that would require confirmation that there are no possible infractions pending before a flag transfer could take place, although this might require close cooperation among the different government agencies involved. Other Parties might require a legislative change to put such a procedure into effect.

The second option would be to prohibit the assignment of a DML to a vessel which has changed flag with a pending violation against it from the period during which it was flying the previous flag. This would not prevent the vessel from changing flag, but would create a strong disincentive for it to do so until such time as it had resolved any pending violations. One element to consider with this approach is that only vessels that requested DMLs would be impacted.

A third option would involve establishing a connection between possible violations of the AIDCP and the IATTC Regional Vessel Register. While the AIDCP Parties obviously have no authority to take decisions on IATTC matters, they could recommend that the IATTC adopt a resolution requiring the removal of a vessel from the Register if it changes flag when a possible violation was pending. In fact, whatever option is pursued, the Parties could recommend that the IATTC consider taking parallel action with respect to the IATTC program, so that a vessel could not evade sanctions for violations of IATTC

conservation and management measures by changing flags.

One problem with any of these options is related to the timing of the notification of a possible violation to the government. It could be close to a year between the time a possible infraction occurs and its notification to the government, which formally follows a referral by the IRP. During that time gap, a vessel could change flag and escape sanctions. One way to address this timing gap would be to start the time period during which a vessel may not transfer flag on the date when the government receives the observer's IRP form indicating that a possible infraction has occurred.

Any action which the Parties decide to take on this matter could be formulated in an AIDCP resolution.