

Soft Law with Hidden Teeth: The Case for a FAO International Plan of Action on Sea Turtles

G. L. LUGTEN¹

1. INTRODUCTION

From 18th to 22nd November 2002, the Second International Fishers Forum (IFF2) was conducted in Honolulu, Hawaii.² The primary purpose of the forum was to evaluate and promote mitigation techniques for the incidental bycatch of sea turtles and seabirds by longline fishing gear. In its final session the Forum passed by overwhelming majority a Resolution (*inter alia*):

- requesting the Western Pacific Regional Fishery Management Council to present the Forum findings at the March 2003 session of the Committee of Fisheries (COFI) of the Food and Agriculture Organisation (FAO); and
- encouraging FAO to develop Guidelines leading to an International Plan of Action (IPOA) for the Reduction of Sea Turtle Bycatch from Marine Fisheries.³

Three years later, FAO has not produced an IPOA-Sea Turtles. In March 2005 at the Twenty-Sixth Session of the Committee on Fisheries, FAO adopted (a soft law instrument) Guidelines to Reduce Sea Turtle Mortality in Fishing Operations, but COFI has refused to support another IPOA on the subject of sea turtles. COFI members have agreed that it would be better to achieve some

¹ B.A., LL.B., Dip.Ed., Ph.D., Law School and Antarctic Climate Change and Ecosystem CRC, University of Tasmania, Australia. Gail.Lugten@utas.edu.au

² The First International Fishers Forum (IFF1) had been conducted in November, 2000 at Auckland, New Zealand. The Second Fishers Forum comprised 236 participants from 28 states. Participants included representatives from the Pacific Ocean longline fishing industry, fishing gear manufacturers, seafood traders, international and regional organizations, government agencies, environmental agencies, and academia. IFF3 was held in Yokohama, Japan in September 2005. Proceedings of the IFF2 are recorded in WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL, PROCEEDINGS OF THE 2002 SECOND INTERNATIONAL FISHERS FORUM (IFF2), 2 Executive Summary (2003).

³ FAO, GUIDELINES TO REDUCE SEA TURTLE MORTALITY IN FISHING OPERATIONS, Adopted by Twenty-Sixth Session of the Committee on Fisheries, March 2005.

real progress on the existing International Plans of Action, rather than add another IPOA to the list of poorly implemented international soft laws. The purpose of this article is to evaluate the legal status of the FAO International Plans of Action, and assess whether a new FAO IPOA on sea turtles could achieve any significant protection for creatures experiencing “a catastrophic decline in populations.”⁴ The paper is divided into three parts. Part 2 provides an overview on the plight of sea turtles and the numerous threats to their continued existence which occur both on land and at sea. Part 3 of the paper looks to the four current FAO International Plans of Action, their status in law, and the potential effectiveness of a fifth IPOA dealing with sea turtles. Part 4 of the paper presents an argument for the customary law status of the IPOAs. The paper submits that to the extent that the law (as distinct from education of fishers and coastal communities, developments in fishing gear technology, or application of better management policies) can conserve the sea turtles, a FAO International Plan of Action on sea turtles, along with the other FAO IPOAs, may be soft law instruments with hidden teeth.

2. THE PLIGHT OF SEA TURTLES

Sea turtles are prehistoric marine creatures, however their continued existence is threatened by human intervention at all stages of the turtle life cycle. Currently, the hawksbill, Kemp’s ridley, and leatherback turtles are listed by the International Union for the Conservation of Nature (IUCN) as critically endangered. The loggerhead, olive ridley, and green turtle are listed as endangered. The Hawaiian green turtle is listed as threatened, and the flatback turtle (native only to Australia) is listed as vulnerable.⁵ Turtles have high annual survivorship in the absence of human impacts, and this is essential to maintain turtle population stability. Accordingly, small increases in mortality at any stage of the sea turtle life cycle can result in significant population decline.⁶ The primary human impacts on turtle populations are discussed below.

2.1 Overexploitation for Eggs, Meat, Leather, and Shell

Female sea turtles leave the water to lay their eggs on tropical beaches. The eggs are the first part of the turtle life cycle to be vulnerable. In many Asian states, turtle eggs are collected and sold as both food and an important ingredient in Asian medicines. Some Latin American states covet sea turtle

⁴ IRENE KINAN, ed., WESTERN PACIFIC SEA TURTLE COOPERATIVE RESEARCH AND MANAGEMENT WORKSHOP REPORT, February 5-8, 2002 at, (2002) 1.

⁵ World Conservation Union <http://www.redlist.org>. Refer the IUCN RED LIST OF THREATENED SPECIES DATABASE Search. Accessed January 13, 2005.

⁶ KINAN, *supra* note 4.

eggs as aphrodisiacs. Domestic dogs and pigs, which accompany human settlements, are also predators of both turtle eggs and hatchlings. A 2002 Malaysian case study concluded:

... decades of excessive egg collection is the single most important factor which has caused the decimation of sea turtle populations in Malaysia. The consumption of turtle meat is “haram” (not permitted) due to religious reasons, but eggs are readily consumed and [this] continues to be the major threat. Eggs are collected and some are poached, and in some cases there exists a legal egg harvest due to egg collection licenses; especially in the state of Terengganu where only leatherback eggs are banned, not for the other species. Other states have banned the harvest of eggs, but there exists a significant problem as eggs are smuggled and can still be bought in the markets freely.⁷

Although the consumption of turtle meat is *haram* in Malaysia, other south east Asian states, particularly Indonesia, exploit nesting females as a source of meat. An Indonesian report notes:

The demand for turtle meat in Bali has been increasing for decades, the local population within the Balinese-Hindu culture area of Southern Bali has used turtle meat as a standard source of food and in religious festivities. The average demand for marine turtles for Bali alone is about 17,000 per year, whereas the government used to permit the harvest and slaughter of only 3,000 turtles per year throughout the whole of Indonesia.⁸

Apart from eggs and meat, sea turtles are overexploited for markets in turtle oil, hide, and shell. The hawksbill turtle is particularly prized for its translucent brown and yellow variegated shell which is made into jewelry and other ornamental or craft objects. The shell has long been capable of replacement by plastic, however a renewed demand for genuine turtle shell products has increased overexploitation of the species.

2.2 Habitat Loss and Degradation

Throughout Asia and the Pacific, turtle nesting beaches are increasingly subjected to coastal development, increased building activity, and human movement. This is detrimental to turtle populations in several ways. First, nesting females can be frightened away from their ‘home’ beach. Second, hatchling turtles instinctively know to move from the nest towards the water by the attraction of the bright light of breaking surf. An increase of building development around nesting beaches leads to an increase in artificial electric

⁷ Hock Clark Liew, *Status of Marine Turtle Conservation and Research in Malaysia* in KINAN, *supra* note 4, at 53.

⁸ Agus Dermawan, *Marine Turtle Management and Conservation in Indonesia* in KINAN, *supra* note 4, at 70.

light which confuses and disorients the hatchlings.⁹ Further, habitats are degraded by increased levels of marine pollution and other forms of debris such as lost or abandoned fishing gear that usually accompany increased coastal development. Floating plastic bags and plastic drink containers can closely resemble the preferred diet of sea turtles—jellyfish—and can kill sea turtles once ingested. A 2002 Report produced by the Great Barrier Reef Marine Park Authority on turtle conservation in developed coastal areas noted:

Approximately 500 turtles a year are reported and found dead or stranded along the Queensland coast. These are primarily green turtles, followed by loggerheads and hawksbill turtles. Of the 140 human-related incidents . . . 78 were from boat or propeller fractures; 24 entangled; 15 ingested marine debris, three as part of the shark control program, two from dredging; [and] 18 from other human related mortality sources.¹⁰

2.3 Bycatch

The problem of turtle bycatch in the fishing industry is one of the most critical threats to turtle population stability. It will be recalled that the purpose of the 2002 Second IFF2 was to examine mitigation techniques for seabirds and turtles that are the bycatch of longline fishing operations.

A comprehensive definition of ‘bycatch’ was provided in 1996 by Martin Hall who said that bycatch was “that part of the *capture* that is discarded at sea, dead (or injured to an extent that death is the result).”¹¹ “Capture” is further defined as all that is taken in the gear. This can be divided into: a portion that is retained for its economic value (the catch); the portion discarded at sea dead (the bycatch); and the portion released alive (the release).¹² For the purposes of this paper, fisheries bycatch includes the incidental mortality of non-fish species such as marine mammals, sea birds, sea turtles, and sharks, all of which are comparatively long-lived and have low reproductive rates. Accordingly, bycatch mortality of these non-fish species presents a major conservation problem.¹³

The FAO IPOA for Reducing Incidental Catch of Seabirds in Longline Fisheries begins by noting the problem of bycatch and then goes on to provide a series of recommendations for member states to follow in order to mitigate

⁹ Refer http://www.bagheera.com/inthewild/van_anim_turtle.htm p.2 (1) Accessed January 13, 2005.

¹⁰ Kirstin Bobbs, *Marine Turtle Conservation in the Great Barrier Reef, World Heritage Area, Queensland, Australia*, in KINAN, *supra* note 4, at 82. The report goes on to note that there are no mandatory reporting requirements for turtles caught by fishing activity in Queensland waters, so it is hard to know what is really happening with fishing bycatch.

¹¹ Martin A. Hall, *On Bycatches*, 6 REV. OF FISH BIOLOGY & FISHERIES 319-352. Italics by this author.

¹² *Id.*

¹³ Martin A Hall, Dayton L. Alverson, & Kaija Metuzals, *Bycatch: Problems and Solutions*, 41 MARINE POLLUTION BULLETIN 201, 204 (2000).

the seabird bycatch problem. If the IPOA-Seabirds were to provide a structural template for an IPOA-Sea Turtles, then again, bycatch mitigation measures would likely be included. Examples of sea turtle bycatch mitigation methods are described below.

Bycatch turtle mortalities occur most commonly among turtles being entangled in, or hooked on, fishing gear. Where hooking or entanglement occurs just prior to the turtle being hauled on board, survival rates are much higher. For example, one preliminary estimate of turtle captures by longlining in the Western Tropical Pacific notes that of 2,182 marine turtles caught by longliners, only 500 to 600 hundred resulted in mortality.¹⁴ Where a turtle is taken on board a vessel alive, then the onus of saving captured turtles is placed back on to the fishers. Accordingly, education and training of fishers has an important role to play as a turtle mitigation technique.

As with seabirds that are bycatch, bait treatment to deter turtles can take several forms in mitigation testing. Studies have been done to test the attractiveness of blue-dyed bait to captive green and loggerhead sea turtles. The results showed that when presented with a choice between blue-dyed squid and normal squid as bait in controlled experiments, the turtles completely ignore the blue bait for up to 8-10 days.¹⁵ A clear need exists to develop and test both artificial and coloured baits, the length of time the dye remains on the bait, dyeing characteristics of bait other than squid, and dyeing effects on other fish lures.¹⁶

Possible fishing gear changes include increased promotion of the trawl fishery turtle exclusion device (TED) which allows for accidentally netted turtles to escape. In longline fisheries, Pacific Ocean studies with round shaped fishing hooks have recently been conducted in order to compare target species fishing effectiveness against turtle mortality mitigation effectiveness. Using large (18/0) circle hooks instead of the traditional 'J' hook results in less capture of sea turtles. At the same time, the circle hooks yield normal catch rates for tuna, but substantially decreased catch rates for swordfish.¹⁷ Other Atlantic Ocean studies on the swordfish fishery have shown no significant difference in the total number of turtles caught by each hook type, but significant differences in the location of the hook type. That is, 'J' hook

¹⁴ DEIDRE BROGAN, A REVIEW OF TURTLE BYCATCH IN THE WESTERN AND CENTRAL PACIFIC OCEAN TUNA FISHERIES (Report prepared for the South Pacific Regional Environment Programme (SPREP) by the Secretariat of the Pacific Community (SPC) Noumea, New Caledonia.) The Report goes on to note that such statistics have wide confidence intervals since total observer coverage in the region has been very low—less than one per cent.

¹⁵ NOAA, *Status of the Hawaii Longline Fishing Experiments to Reduce Sea Turtle Bycatch: October, 2002*, *supra* note 3.

¹⁶ Boggs C.H. *Deterring Albatrosses from Contacting Baits During Swordfish Longline Sets* in SEABIRD BYCATCH: TRENDS, ROADBLOCKS AND SOLUTIONS 79-94 (Melvin E.F. & Parrish J.K. eds., 2001).

¹⁷ NOAA, *supra* note 15.

caught turtles were hooked in the throat, but circle hook caught turtles were hooked in the mouth. Clearly this would have significant implications on final sea turtle mortality rates. Again, in the Atlantic Ocean tests, circle hooks caught substantially fewer swordfish.¹⁸

Another potential change to fishing vessel equipment, though it cannot be classified as fishing gear, is electronic monitoring (EM) of fish catches. Whilst numerous states have implemented observer/inspector programs, the cost of running such programs can be prohibitive, and given the fact that human observers/inspectors cannot see and record everything, EM was demonstrated as an alternative method of observer-based at-sea monitoring of fishing. In April 2003, a comprehensive EM study prepared for the Pacific Halibut Management Association and the Pacific Scientist Advice Review Committee of Fisheries and Oceans Canada was published by a Canadian company with extensive work in developing and researching video-based electronic monitoring of the halibut longline fishery.¹⁹ This project involved the use of a lockable, tamper-proof control box which contains the operating system, data storage components, and power supplies for video cameras and peripheral vessel sensors being mounted on fishing vessels.²⁰ A data logging computer is designed to run continuously for the duration of the fishing trip and provides a digital-time series record of the vessel activities, such as setting or hauling fishing gear.²¹ In the 2002 British Columbia halibut longline fishery, EM systems were deployed on 59 halibut fishing trips involving 19 fishing vessels. The testing evaluated 700 fishing sets, 350,000 observed hooks, and produced 1,000 hours of imagery. Compared with observer statistics, EM was accurate within ten percent, and was successfully able to distinguish 13 species that represented 97 percent of the halibut fishery catch.²² The Report concludes that the substantially lower costs and broader fleet suitability of EM over observers makes EM an attractive and viable tool for at-sea monitoring applications.²³ Where regional fishery bodies are able to endorse such electronic monitoring of catch type and numbers, there is a clear opportunity for accurate data compilation. Such information is critical to informed management practices.

¹⁸ Bolton A.B. and Bjørndal K.A., *Experiment to Evaluate Gear Modification on Rates of Sea Turtle Bycatch in the Swordfish Longline Fishery in the Azores* in PROCEEDINGS OF THE SECOND INTERNATIONAL FISHERS FORUM 2002(1), *supra* note 3.

¹⁹ McElderry H., Schrader J. and Illingworth J., *The Efficacy of Video-Based Electronic Monitoring Technology for At-Sea Monitoring of the Halibut Longline Fishery* 2002 PROC. OF THE SECOND INTL FISHERS FORUM, *supra* note 3.

²⁰ *Id* at 3.

²¹ *Id.*

²² *Id.* The report notes that some species, particularly non-distinct forms, were not identified well by EM.

²³ *Id.* The authors suggest that the ideal monitoring program would be an integrated EM-observer program using both methods in a complimentary fashion.

Changes to fishing operational measures could also reduce turtle mortalities. Where particular hotspots of vulnerability exist either geographically or seasonally, it may be necessary to consider either closed fishing areas or establishing closed seasons. For example, Eastern Pacific leatherback turtles have been found to be particularly vulnerable to longline fishing capture in identifiable pockets of Pacific Ocean tropical waters off central America.²⁴

To summarise these ongoing threats to turtle population stability, it is clear that sea turtles are threatened at all stages of their life cycle, both on land and at sea. This raises an interesting question regarding the content of any proposed FAO-IPOA on sea turtles. Should the turtle IPOA only examine the threats that exist from current wasteful fishing practices, or should it more broadly apply precautionary principles to all stages of the sea turtle life cycle? It will be recalled that the original 2002 request to FAO from the Second IFF2 was for the preparation of a FAO-IPOA dealing with “Reduction of Sea Turtle Bycatch.” This requires a IPOA-Sea Turtles that would utilize a similar format to the existing IPOA on bycatch of sea birds. The 2002 International Fishers Forum discussed, voted on, and ultimately rejected the wording used by the IPOA for the *Conservation and Management of Sharks*.²⁵ The Forum believed that it was preferable to use wording that would focus on the bycatch problem. However, this paper submits that in view of the sea turtle problems outlined above, including ongoing overexploitation of eggs, meat, leather, oils and shells, as well as loss and degradation of land habitat, an IPOA on sea turtles should adopt the broader mandate to deal with total conservation and management, and not be restricted to just the bycatch problem. The 2005 FAO Guidelines to Reduce Sea Turtle Mortality in Fishing Operations clearly adopts the more narrow mandate to focus on bycatch. The content and status of the current FAO IPOAs is elaborated below in Part 3 of this paper.

3. THE FAO IPOAs

The Constitution of the Food and Agriculture Organization created FAO in order to improve efficiency in the production and distribution of food and agricultural products.²⁶ ‘Food’ includes fisheries and marine products.²⁷ FAO powers include the ability to promote research, improve education and public knowledge, provide assistance to governments, encourage the adoption of

²⁴ Martin Hall, 2002, PROC OF THE SECOND INTL FISHERS FORUM, *supra* note 3.

²⁵ Emphasis by this author.

²⁶ Preamble to FAO CONST. Refer UNFAO Legal Office Basic Texts, www.fao.org. Accessed January 13, 2005.

²⁷ *Id.*, Article 1.1.

international policies and make recommendations on the conservation of natural resources.²⁸ Using the latter two powers, FAO have initiated the drafting, promotion, and implementation of a series of soft law fishery instruments. These instruments include the FAO Code of Conduct for Responsible Fisheries and (under the framework of the Code of Conduct) four FAO International Plans of Action. These are:²⁹

- The International Plan of Action for the Conservation and Management of Sharks (IPOA-Sharks);
- The International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity);
- The International Plan of Action on Illegal, Unreported and Unregulated Fishing (IPOA-IUU); and
- The International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-Seabirds).

Unlike treaties which are hard law instruments, soft law instruments such as the Code of Conduct, the IPOAs, and the 2005 FAO Guidelines to Reduce Sea Turtle Mortality in Fishing Operations are not intended to give rise to any legally binding obligations. An interesting description was provided by the European community, supported by Canada, at the time of negotiating the International Plan of Action on Illegal, Unreported and Unregulated Fishing, when it was said that soft laws were “not a legal text, but a political text.”³⁰ Soft laws have no provisions as to state signature, entry into force, or other final clauses found in hard law international agreements. They also use non-mandatory legal language, for example, “States should . . .” or “States are encouraged to . . .” The purpose of soft laws is to draw attention to a problem, suggest appropriate behaviour to deal with this problem, and provide a transition period for states to adopt behavioural change between the interstitial period of non-mandatory obligations of soft law and the development of hard law instruments. Furthermore, Birnie and Boyle make the point that soft law international instruments are carefully negotiated and drafted with “an element of good faith commitment, an expectation that they will be adhered to if possible, and in many cases, a desire to influence the development of state practice.”³¹ They can also operate without the secretariats or bureaucracies that

²⁸ *Id.*, Article 1.2 and 1.3.

²⁹ FAO 1995, Code of Conduct for Responsible Fisheries, Rome. ISBN 92-5-103834-1. Available On Line at www.fao.org/fi/agreem/codecond/codecon.asp. Accessed January 13, 2005 (1). Hereinafter referred to as the “Code of Conduct.”

³⁰ William Edeson, *The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument* in 16 INTL. J. MARINE & COASTAL LAW 603, 609 (2001).

³¹ PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 25 (2nd ed. 2002).

frequently accompany legally-binding agreements. This fact alone makes soft law instruments a more feasible and appealing alternative to many developing states.³²

Since the early 1990s, the number of international soft law environmental instruments has increased substantially. Apart from the FAO Code of Conduct and IPOAs, soft law environmental instruments that have impacted on marine resource management include: the Rio Declaration;³³ Agenda 21;³⁴ the Rome Consensus on World Fisheries;³⁵ the Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food Security;³⁶ the Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries;³⁷ the Reykjavik Declaration;³⁸ the Johannesburg Declaration and the Plan of Implementation from the 2002 World Summit on Sustainable Development (the Plan).³⁹ All of these soft law instruments target subjects that have been identified by the international community as deserving of urgent attention, although there may be political reasons why the subject is addressed by soft law rather than treaty law.⁴⁰

The four FAO IPOAs address their subjects by incorporating the precautionary principles of the Code of Conduct, while focusing on specific problems in contemporary fisheries management. In particular, the IPOAs on capacity and IUU examine subjects that are seen as undermining global fisheries management. The IPOAs on seabirds and sharks, like a potential IPOA on sea turtles, are subject-specific in their focus and deal with the

³² Douglas Hykle, *The Convention on Migratory Species and Other International Instruments Relevant to Marine Turtle Conservation: Pros and Cons* in 5 JOURNAL OF INTL. WILDLIFE LAW AND POL. 105, 107.

³³ United Nations Conference on the Environment and Development (UNCED) June 3-14, 1992, Rio de Janeiro, Brazil (The Earth Summit) United Nations Publication ISBN: 92-1-100509-4.

³⁴ *Id.* The blueprint for global environmental action to be taken throughout the 1990s and into the 21st Century.

³⁵ FAO, The Rome Consensus on World Fisheries (adopted by the FAO Ministerial Conference on Fisheries Rome 14-15 March 1995 (1). On line at <http://www.fao.org/fi/agreem/consensu/conef.htm> Accessed January 14, 2005 (1).

³⁶ The Kyoto Declaration and Plan of Action on the Sustainable Contribution of Fisheries to Food Security, Kyoto Japan December 4-9, 1995 (1). On line at <http://www.fao.org/documents> Accessed January 14, 2005 (1).

³⁷ Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries, Adopted by the FAO Ministerial Meeting on Fisheries, Rome, March 10-11 1999. On line at <http://www.fao.org/documents>. Accessed January 14, 2005 (1).

³⁸ Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem, October 1-4, 2001. Available on line at www.fao.org/docrep/meeting/004/Y2211e.htm. Accessed January 14, 2005 (1).

³⁹ World Summit on Sustainable Development Resolution 1—Political Declaration Johannesburg Declaration on Sustainable Development, and Resolution 2—Plan of Implementation of the World Summit on Sustainable Development. Both documents can be found at A/CONF.199/20. Published by United Nations, New York, 2002 ISBN 92-1-104521-5. Available on line at www.johannesburgsummit.org.

⁴⁰ David Doulman, *The 1995 FAO Code of Conduct for Responsible Fisheries: Development Considerations and Implementation Challenges*, Paper Presented at the National Workshop on the Implementation of the Code of Conduct for Responsible Fisheries, Dhaka, Bangladesh, April 22-23, 2002.

general minimization of wasteful fishing practices and, in the case of the IPOA-Sharks, the issues of conservation and management.⁴¹

In February 2003, the 25th COFI meeting convened in Rome and considered, *inter alia*, a Report on Progress of the Implementation of the Code of Conduct for Responsible Fisheries and *Related International Plans of Action*.⁴² The Report reveals an appalling level of state interest in, and compliance with, the FAO IPOAs. Only 57 percent of FAO members even bothered to respond to the FAO questionnaire.⁴³ Whilst specifically addressing the Code of Conduct, the FAO questionnaire investigates state compliance with the four FAO IPOAs. The findings are summarized below.

First, in relation to the IPOA-Seabirds, it must be remembered that the IPOA will apply to all states which permit and/or conduct longline fishing in their own waters, other state waters, and the high seas. Whilst 69 members reported that they have longline fisheries,⁴⁴ Table 13 of the COFI Report notes that only three of these states have taken steps to address the IPOA-Seabirds.⁴⁵ An additional three states—the European community, Spain, and Sweden—have undertaken a preliminary assessment of how to implement the IPOA-Seabirds. Statistically, IPOA-Seabirds ranks at the very bottom in terms of implementation by states of the four existing IPOAs. Further, the member states expressing an intent to implement the IPOA-Seabirds did not generally indicate a time frame.

The second lowest ranking is held by the other species-specific IPOA, the IPOA-Sharks. Here, only six states out of a responding total of 134 have complied with the IPOA-Sharks by implementing their own national plans of action.⁴⁶ A further 11 states are in the process of addressing the IPOA-Sharks.⁴⁷

⁴¹ William Edeson, *The Role of 'Soft' International Instruments to Control Fishing* 20 AUSTRALIAN Y.B. OF INTL LAW 12.

⁴² Food and Agriculture Organisation of the United Nations, Committee on Fisheries COFI/2003/3, emphasis by this author.

⁴³ The survey was conducted in 2000 and 2002. The total responses in 2000 were 56 percent and in 2002 they were 57 percent. Some States responded in 2002 when they did not respond in 2000, but conversely there were other states responding in 2000 and not responding at all in 2002.

⁴⁴ Angola, Burkina Faso, Burundi, Chad, Democratic Republic of Congo, Cote d'Ivoire, Eritrea, Guinea, Kenya, Madagascar, Malawi, Morocco, Mozambique, Namibia, Niger, Senegal, Seychelles, South Africa, Togo and Tunisia; Bangladesh, India, Indonesia, Republic of Korea, Malaysia, Myanmar, Pakistan, Philippines and Sri Lanka; Cyprus, European Community, Greece, Norway, Spain and Sweden, Argentina, Barbados, Brazil, Chile, Colombia, Dominica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, St. Lucia, Trinidad and Tobago, Uruguay and Venezuela; Egypt, Islamic Republic of Iran, Jordan, Oman and Syrian Arab Republic; Canada and the United States of America; Australia, Cook Islands, Fiji, Marshall Islands, Nauru, New Zealand, Papua New Guinea, Samoa and Tonga.

⁴⁵ Brazil, Egypt, and United States of America.

⁴⁶ Namibia, South Africa, Thailand, Brazil, Mexico and the United States of America.

⁴⁷ Trinidad and Tobago, the European Community, Spain, Sweden, Syrian Arab Republic, Canada, Australia, Marshall Islands, New Zealand and Papua New Guinea.

Both the 2003 COFI Report and the FAO member countries gave more attention to the subject of compliance with the IPOAs dealing with capacity and IUU fishing.⁴⁸ Nevertheless, compliance levels remained low. The IPOA-Capacity revealed nine states that had addressed the Plan and 42 states that were in the process of addressing the Plan. The IPOA-IUU revealed 47 states that had addressed the Plan, and 23 states that were in the process of addressing the Plan.

Whilst regional agreements are outside the scope of this paper, it is worth noting that the COFI report goes on to consider responses to the same questionnaires by Regional Fishery Bodies (RFB) and Non-Governmental Organisations. Here, replies were received from 19 out of 27 regional fishery bodies contacted by FAO. More than half the RFB were addressing the IPOA-IUU, but compliance levels with the remaining IPOAs were again low. That is, eight RFB were addressing the IPOA-Capacity,⁴⁹ seven RFB were addressing the IPOA-Sharks,⁵⁰ and only three RFB (1) the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the International Commission for the Conservation of Atlantic Tunas (ICCAT), and the Indian Ocean Tuna Commission (IOTC) (1) had taken steps to address the IPOA-Seabirds. In fairness, recognition must also be given to the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) which is given a specific acknowledgment within the provision of the IPOA-Seabirds itself.⁵¹

This discussion of the COFI report must acknowledge the concluding remarks made by FAO members on the constraints they face in implementing the IPOAs. Such constraints, if not addressed, are certain to equally apply to the proposed IPOA-Sea Turtles. The recurring constraints for implementing all FAO IPOAs were:

1. A lack of political will to support implementation;
2. Fisheries not being assigned a high national priority because of their small economic contribution;
3. The fisheries sector being poorly organized.⁵²

These constraints are primarily driven by economics, and if we apply the same constraints to the plight of sea turtles, then:

⁴⁸ COFI, *supra* note 42, paragraphs 53-55 and 58-60.

⁴⁹ Committee for the Conservation of Antarctic Marine Living Resources (CCAMLR); the Forum Fisheries Agency (FFA), General Fisheries Council for the Mediterranean (GFCM), Inter American Tropical Tuna Commission (IATTC), International Commission for the Conservation of Atlantic Tunas (ICCAT), Indian Ocean Tuna Commission (IOTC), North Atlantic Fisheries Organisation (NAFO), and South East Asian Fisheries Development Corporation (SEAFDEC).

⁵⁰ CCAMLR, GFCM, IATTC, ICCAT, IOTC, NAFO and SEAFDEC.

⁵¹ IPOA-Seabirds, The International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries can be accessed through the FAO homepage at <http://www.fao.org/documents>. See Paragraph 4.

⁵² COFI, *supra* note 42, paragraph 84.

1. Turtles have an even smaller economic contribution to state budgets than fisheries do, and therefore they are unlikely to be assigned a high national priority.
2. Without an economic priority status, there will be a lack of political will by nation states to address the plight of sea turtles.
3. If the substantial fisheries sector (which at least constitutes an industry in many states) is seen as ‘poorly organized,’ the prospects are not encouraging for an ‘organized’ sea turtle sector working towards conservation or protection.

Thus, a potential IPOA-Sea Turtles is hobbled even before it exists by the same constraints that hinder national action on the existing FAO IPOAs. Accordingly, although there is a clear need for an international law (soft or hard) on conservation and management of sea turtles, the COFI decision to not prepare new IPOAs before there was better compliance with existing IPOAs was probably the most sensible decision to take. So how can the international community of states be better encouraged to comply with FAO soft law instruments such as the Code of Conduct and the IPOAs? Part 4 of this paper presents a case that although these instruments are soft law, recent developments in international law suggests a ‘hardening’ of their status. That is, that the FAO IPOAs may be soft law, but with hidden teeth.

4. SOFT LAW WITH HIDDEN TEETH?

Whilst it is true that the IPOAs do not *prima facie constitute* ‘law’ as the sources of international law are set forth in Article 38(1) of the Statute of the International Court of Justice,⁵³ international lawyers are in agreement that soft law may evolve into hard law.⁵⁴ But must this transition involve a soft law instrument being re-negotiated as a hard law treaty, or can hard law status be achieved by the customary adherence of states to the soft law instrument itself?

As a source of public international law, customary law is described in Article 38 (1)(b) of the Statute of the International Court of Justice as: “international custom, as evidence of a general practice accepted as law.” There are two pivotal concepts in this wording: they are the ‘practice’ of states and ‘acceptance’ of the practice. In other words, there is a ‘doing’ element of practice and a ‘thinking or psychological’ element of accepting

⁵³ Article 38 of the Statute of the International Court of Justice provides that the ICJ shall apply: “(a) international conventions . . . , (b) international custom . . . , (c) the general principles of law recognised by civilised nations, (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations . . .”

⁵⁴ See for example, ANTONIO CASSESE, *INTERNATIONAL LAW* 161 (2001).

the practice as obligatory. In the words of Birnie and Boyle, “both conduct and conviction on the part of the state are required before it can be said that a custom has become law.”⁵⁵ Bearing these requirements of international customary law in mind, it is possible to argue that the principles of both the FAO Code of Conduct and the IPOAs are in the process of attaining customary law status as a source of public international law. This argument is based on both state conduct and state conviction.

State conduct to adhere with the sustainability provisions of both the Code of Conduct and the existing IPOAs occurs with varying degrees of commitment, but in a majority of coastal states. That is, most states in the world are taking steps (at least within their domestic legislation and often through regional agreements) to address the FAO principles relating to (*inter alia*) coastal zone management, overfishing, IUU fishing, bycatch, fishing gear, processing, and trade in fish and fishery products. The extent of action to be taken is dependent upon the impact on states. Thus, while few states appear to be actively implementing the entire Code of Conduct and the four IPOAs, a majority of states are actively addressing elements of the Code and the IPOAs in their domestic legislation by their participation in regional agreements and/or adherence to hard law treaties. Thus, the marine life sustainability measures taken by the community of states are evidence of customary law conduct.

The plight of sea turtles, and a potential IPOA on their conservation and management, is an interesting case in point. As a highly migratory species under threat, sea turtles require international (or at the least, regional law) protection. Accordingly, there are international treaty laws that indirectly offer some protection for sea turtles (including the Bonn Convention and the Convention on Biological Diversity), plus subject-specific regional agreements (including the Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia,⁵⁶ the Memorandum of Understanding concerning Conservation Measures for Marine Turtles of the Atlantic Coast of Africa,⁵⁷ and the Inter American Convention for the Protection and Conservation of Sea Turtles).⁵⁸ But for the one percent of turtle lives spent on land, turtles also require domestic legislation for conservation and management. A large number of coastal states already recognize the need to conserve and/or protect turtles in their coastal waters and on their beaches. Accordingly, many states are

⁵⁵ BIRNIE & BOYLE, *supra* note 31, at 16.

⁵⁶ Concluded Under the Auspices of the Convention on the Conservation of Migratory Species of Wild Animals, Manila, June 23, 2001. On Line at http://www.ioseaturtles.org/Mou/MoU_CMP.combo.pdf. Accessed Jan 14, 2005 (1).

⁵⁷ On Line at http://www.cms.int/species/africa_turtle/AFRICAturtle_bkgd.htm.

⁵⁸ On Line at <http://www.seaturtle.org/iac/intro.shtml>.

demonstrating customary law conduct at international, regional, and domestic levels to conserve and manage sea turtles.⁵⁹

In terms of the customary law requirement of conviction to endorse and implement the FAO IPOAs, it is submitted that beginning with the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa, from August 26 to September 4, 2002, there is clear evidence of such conviction within the international community of states. At its conclusion, the WSSD adopted two resolutions. The first approved the Johannesburg Declaration on Sustainable Development. This instrument essentially reaffirms a general commitment to sustainable development. Of greater interest is the second resolution of the WSSD which adopted the Plan. Whilst the articles contained in the Plan mostly employ non-mandatory, soft law language on subjects including the marine environment and its resources, some provisions within the Plan outline a number of actions that are “required” of states in order to achieve sustainable development. It is submitted that the use of the word “required” supports an interpretation that states are obliged to act, rather than the more discretionary language inviting states to *inter alia* “promote,” “strengthen,” and “support” principles of sustainability. Particular attention should be given to Article 30(d) of the Plan which provides:

To achieve sustainable fisheries, the following actions are *required* at all levels: . . .

(d) *Urgently develop and implement* national and, where appropriate, regional plans of action, to put into effect the FAO international plans of action . . . ,⁶⁰

Whilst the provision goes on to draw particular attention to the IPOAs dealing with fishing capacity and IUU fishing, the central wording of the provision remains an obligation to put all the FAO IPOAs into effect, thus including seabirds and sharks. As a soft law instrument, the Plan contains no provisions for state ratification, but it must be noted that 104 heads of government were involved in the Johannesburg World Summit. When these heads of government and ranking ministerial representatives, were given the opportunity to object to terms within the Plan of Implementation, and they did not object, then clearly they acquiesced with the content of the Plan. These heads of state may have acquiesced with a non-binding, soft law instrument, but the instrument clearly contained a mandatory component. The final adoption *by consensus* of the whole Plan, including the mandatory language in Article 30(d), can be argued to address the conviction requirement of customary international law.

⁵⁹ In the Pacific Ocean region those States which have implemented sea turtle conservation and management programmes include: Australia, United States, Japan, Philippines, Malaysia, Indonesia, Thailand, Vietnam, Papua New Guinea, Papua, Fiji, Vanuatu, Palau, Guam, American Samoa, Mexico.

⁶⁰ WSSD *supra* note 39. (Underlined emphasis by this author).

Similarly, in recent years the United Nations General Assembly (UNGA) has adopted by consensus a series of “Oceans Resolutions.” These UNGA Resolutions are 57/253 World Summit on Sustainable Development;⁶¹ 57/143 on Agreement for Implementation of the UN Fish Stocks Agreement;⁶² and 57/142 on Developments in large-scale pelagic drift net fishing, unauthorized fishing in zones of national jurisdiction and on the high seas, IUU fishing, bycatch and discards.⁶³ Furthermore, UNGA Resolution 57/141 on Oceans and the Law of the Sea was passed on December 12, 2002, by a vote: 132 in favour, one vote against and two abstentions.⁶⁴ Each of the December 2002 WSSD and Oceans resolutions contained provisions relating either directly or implicitly (via the WSSD Plan of Implementation) to the FAO IPOAs.

Thus,

- UNGA Resolution 57/253 on the World Summit on Sustainable Development calls for the implementation of the commitments, programmes, and time-bound targets adopted at the Summit and, to this end, for the fulfillment of the provisions of the means of implementation, as contained in the Johannesburg Plan of Implementation.⁶⁵
- UNGA Resolution 57/143 on the UN Fish Stocks Agreement welcomes and reaffirms the outcomes of the World Summit on Sustainable Development.⁶⁶
- UNGA Resolution 57/142 on Developments in Fisheries:
 1. Notes with concern that COFI has adopted international plans of action and that only a small number of countries have begun implementation of the international plans of action.⁶⁷

⁶¹ United Nations General Assembly 57th Session, A/57/PV.78+Corr.1, Adopted Without Vote December 20, 2002 World Summit on Sustainable Development. A/RES/57/253. On Line at <http://www.un.org/Depts/dh/resguide/r57.html>. Accessed January 14, 2005 (1).

⁶² United Nations General Assembly 57th Session Plenary A/57/PV.74 Adopted Without Vote December 12, 2002 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, A/RES/57/143. On Line at <http://www.un.org/Depts/dh/resguide/r57.htm> Accessed January 14, 2005 (1).

⁶³ United Nations General Assembly 57th Session Plenary A/57/PV.74 Adopted Without Vote December 12, 2002 Large-scale pelagic drift-net fishing, unauthorized fishing in zones of national jurisdiction and on the high seas/ illegal, unreported and unregulated fishing, fisheries bycatch and discards, and other developments, A/RES/57/142. On Line at <http://www.un.org/Depts/dh/resguide/r57.htm>.

⁶⁴ United Nations General Assembly 57th Session Plenary A/57/L.48/Rev.1+Add.1 Adopted By Vote 132 in favour, 1 vote against, 2 abstentions on December 12, 2002 Oceans and Law of the Sea, A/RES/57/141. On Line at <http://www.un.org/Depts/dh/resguide/r57.htm>. The one dissenting vote was from Turkey, the two abstentions were Colombia and Venezuela.

⁶⁵ A/RES/57/253, *supra* note 61, Paragraph 6. Such programmes obviously include the “required” and “urgent” implementation of the FAO International Plans of Action.

⁶⁶ A/RES/57/143, *supra* note 62, Preamble and Paragraph 4.

⁶⁷ A/RES/57/142, *supra* note 63, Preamble.

2. Encourages States to implement directly or, as appropriate, through the relevant international, regional, and subregional organizations and arrangements, the international plans of action of the Food and Agriculture Organization of the United Nations . . . since, according to the timetables contained within the international plans of action, progress on implementation, in particular through the development of national plans of action, should be either completed or at an advanced stage.⁶⁸
- UNGA Resolution 57/141 on Oceans and the Law of the Sea:
 1. Welcomes the Plan of Implementation of the World Summit on Sustainable Development.⁶⁹
 2. Also welcomes the commitments set out in the Johannesburg Plan of Implementation to actions at all levels, within specific periods for certain goals, to ensure the sustainable development of the oceans, including sustainable fisheries.⁷⁰
 3. Calls upon States to promote the conservation and management of the oceans in accordance with . . . relevant international instruments, to facilitate . . . the elimination of destructive fishing practices.⁷¹

It is submitted that these resolutions contain important and significant principles. To put the matter into context, we are talking about a clear majority of countries in the world (with representation in the United Nations General Assembly) supporting (without a vote, but) *by consensus* a concern over the small number of states that have implemented the FAO IPOAs, and by endorsing the WSSD Plan of Implementation also acknowledging the *urgent requirement* for all states to bring the FAO IPOAs into effect.⁷²

Article 10 of the UN Charter gives to the General Assembly the power to make “recommendations” on matters that fall within its competence. The suggestion that recommendations cannot be binding is reasonable, and further complies with the fact that Article 38(1) of the Statute of the International Court of Justice, which lists the main sources of public international law, does not include UNGA resolutions. However, the UNGA resolutions must be seen as further evidence of the ‘conviction’ requirement of customary international law. The UNGA resolutions not only show international support for the

⁶⁸ *Id.* at Paragraph 13.

⁶⁹ A/RES/57/141, *supra* note 64, Paragraph 7.

⁷⁰ *Id.* at Paragraph 8.

⁷¹ *Id.* at Paragraph 53.

⁷² That is, A/RES/57/253, *supra* note 61, Paragraph 6; A/RES/57/143, *supra* note 59, Paragraph 4; A/RES/57/142, *supra* note 60, Paragraph 13. Emphasis by this author.

contents of the FAO IPOAs, but also an intention and reasonable expectation that the international community *will* urgently act to implement the FAO IPOAs. Furthermore, it should be noted that UNGA states can potentially object to a consensus resolution, but this was not done, and accordingly, the first three above-mentioned resolutions were allowed to pass by consensus with no state recording an express negative vote. Only Turkey voted against UNGA Resolution 57/141 with abstentions by Colombia and Venezuela. Accordingly, the resolution elicited a massive level of international support, with 132 states voting in favour.⁷³

Apart from the submission that the UNGA resolutions show an intention and reasonable expectation that the FAO IPOAs will be implemented, it has also been argued by Mendelson that consensus UNGA resolutions may be seen as establishing a form of estoppel that binds those states that have supported the resolution.⁷⁴ Although the application of the doctrine of estoppel in international law is still unclear,⁷⁵ it can be argued that states which adopt a resolution by consensus may be estopped from acting contrary to that resolution and, for example, acting inconsistently with the WSSD Plan of Implementation and the FAO IPOAs.

A final argument is that UNGA resolutions should be viewed as binding in their own right. In the *Nicaragua Case*,⁷⁶ the International Court of Justice gave a greater status to General Assembly Resolutions than merely soft law instruments.⁷⁷ On other occasions, the International Court of Justice has acknowledged the legal force of some UN declarations.⁷⁸ From these decisions, it can be argued that UNGA Resolutions are potentially binding on states if the states do not object to a consensus resolution.⁷⁹ That is, acquiescence to a resolution could make that resolution binding on a state.

To summarise the arguments in support of the FAO IPOAs acquiring hard customary law status, this paper submits that existing state practice to address and promote the principles of the Code of Conduct and the FAO IPOAs (regardless of how rudimentary the practice may be) represents customary law conduct. Furthermore, the near unanimous support given to the WSSD Plan,

⁷³ General Assembly Press Release GA/10122, 10 December 2002.

⁷⁴ Maurice Mendelson, *The Legal Character of General Assembly Resolutions: Some Considerations of Principle* in 95 LEGAL ASPECTS OF THE NEW INTL. ECON. ORDER 96 (Hossain K. ed. 1980).

⁷⁵ *Id.*

⁷⁶ Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v USA) (Merits) 1986 International Court of Justice Reports at 14.

⁷⁷ F.L. Morrison, Appraisals of the ICJ's Decision: Nicaragua v United States (Merits)" (1987) 81 Am. J. of Intl. Law 160, 161(1987).

⁷⁸ Note for example The Advisory Opinions on Western Sahara 1975 International Court of Justice Reports at 12, and Legal Consequences for states of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) 1971 International Court of Justice Reports at 16.

⁷⁹ Morrison, *supra* note 77.

and the recent law of the sea UNGA resolutions represents customary law conviction. Accordingly, the FAO IPOAs may be soft law with hidden teeth.

5. CONCLUSION

Should FAO draft another International Plan of Action dealing with the Conservation and Management of Sea Turtles?

In public international law there are hard law treaties that indirectly attempt the conservation of the sea turtles. Such hard laws are indirect in that they are a part of international environmental laws that deal with wider concerns: biodiversity, migratory species, international trade, and marine life conservation and management. Such instruments have the teeth to require state adherence, but are sometimes viewed as too general to address specific and immediate problems.

The strength of soft law instruments is that they are able to focus on specific problems in environmental management. Thus, the FAO IPOAs on capacity and IUU examine specific subjects undermining global fisheries management. The IPOAs on seabirds and sharks, like a proposed IPOA on sea turtles, are even more subject-specific by dealing with species conservation and management. This paper supports the 2002 International Fishers Forum recommendation that FAO draft an IPOA on sea turtles. Further, to address the threats that confront sea turtles at land and sea, at all stages of the life cycle, the proposed IPOA should be broad, and comprehensively address conservation and management issues. That is, it should be more akin to the IPOA-Sharks, than the restrictive IPOA-Seabirds which focuses only on bycatch.

FAO's reluctance to embark on this project appears to be based on concern for the low level of state compliance with existing IPOAs as international soft laws. However, the paper has submitted that a legal argument currently exists and is growing increasingly stronger with each subsequent state endorsement of the IPOAs, that the IPOAs may have hard law status as international custom. It has been suggested that both the conduct and conviction elements of international customary law have been, and are continuing to be, addressed.

Can a FAO IPOA-Sea turtles save sea turtle species? This paper has suggested that the FAO IPOAs can be viewed in two ways: as soft law political instruments or as hard customary law.

The impact of a soft law IPOA-Sea Turtles would depend on numerous factors. For example, if (as with the other IPOAs,) an IPOA on sea turtles was to call upon states to implement National Plans of Action (NPOAs), then much would depend on the number of states to actually draft NPOAs and the quality of those NPOAs. It has been observed that the track-record of states which comply with the IPOAs by drafting NPOAs is weak.

Alternatively, IPOAs can arguably be seen as having customary law status, and as hard laws they would have the potential to bind states. By this interpretation, the IPOAs could have a significant beneficial impact on the conservation and management of sea turtles.

In conclusion, an IPOA-Sea Turtles may not save the turtles, but it will not hurt them, and there is always the possibility that even a soft law instrument may be found to have hidden teeth.