

INTERNATIONAL DOLPHIN CONSERVATION PROGRAM

INTERNATIONAL REVIEW PANEL

40TH MEETING

LA JOLLA, CALIFORNIA

19 OCTOBER 2005

DOCUMENT IRP-40-09b

SUMMARY OF PENDING SPECIAL CASES MONITORED BY THE IRP

CASE 31-01. FISHING CAPTAIN 'A'

This captain was permanently removed from the *List of Qualified Captains* in October 2001. Prior to the 31st IRP Meeting in October 2002, the Secretariat notified the Party informally that it had information indicating that this captain had recently made two fishing trips on a vessel with a DML. The Party replied in a letter dated October 8, 2002, that vessel management had been notified that this was a possible infraction with a monetary sanction, and that the case was under appeal. The IRP identified these two possible infractions at its 31st meeting (trip nos. 2002-373 and 2002-486), and the Party was formally notified. To date there has been no further response to these cases.

The 32nd Meeting of the IRP in February 2003 reviewed another trip by this captain on the same vessel (trip no. 2002-735) during which intentional sets on dolphins were made, and it was reported to the Party in March 2003 as a possible infraction. To date there has been no response to this case.

The 33rd Meeting of the IRP in June 2003 reviewed two more trips by this captain on the same vessel, both trips with intentional dolphin sets, and they were reported to the Party as possible infractions (trip nos. 2003-028 and 2003-194). The Party replied on October 3, 2003, that those two possible infractions were under investigation; there has been no subsequent response.

The 34th Meeting of the IRP in October 2003 identified as a possible infraction another trip with intentional dolphin sets by this captain on the same vessel (trip no. 2003-341). To date there has been no response.

The 35th Meeting of the IRP in February 2004 reviewed a trip by a vessel of a different Party involving this captain (trip no. 2003-700), described in Case 35-01 (Vessel 'H'). The Party responded on 31 January 2005, stating that the case had been found to be without merit and had been terminated by resolution on October 12, 2004.

The 36th Meeting of the IRP in June 2004 reviewed a trip with intentional sets on dolphins by Vessel 'H' involving this fishing captain (trip no. 2004-013)

At the 11th Meeting of the Parties, the flag government of Vessel 'H' advised the Parties that none of its flag vessels would ever employ this fishing captain again. The Parties asked the Secretariat to circulate the name of Captain 'A' to all the Parties, which was done on July 20, 2004.

Captain 'A' has not been identified as the fishing captain on any vessel that has completed a trip since June 2004, nor has any observer reported his presence on a vessel during that period.

The Secretariat received a letter from Captain 'A', dated March 3, 2005, in which he requested clarification of all the accusations against him. He also asked what he could do to rectify his situation, and requested that the Parties reconsider their actions and that he be reinstated to the List of Qualified Captains. The Secretariat replied on April 4, attaching a summary of all the possible infractions identified by the IRP that had occurred since 2000, during trips by vessels on which he acted or appeared to act as fishing captain. Captain 'A' replied on April 25 that he did not fully understand all these possible infractions, but removing him permanently from the List was an injustice. On May 12, the Secretariat informed Captain

'A' that it would recommend that his situation be reviewed at the AIDCP meetings in June. This entire correspondence was copied to the Parties, at Captain 'A's' request.

At the 39th Meeting of the IRP in June 2005, one Party proposed that, for humanitarian reasons, this case should be reopened. The Panel decided not to review the case, although it did agree that the Panel should be open to receiving any additional information on the situation from the captain or any Party, and that the case could be discussed again at the request of any Party.

CASE 32-01. Vessel 'F' – AIDCP vessel

The 32nd Meeting of the IRP in February 2003 reviewed trip no. 2002-654 by this vessel and identified as a possible infraction 35 intentional dolphin sets without a 2002 DML. On February 13, 2003, prior to the Secretariat's notification to the Party of the possible infraction, the Party notified the Secretariat that the infraction had been confirmed, the vessel fishing captain had been fined US\$100,000, and his license had been suspended for five years. The Party provided an update on this case on June 8, 2005, stating that vessel management had protested because in their opinion the vessel's international fishing license should allow it to set on tunas associated with dolphins. After hearing the arguments of vessel management and the fishing captain, the government upheld the original finding and sanctions.

The 33rd Meeting of the IRP in June 2003 reviewed the vessel's next two trips, nos. 2002-756 and 2003-101. The fishing captain mentioned above was the fishing captain of trip 2002-756, which ended prior to February 13, 2003. However, during that trip there were 33 intentional dolphin sets made in 2003 without a DML, which was identified by the IRP as a possible infraction. During trip 2003-101, with a different fishing captain, two intentional dolphin sets were made prior to the effective date of the vessel's 2003 DML, assigned from the Reserve DML Allocation. The Panel identified these sets as a possible infraction and expressed its concern that the vessel could be forming a pattern of infractions. All of these findings were forwarded to the Party by the Secretariat in a letter dated August 13, 2003. On February 17, 2004, the Party informed the Secretariat that cases 2002-756 and 2003-101 were under investigation.

At the 36th Meeting of the IRP in June 2004, the Party informed the Secretariat that the cases involving this vessel are still being investigated. There was no further response from the Party before the 37th Meeting of the IRP in October 2004, and at that meeting the Panel asked the Secretariat to urge the Party concerned to respond by the 38th Meeting of the IRP. On January 21, 2005, the Secretariat advised the Party of the Panel's request. The Party responded to both cases on June 8, 2005. The same sanction that was applied to the captain for trip 2002-654 was applied to him for trip 2002-756 on July 8, 2003. Regarding trip 2003-101, the government accepted that the vessel's action could have resulted from misinformation with respect to the granting of the DML to the vessel and its effective date, resulting in the two dolphin sets prior to the notification by the Director. Thus, the government does not consider it to be an infraction.

On June 29, 2005, the Secretariat informed the Party that the vessel had met the definition of a pattern of infractions as per section 1(b) of Resolution A-02-03, and thus was not eligible for a DML in 2006. The Party replied on July 22, 2005 stating the following:

- Under national legislation and regulations, the captain is sanctioned and not the vessel.
- Paragraph 5 of the Resolution states that its provisions shall be applied in accordance with the national laws and regulations of each Party.
- The vessel owner declared to the administration that these possible infractions were due to matters beyond his control, since they consider that the cause of the infractions are not attributable to the owner, the vessel, nor the captain, and that the procedure for assigning DMLs and the granting of the international license, should be considered sufficient for the vessel to operate without any restriction. From the beginning there was much confusion regarding the assignment of the DML to the vessel, even before requesting one from the Director's reserve. This was the first ves-

sel to receive such a DML, and this caused much confusion included the decision regarding when the DML could be utilized.

- An important difficulty of trip 2002-654 was the lack of due process, in that statements from the fishing captain and owner were not obtained by the government, thereby undermining their right to a defense.
- The result is that the owner obtained a pronouncement that states that possibly the captain, and not the vessel, has a pattern of infractions under the national laws, and given the AIDCP's interpretation of these laws, it is considered that there is no infraction for trip 2002-654.

For these reasons, and in the application of the national laws and regulations referred to in the Resolution itself, the Party considers that the vessel has not incurred a pattern of infractions and that therefore none of the legal consequences that that situation gives rise to are applicable to it.

The Secretariat wrote to the Party on 16 September, noting that this is the first time of encountering the possibility of a vessel not being considered culpable for an infraction because the captain was responsible. The Agreement is written in terms of infractions being committed by vessels, and because there would be significant implications for the Agreement if Parties were to decide that vessels were not responsible for infractions, the IRP should provide guidance on how to address this issue.

CASE 36-01. Vessel 'G' – AIDCP vessel

At the 10th Meeting of the Parties in October 2003, it was decided that this vessel, which had a DML during 2003, was not eligible for a 2004 DML because it had repeatedly employed fishing captains not on the AIDCP *List of Qualified Captains* while it had a DML. However, the flag Party assigned the vessel a 2004 DML from its national DML allocation. In February 2004, the 35th Meeting of the IRP reviewed trip no. 2003-789 by the vessel, which included fishing activity in both 2003 and 2004. The IRP identified six possible infractions for this trip: 1) one night set; 2-3) two sets with explosives use; 4) observer interference; 5) unqualified fishing captain (during 2003); and 6) fishing on dolphins without a DML (20 sets during 2004). These findings were forwarded to the Party by the Secretariat in a letter dated March 24, 2004. The 35th Meeting of the IRP agreed that the question of whether the vessel has a valid 2004 DML would be discussed at its 36th meeting in June 2004.

On April 27, 2004 the Party notified management that a sanction of US\$41,771 had been applied to all five infractions.

The 36th Meeting of the IRP in June 2004 reviewed trip no. 2004-152 by this vessel and identified the following possible infractions: fishing on dolphins without a DML (39 sets), explosive use during 5 sets on dolphins, and 1 night set. These findings were forwarded to the Party by the Secretariat in a letter dated August 13, 2004. There has been no response from the Party.

The Panel referred this case to the 11th Meeting of the Parties in June 2004 in regard to the validity of the DML allocated to it by the flag Party. The Parties determined that the 2004 DML is invalid; one Party expressed its belated disagreement with the decision made by the 10th Meeting of the Parties regarding the vessel's DML for 2004.

The 37th Meeting of the IRP in October 2004 reviewed trip no. 2004-329 by this vessel and identified the possible infraction of 50 intentional sets on dolphins without a DML. These findings were forwarded to the Party on January 3, 2005. As of October 3, 2005, the Party has not responded to this possible infraction.

In October 2004 the 12th Meeting of the Parties to the AIDCP agreed with a recommendation of the 37th Meeting of the IRP that, because this vessel's record was so bad, it should not be eligible for a DML for 2005.

On December 17, 2004, a judicial court of the flag Party ruled that the process of changing the flag of the

vessel to that of another Party should be completed. All subsequent references to the vessel's government refer to this other Party, under whose jurisdiction the vessel currently operates.

On January 23, 2005, the government advised the Secretariat that it was allocating the vessel a 2005 DML from its national allocation.

During the review of this case at the 38th Meeting of the IRP in February 2005, the government advised the Panel that it would provide a response on this matter soon after the conclusion of the meeting. In a letter dated March 9, the government stated it could find no reason to not allocate a DML to the vessel, and asked that the discussion of this case be closed. The Secretariat replied on March 21, stating that its understanding was that the vessel does not have a DML for 2005 pursuant to the Agreement. Both communications were circulated to the Parties on March 21.

The 38th Meeting of the IRP also reviewed trip no. 2004-569 by this vessel, which occurred prior to the flag change referred to above, and identified the possible infraction of 24 intentional sets on dolphins without a DML. These findings were forwarded to the Party on April 20, 2005.

On June 7, 2005 the government requested from the Secretariat all observer reports of possible infractions by this vessel that had occurred since February 13, 2004, which were provided.

The 39th Meeting of the IRP in June 2005 reviewed trips 2004-739 and 2005-166 by this vessel, and identified the possible infraction of fishing on dolphins without a DML during both trips. These findings were forwarded to the government on August 12, 2005.

At the 13th Meeting of the Parties in June 2005 it was decided that it would be acceptable for the new government to undertake an investigation of the possible infractions that occurred during the period of flag dispute and present its results to the IRP, without prejudice to the findings of the previous flag government.

On June 9, 2005 the government advised the Secretariat that all possible infractions from trips 2004-152, 2004-329, 2004-569, and 2004-739 are under investigation. In two letters, dated August 29 and August 30, 2005, the government reported the following results of its investigation:

2004-152: Fishing without a DML – No infraction; Explosive use during 5 sets – No infraction; 1 night set – the case remains under investigation

2004-329: Fishing without a DML – No infraction

2004-569: Fishing without a DML – No infraction

2004-739 & 2005-166: Fishing without a DML - In accordance with its national legislation, there was no infraction because they did assign a national DML to this vessel.

CASE 37-01. AIDCP vessel

The 37th Meeting of the IRP in October 2004 reviewed trip no. 2004-338 by this vessel and identified the possible infractions of one set on dolphins without a DML and observer harassment/interference. The observer reported that vessel personnel pressured him to not report the set on dolphins as an intentional set. On January 3, 2005, the Secretariat notified the Party of these possible infractions and that it had been designated as a *Special Case*. On August 22, 2005 the Party advised the Secretariat that the investigation of this case began on February 14, 2005, and that on March 17, 2005 a fine of US\$ 200 had been imposed on the vessel and it was required to suspend all activities for 15 working days.

CASE 37-02. Vessel of carrying capacity less than 363 t; well volume = 412 m³

The 37th Meeting of the IRP in October 2004 was advised of a report from an observer that, from his assigned vessel, he saw a small purse-seine vessel, ineligible for a DML, conduct a speedboat chase and then a set on a herd of dolphins. The Secretariat had previously notified the Party of the possible infraction on July 9, 2004, and the Party replied on October 14, 2004 that the case is being investigated. On Ja-

January 3, 2005, the Secretariat advised the Party that the 37th Meeting of the IRP had designated this as a *Special Case*, and on January 12, it advised the Party that, as required by Resolution A-02-01, the vessel must immediately participate in the AIDCP On-Board Observer Program and pay the associated fees.

The 39th meeting of the Panel discussed the question of how long the vessel is to carry an observer, since Resolution A-02-01 does not stipulate the length of time. The Panel agreed that the vessel should continue to carry an observer until the Party had concluded its investigation.

On August 26, 2005 the observer that reported this case testified during a hearing before the Party's Director General of Fisheries. As of October 3 2005, the vessel was at sea with an AIDCP observer aboard. AIDCP observers were also aboard the vessel during its 8 previous fishing trips.

CASE 37-03. AIDCP vessel

During trip no. 2004-469, the observer recorded 52 dolphin mortalities during a set that resulted in the vessel exceeding its DML. He reported that he advised the fishing captain of this after the set, creating a tense situation on the vessel, and that he was physically attacked by a crewman; this was verified by the navigator in a written report in which he recommended the crewman's dismissal. The observer reported that the vessel made 24 additional sets on dolphins after exceeding the DML. The fishing captain wrote two reports questioning the observer's mortality report, his behavior, and his credibility, and the vessel owner wrote a similar report. After the trip, the observer reported that the vessel owner offered him a bribe to modify the Tuna Tracking Form, and when he refused the owner seriously threatened him.

On September 17, 2004, the Secretariat sent a letter to the flag Party, copied to the vessel owner, informing it that 1) the vessel had exceeded its DML during the trip in a set with 52 mortalities; 2) the fishing captain had been advised of this after the set was completed; and 3) despite the observer's notification the vessel made 24 additional sets on dolphins during the remainder of the trip. The Party was advised that each of the 24 sets constituted a possible infraction, and that the case would be reviewed at the 37th Meeting of the IRP. On November 15, 2004, the Party responded to the Secretariat that such a complicated case would require a thorough investigation, and that it had doubts regarding the number of dolphin mortalities reported by the observer and his performance.

The 37th Meeting of the IRP in October 2004 reviewed trip no. 2004-469 and identified the following possible infractions: 1) explosive use during one chase and/or set on dolphins; 2) 24 intentional sets on dolphins after reaching the DML; and 3) observer harassment/interference. On January 3, 2005, the Secretariat advised the Party of these possible infractions and that the trip had been designated as a *Special Case*. On June 8, 2005 the Party informed the Secretariat that the vessel had changed flag to another Party and thus it can not sanction the vessel, nor can the current Party because the possible infraction did not occur under its jurisdiction. The Party referred to its previous response in which it stated its doubts about the observer's performance, noting that Annex II.13.b of the AIDCP provides for such an objection.

At the 39th meeting of the Panel, concern was expressed that the vessel changed flags to avoid being sanctioned. Also, it was noted that if a vessel changes flags and ownership before the government can launch an investigation, it would be difficult for the new flag Party to open an investigation. It was agreed that both governments involved should investigate this case to the maximum extent possible according to their laws.

CASE 38-01. AIDCP vessel

The 38th Meeting of the IRP in February 2005 reviewed trip no. 2004-462 by this vessel and identified a possible infraction of observer harassment and/or interference. The observer reported that on the day he first boarded the vessel, the fishing captain asked him how much money he wanted in order to help him by falsifying his data, which the observer emphatically stated that he would not do. After a set during the trip, the fishing captain asked the observer if he had recorded explosive use during the set, which the observer confirmed. The fishing captain asked him to remove the report of explosive use, and said that he

could make a monetary arrangement for the observer in port. The observer refused. This fishing captain was also the fishing captain during trips 2002-654 and 2002-756 of Vessel 'F', Case 32-01.

These findings were forwarded to the Party by the Secretariat on April 18, 2005. As of October 3, 2005, no response had been received.

CASE 39-01. AIDCP vessel

The 39th Meeting of the IRP in June 2005 reviewed trip 2005-096 by this vessel and identified a possible infraction of observer harassment and/or interference. The observer reported that prior to the vessel's departure the fishing captain and the vessel owner asked him not to report sets on dolphins as the vessel did not have a DML. The observer refused and during the trip he was subjected to daily harassment by one particular crewman.

These findings were forwarded to the Party by the Secretariat on August 11, 2005. As of October 3, 2005, no response had been received.