

INTERNATIONAL DOLPHIN CONSERVATION PROGRAM

**INTERNATIONAL REVIEW PANEL**

**47<sup>TH</sup> MEETING**

LA JOLLA, CALIFORNIA (USA)  
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**INFORMATION PAPER PRESENTED BY THE UNITED STATES**

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

**1. Introduction**

At the 41<sup>st</sup> IRP, the Parties discussed a paper by the Secretariat, Document [IRP-41-06](#) which presented the situation of vessels that change flag after incurring infractions, which cannot then be prosecuted by either the former or the current flag state. The Panel had asked the Secretariat to examine the options available to address this apparent loophole in the Agreement, which allows vessels to avoid sanctions for violations of the Agreement by changing flag before the investigation is initiated or completed. The document presented several options for mitigating this problem. After considerable discussion, the IRP agreed that the first two options in Document [IRP-41-06](#) should be examined. This paper seeks to do so and to generate discussion of a possible way to address this matter.

**2. Analysis**

While the occurrence of the problem of flag change of vessels with pending investigations or sanctions has not increased significantly, it remains a gap in governance that Parties encounter, and is an area that deserves some attention by the Parties in order to ensure that the AIDCP continues to adapt to address such problems and allow for the efficient implementation of the Agreement and its provisions.

In reviewing this matter, the legal context discussed at the 41st IRP can be found in the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement), which sets out in Art. 3 on “Flag State Responsibility” the following with regard to change of flag under these circumstances:

“5. (a) No Party shall authorize any fishing vessel previously registered in the territory of another Party that has undermined the effectiveness of international conservation and management measures to be used for fishing on the high seas, unless it is satisfied that

(i) any period of suspension by another Party of an authorization for such fishing vessel to be used for fishing on the high seas has expired; and

(ii) no authorization for such fishing vessel to be used for fishing on the high seas has been withdrawn by another Party within the last three years.

(b) The provisions of subparagraph (a) above shall also apply in respect of fishing vessels previously registered in the territory of a State which is not a Party to this Agreement, provided that sufficient information is available to the Party concerned on the circumstances in which the authorization to fish was suspended or withdrawn.

(c) The provisions of subparagraphs (a) and (b) shall not apply where the ownership of the fishing vessel has subsequently changed, and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the fishing vessel.

(d) Notwithstanding the provisions of subparagraphs (a) and (b) above, a Party may authorize a fishing vessel, to which those subparagraphs would otherwise apply, to be used for fishing on the high seas, where the Party concerned, after having taken into account all relevant facts, including the circumstances in which the fishing authorization has been withdrawn by the other Party or State, has determined that to grant an authorization to use the vessel for fishing on the high seas would not undermine the object and purpose of this Agreement.”

The FAO International Plan of Action on IUU Fishing also sets out specific and relevant points in the Flag State Responsibilities section that relates to Fishing Vessel Registration:

“38. Flag States should deter vessels from reflagging for the purposes of non-compliance with conservation and management measures or provisions adopted at a national, regional or global level. To the extent practicable, the actions and standards flag States adopt should be uniform to avoid creating incentives for vessel owners to reflag their vessels to other States.

39. States should take all practicable steps, including denial to a vessel of an authorization to fish and the entitlement to fly that State’s flag, to prevent "flag hopping"; that is to say, the practice of repeated and rapid changes of a vessel’s flag for the purposes of circumventing conservation and management measures or provisions adopted at a national, regional or global level or of facilitating non-compliance with such measures or provisions.

40. Although the functions of registration of a vessel and issuing of an authorization to fish are separate, flag States should consider conducting these functions in a manner which ensures each gives appropriate consideration to the other. Flag States should ensure appropriate links between the operation of their vessel registers and the record those States keep of their fishing vessels. Where such functions are not undertaken by one agency, States should ensure sufficient cooperation and information sharing between the agencies responsible for those functions.”

In this context, while it is the practice of the AIDCP Parties to consider taking steps to modify the procedures under the Agreement to provide clear guidance to the Parties, the actions that may be taken to directly address this matter are a fundamental function and responsibility of individual flag States.

As discussed in document IRP-41-06, there were two options presented previously and identified by the IRP as desirable for further examination. The first was to not allow a vessel to change flag if it has a possible infraction or a sanction pending. This would apply in the event that 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 option is consistent with the Compliance Agreement responsibilities established for flag States and it is clearly within the sovereign right of any government. It is legally feasible within each government’s national legal framework to attach such a condition to flag transfers, either under existing regulatory authority or subject to legislative action. It would also necessitate the development of an internal procedure that would require confirmation with the relevant government agency of the vessel’s current flag that there are no infractions pending before a flag transfer could take place. While this might require close cooperation among the different government agencies involved, such cooperation should already exist in the context of changes of flag that may have implications under the IATTC resolution C-02-03, as well as the IATTC guidance to Members on consultations to be held when a vessel on the IATTC Regional Vessel Register is changing flags between IATTC Members.

This approach would also require no amendment of the AIDCP. Instead, Parties could commit to take the

internal steps necessary to prevent granting a vessel a flag if there are possible infractions that remain under investigation, sanctions that are not yet settled, or some other case that might warrant granting a flag such as the circumstances described in paras. 5(c) and (d) cited above, with appropriate communication to the Parties of the basis for any determination along these lines.

In a recent case that involved the United States, this approach was put into practice. A fishing vessel that was seeking U.S. flag claimed that it had recently been deleted from its prior flag state, but upon investigation by the U.S. coast Guard and the U.S. National Marine Fisheries Service it was determined that in reality there had been an intermediary flag state and there were fisheries violations that had not been settled. At that point, the vessel ownership was informed that U.S. documentation would not be available until the current flag State provided a deletion certificate and the pending sanctions were satisfied. At the same time, the U.S. Government took the opportunity to consult with the current flag State prior to the conclusion of the flag change to determine the intention of the current flag state with regard to the capacity of the vessel. In this way, through coordination of the relevant agencies and established policies, the range of both general and IATTC-specific flag State responsibilities can be fulfilled, and an incentive established for resolving the pending sanctions or investigations.

The second option that was previously discussed in the IRP was the potential 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 approach may provide a disincentive only for vessels that seek to fish with a DML. It would also require amending the AIDCP, possibly at Annex IV. Finally, it also dilutes the focus on actions by flag States to fulfill their responsibilities without providing an expectation that it would serve as a more effective deterrent.

### **3. Recommendation**

If it is considered necessary, the AIDCP Parties could develop guidance for fulfilling flag State responsibilities using the model of the guidance in place for IATTC Members regarding consultations prior to concluding a flag change. The guidance would ask Parties to inform each other of the relevant agencies that should be involved and points of contact therein. A document could be prepared for consideration by the MOP in October/November 2009 for consideration of the Parties with a view toward approval of the guidelines. Parties could then report to subsequent MOPs on progress in implementing the guidelines. The Parties could recommend that the IATTC also 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.