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MIGRATORY
SPECIES**

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**MOZAMBIQUE COUNTRY REPORT
IMPLEMENTATION OF THE CONVENTION ON THE CONSERVATION OF MIGRATORY
SPECIES OF WILD ANIMALS (CMS) CONCERTED ACTION FOR THE WHALE SHARK
(*Rhincodon typus*)**

(Prepared by Sea Shepherd Legal)

Summary:

The Mozambique Country Report - Implementation of the Convention on the Conservation of Migratory Species of Wild Animals (CMS) Concerted Action for the Whale Shark (*Rhincodon typus*) has been prepared by Sea Shepherd Legal (SSL) as part of its agreement to assist the Government of the Philippines and the CMS Secretariat with implementing the Concerted Action for the Whale Shark (UNEP/CMS/CoP12/doc.26.2.7).

The report provides the results of a review of protective legislation for the whale shark in Mozambique as addressed in CMS COP13 document 28.1.7(a).



MOZAMBIQUE COUNTRY REPORT

Implementation of the Convention on the Conservation of Migratory Species of Wild Animals (CMS) Concerted Action for the Whale Shark (*Rhincodon typus*)

Purpose

Sea Shepherd Legal (SSL) submits this Country Report as part of its agreement to assist the Government of the Philippines and the CMS Secretariat with implementing the Concerted Action for the Whale Shark (UNEP/CMS/CoP12/doc.26.2.7).

CMS Parties adopted the Concerted Action in November 2017 to respond to the global population decline of whale sharks. The CMS Secretariat noted a key concern was that protective legislation was lacking in at least seven “hotspots” of the whale shark’s 120 Range States, including Gabon, Madagascar, Mozambique, Pakistan, Peru, Portugal (Azores), and Tanzania. To support implementation of the Concerted Action, SSL is providing the Secretariat with (1) Country Reports for each of these seven hotspot Range States based on corresponding gap analyses and (2) an overarching Legislative Review and Recommendations for Implementation report applicable to all whale shark Range States.

SSL thanks the International Environmental Law Project (IELP) for its extensive assistance with this project. IELP is a legal clinic at Lewis & Clark Law School that works to develop, implement, and enforce international environmental law. IELP focuses on a range of issues, including wildlife conservation, climate change, and matters relating to trade and the environment, and provides support to the Secretariats of CMS and the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES).

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I. Overview of Legislation

Laws, Regulations, and Policies Reviewed*

- Law No. 5/2017 (Revokes, republishes, and amends Law No. 16/2014 “Law on the Protection, Conservation, and Sustainable Use of Biological Diversity”)
- Decree No. 34/2016 of August 24 (“CITES Regulations”)
- Law No. 4/96 (“Law of the Sea”)
- Decree No. 35/2007 (“Regulation of Commercial Maritime Transport”)
- Decree No. 21/2017 (“Regulation Establishing the National Regime Juridical Committee on the Use of Maritime Space”)
- Law No. 22/2013 (“Fisheries Law”)
- Law No. 43/2003 (“General Regulation on Maritime Fisheries”)
- Decree No. 74/2017 of December 29 (“Regulation on the Granting of Fishing Rights and Fishing Licenses”)
- Law n.º 20/1997 of October 1997 (Approving the Environment Act)
- Decree No. 45/2006 of 30 November 2006 (“Regulations for the Prevention of Pollution and Protection of the Marine and Coastal Environment”)
- Decree 89/2017 (“Conservation Biodiversity Law-Regulations”)
- Decree No. 88/2009 of December 31 (“Ecotourism Regulation”)
- Law n.º 4/2004 of June 17 (“Tourism Law”)

Potential Missing Legislation

- A list of CMS-listed species to which relevant legislation applies
- Bycatch regulations and requirements for safe release
- Legislation to implement MARPOL Annex V
- Management plans for protected areas and areas where whale sharks congregate

Preliminary Gap Assessment

Mozambique has numerous laws that provide the framework for protecting whale sharks and implementing the Concerted Action for Whale Sharks. However, it appears to be missing the following:

- A prohibition against taking whale sharks and other CMS Appendix I species
- Regulations to ensure the safe release of whale sharks caught in purse seine nets

* All reasonable attempts, including attempts to communicate with governmental officials, have been made to ensure that the laws reviewed in this country report are in force and that other relevant laws do not apply. Nonetheless, given the broad scope of the legislative review warranted by the Concerted Action for the Whale Shark, it is possible that not all laws, decrees, and other measures were located and assessed.

- Regulations prohibiting the dumping of fishing gear and nets as well as for the proper disposal of fishing gear and nets
- A requirement to make a non-detriment finding prior to export or introduction from the sea of whale shark specimens, under CITES
- Conservation or regional action plan for whale sharks
- Establishment of marine protected areas that include specific protections for whale sharks

II. CMS Implementing Legislation

Given that the whale shark is included in Appendix I¹ of the CMS,² Mozambique must prohibit the “taking” of members of that species.³ CMS defines “taking” broadly as “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.”⁴ To comply with CMS, Mozambique must prohibit all of these actions with regard to the whale shark in all areas under its jurisdiction, including on the high seas by vessels flying its flag.⁵ The only permissible exceptions to the prohibition against taking are for scientific purposes, enhancing propagation or survival of the species, accommodating traditional subsistence uses, and extraordinary circumstances.⁶ Additionally, any exception must be precise as to content, limited in space and time, and not operate to the disadvantage of the species.⁷

Mozambique’s Law n.º 16/2014 de of 20 June, as amended by Law n.º 5/2017, Law on Protection, Conservation and Sustainable Use of Biological Diversity (Biodiversity Law),⁸ applies throughout the national territory as well as waters under national jurisdiction.⁹ It directs the Council of Ministers to adopt a list of protected species.¹⁰ We have not been able to determine whether this list or any other law relevant to CMS has been adopted; Mozambique last submitted a CMS national report in 2011 but did not identify any relevant legislation.¹¹ In 2012, 54 tons of shark were caught.¹² While it is not known whether these were whale sharks, whale sharks are known to inhabit the waters off Mozambique.¹³ Absent such legislation, any taking of whale sharks would not be prohibited.

¹ CMS, Appendix I & II of CMS, effective 26 January 2018, available at <https://www.cms.int/en/page/appendix-i-ii-cms>.

² Convention on the Conservation of Migratory Species of Wild Animals, signed June 23, 1979, entered into force Nov. 1, 1983, 1651 UNTS 331, available at <http://www.cms.int/en/convention-text> [hereinafter CMS].

³ *Id.* at art. III(5).

⁴ *Id.* at art. I(1)(j).

⁵ *Id.* at art. I(1)(h).

⁶ *Id.* at art. III(5)(a)–(d).

⁷ *Id.* at art. III(5).

⁸ Law n.º 5/2017 amending and republishing Law n.º 16/2014, de of 20 June, Law on Protection, Conservation and Sustainable Use of Biological Diversity (Biodiversity Law), available at <http://extwprlegs1.fao.org/docs/pdf/moz168082.pdf>.

⁹ *Id.* at art. 2.

¹⁰ *Id.* at art. 46(1).

¹¹ Mozambique, National Report, UNEP/CMS/Inf.10.12.77, at 2, available at https://www.cms.int/sites/default/files/document/077_mozambique_e_0.pdf.

¹² Marcos A.M. Pereira et al., *Mozambique Marine Ecosystems Review*, 86, Tbl. 9–2 (2014), available at http://www.fondationensemble.org/wp-content/uploads/2014/12/Mozambique_Marine_Review_Final_12-01-2014.pdf.

¹³ Siyabona Africa, Whale Sharks and Manta Rays of Mozambique, http://www.mozambique.co.za/Marine_Life-travel/whale-sharks-manta-rays.html.

CMS Article III(4) also requires Parties to endeavor, as appropriate, to prevent, remove, or minimize the adverse effects of activities that seriously impede or prevent the migration of the species, and to prevent, reduce or control factors that are endangering or are likely to further endanger the species. Legislation relating to fisheries, habitat conservation, tourism, and pollution, which are assessed in the following sections, can all play a role in implementing Article III(4).

III. Fisheries Legislation

Targeted fishing, entanglement, and bycatch are three sources of significant mortality for whale sharks. Accordingly, regulation of fishing activities is essential for the species' conservation. National fisheries legislation can regulate the harvest of whale sharks through take prohibitions, catch limits, gear restrictions, and other strategies. Additionally, regulation of fishing gear is important because the use of purse seine nets, for example, can result in the bycatch of whale sharks, which can result in injury or death. Finally, the regulation and control of foreign fishing vessels is necessary to manage the marine resources of a country effectively.

A. Regulation of Marine Species Harvest

Mozambique clearly establishes jurisdiction over national and foreign vessels, including fishing vessels, throughout its territorial sea and exclusive economic zone (EEZ).¹⁴ In addition, Mozambique clearly regulates the activities of its fishers on the high seas.¹⁵ The law also grants authorities the right to retain vessels at a Mozambican port for inspection with relevant laws, including those relating to fisheries.¹⁶

The Fisheries Law declares fisheries resources within Mozambique's jurisdictional waters to be owned by the State¹⁷ and directs the State to manage and develop fisheries in Mozambique's jurisdictional waters.¹⁸ The State has broad authority to establish size restrictions, gear restrictions, conservation zones, and other measures designed to conserve and manage fish stocks.¹⁹ The Fisheries Law also requires registration of all fishing companies, fishing gear, and fishing vessels.²⁰ Additionally, fishing in Mozambique's jurisdictional waters requires a license, as does

¹⁴ Law n.º 4/96 of January 4 (Law of the Sea), at arts. 1(c), 2(1), 4, 9, 11, available at <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC022054/>. See also Law n.º 22/2013, Fisheries Law, art. 2, available at <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC128917/> [hereinafter Fisheries Law]; Decree n.º 43/2003 of December 10 on Marine Fisheries Regulations, arts. 3–5, available at <https://www.ecolex.org/details/legislation/decreo-no-432003-on-marine-fisheries-regulation-repmar-lex-faoc052143/?q=decreo+no.+43+of+2003%2C+mozambique> [hereinafter Fisheries Regulations]; Decree No. 74/2017 of December 29, art. 2, Regulation on the Granting of Fishing Rights and Fishing Licenses, available at <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC172331> [hereinafter Fishing Rights Regulations].

¹⁵ Fisheries Law, *supra* note 14, at art. 2.

¹⁶ *Id.* at art. 72.

¹⁷ *Id.* at art. 10.

¹⁸ *Id.* at arts. 12, 14. See also Law n.º 4/96, *supra* note 14, at art. 11(1) (stating that, within the exclusive economic zone, Mozambique has the authority to explore, exploit, conserve, and manage living and non-living resources).

¹⁹ Fisheries Law, *supra* note 14, at arts. 14–16, 48.

²⁰ *Id.* at art. 22.

fishing on the high seas by Mozambican nationals.²¹ Foreign fishers may fish in Mozambican waters only through a fishing agreement or contract.²² The Fisheries Law also prohibits the possession, transportation, storage, processing, and sale of any protected species,²³ and fishing rights may be extinguished if a species is in danger of extinction, if fishing constitutes a danger to the environment, or for other reasons.²⁴

It does not appear that Mozambique has fisheries legislation that manages whale sharks. Mozambique has reported that “[t]he lack of specific national strategies for sharks is still a challenge.”²⁵ Others have reported that shark fishing in Mozambique has been poorly reported.²⁶ Sightings of whale sharks in Inhambane Province have declined by 79% between 2005 and 2011.²⁷

B. Fishing Gear and Bycatch Regulation

The Ministry of Fisheries has authority to regulate the type of gear used by fishers²⁸ and a fishing license must specify the kind of gear that may be used.²⁹ The Ministry also has authority to regulate bycatch.³⁰ The production, importation, and sale of fishing nets not authorized for use is prohibited.³¹ However, that the Ministry has apparently not adopted rules for bycatch. It appears that Mozambique is considering new rules for introducing or strengthening rules relating to bycatch of sharks generally.³²

As a member of the Indian Ocean Tuna Commission (IOTC),³³ Mozambique must comply with the recommendations adopted by this regional fisheries management organization, which manages tuna and tuna-like species in the Indian Ocean.³⁴ More specifically, it must comply with IOTC measures and recommendations relating to fishing gear and the technical specifications

²¹ *Id.* at art. 39.

²² Fishing Rights Regulations, *supra* note 14, at art. 8(2).

²³ *Id.* at art. 14(2).

²⁴ *Id.* at art. 32.

²⁵ Mozambique National Report to the Scientific Committee of the Indian Ocean Tuna Commission, at 16 (2017), available at http://www.iotc.org/sites/default/files/documents/2017/11/IOTC-2017-SC20-NR18_-_Mozambique_Rev_1.pdf.

²⁶ Pereira et al., *supra* note 12, at 9.

²⁷ Proposal for the Inclusion of the Whale Shark (*Rhincodon typus*) in Appendix I of the Convention, UNEP/CMS/COP12/Doc.25.2.20, 7, available at https://www.cms.int/sites/default/files/document/cms_cop12_doc.25.1.20_listing-proposal-whale-shark-appI-Philippines-Israel-Sri%20Lanka_e.pdf.

²⁸ Fisheries Law, *supra* note 14, at art. 48.

²⁹ Fishing Rights Regulations, *supra* note 14, at arts. 9(2)(i), 16(1)(g).

³⁰ Fisheries Regulations, *supra* note 14, at art. 137.

³¹ Fisheries Law, *supra* note 14, at art. 71.

³² Diploma Ministerial n.º 162/2014, at Section 14.1, available at <http://extwprlegs1.fao.org/docs/pdf/moz137329.pdf>.

³³ The Indian Ocean Tuna Commission was established by the Agreement for the Establishment of the Indian Ocean Tuna Commission, Nov. 25, 1993, 1927 U.N.T.S. 329, available at <http://www.iotc.org/sites/default/files/documents/2012/5/25/IOTC%20Agreement.pdf> (entered into force Mar. 27, 1996) [hereinafter IOTC Convention]. For a list of IOTC members, see IOTC, Structure of the Commission, Commission Contracting Parties (Members), <http://iotc.org/about-iotc/structure-commission>.

³⁴ *Id.* at art. I.

thereof and all other technical measures applicable to fishing activities in the convention area, which includes Mozambique's jurisdictional waters.³⁵

One IOTC rule requires vessels that unintentionally encircle whale sharks in a purse seine net within the IOTC's convention area to take "all reasonable steps" to ensure the shark's safe release.³⁶ While taking these steps, vessels must also take into account crew safety and report the incident with details of the interaction and location of the encirclement, and take steps to ensure the animal's safe release.³⁷ Vessels using different gear types to fish tuna and tuna-like species associated with whale sharks must also report all interactions with whale sharks to the relevant authority.³⁸ However, IOTC members and cooperating non-members (collectively referred to as CPCs) are exempt from reporting whale shark interactions if they have national and state legislation for protecting whale sharks.³⁹ Nevertheless, Mozambique would not, of course, be exempt as it has yet to adopt such legislation.

Mozambique reports that it does not have a national purse seine fleet⁴⁰ without acknowledging that it should adopt legislation to ensure that foreign fleets also ensure the safe release of whale sharks by foreign-flagged vessels in its waters. However, Mozambique may be confused as to the difference between a whale shark and a cetacean. Specifically, in its 2017 IOTC report concerning implementation of IOTC Resolution 13/05 on the conservation of whale sharks, Mozambique reported that "[a]ccording to the national legislation the cetaceans are protected species. In the longliners, no interaction with cetaceans was observed."⁴¹

In addition, IOTC members must take the necessary measures to ensure that their fishers "fully utilize their *entire* catches of sharks."⁴² The IOTC defines "full utilization" as "retention by the fishing vessel of all parts of the shark excepting head, guts and skins, to the point of first landing."⁴³ Consistent with this requirement of full utilization, the recommendation further requires that CPCs ensure that the quantity of fins onboard their vessels total no more than 5% of

³⁵ The Convention Area is defined as follows: (*Continued on next page...*)

The area of competence of the Commission (hereinafter referred to as the "Area") shall be the Indian Ocean (defined for the purpose of this Agreement as being FAO statistical areas 51 and 57 as shown on the map set out in Annex A to this Agreement) and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing stocks that migrate into or out of the Indian Ocean.

Id. at art. II. For a map of the area, see IOTC, Competence: Area & Species, <http://www.iotc.org/about-iotc/competence>.

³⁶ IOTC, Conservation of Whale Sharks (*Rhincodon typus*), Resolution 13/05, ¶ 3 (2013), available at https://www.ccsbt.org/sites/ccsbt.org/files/userfiles/file/other_rfmo_measures/iotc/Resolution%2013_05.pdf.

³⁷ *Id.*

³⁸ *Id.* at ¶ 4.

³⁹ *Id.* at ¶ 9.

⁴⁰ Mozambique IOTC Report, *supra* note 25, at 25.

⁴¹ *Id.* at 25.

⁴² IOTC, *Conservation of Sharks Caught in Association with Fisheries Managed by IOTC*, Resolution 17/05, ¶ 2 (2017), available at http://www.iotc.org/sites/default/files/documents/compliance/cmm/iotc_cmm_1705.pdf.

⁴³ *Id.*

the weight of sharks onboard, prior to the first point of landing.⁴⁴ Mozambique reports catches of hammerhead and other sharks (but not whale sharks),⁴⁵ yet does not explain whether it has met the requirements of this IOTC measure.

It is possible that Mozambique includes rules relating to bycatch, safe release, and other measures in its fishing licenses. However, there is not any readily-available evidence demonstrating that it has enacted such rules or regulations.

C. Foreign Vessels Regulation

Mozambique reported that 30 foreign vessels (23 longliners and 7 purse seiners) were licensed to fish for tuna and tuna-like species in Mozambican waters in 2016.⁴⁶ As noted in Section III.A, Mozambique requires all vessels fishing in Mozambique waters to be licensed.

IV. Habitat Legislation

Protecting key habitat is essential for the conservation of whale sharks. Accordingly, the establishment of marine reserves and other protected areas and the development of conservation plans or regional action plans are critical steps that can help restore or maintain the conservation status of the species. Protection of resting, feeding, and breeding sites is essential for the conservation of a species. Providing these sites with special protection allows for better management of whale shark populations and better monitoring of species status.⁴⁷ As discussed below, such protections are apparently absent from the Mozambique regulatory scheme.

A. Protected Areas

Whale sharks (and mantas) are known to congregate along Mozambique's southern coast between Závora and Vilanculos.⁴⁸ Mozambique has at least five Marine Protected Areas (MPAs) covering 8,633 km².⁴⁹ Overall, whale sharks are poorly represented in Mozambique's MPA system.⁵⁰

Notably, the Biodiversity Decree,⁵¹ which implements the Biodiversity Law,⁵² allows for the protection of areas where extraction of resources is prohibited⁵³ and other types of protected

⁴⁴ *Id.* at ¶ 4.

⁴⁵ Mozambique IOTC Report, *supra* note 25, at 2.

⁴⁶ *Id.* at 6.

⁴⁷ See generally, Luke Warwick, Issues Brief: Protections for Threatened Migratory Sharks, available at <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/10/protections-for-threatened-migratory-sharks> ("Protecting migratory marine species and their habitats is a critical component of efforts to ensure the health of the world's oceans.").

⁴⁸ Pereiro et al., *supra* note 12, at 44.

⁴⁹ *Id.* at 80.

⁵⁰ *Id.*

⁵¹ Decree No. 89/2017 of December 29 [hereinafter Biodiversity Decree].

⁵² Article 6 of the Biodiversity Law directs the Council of Ministers to define policies that guide management of conservation areas. Biodiversity Law, *supra* note 8, at art. 6(2).

⁵³ Biodiversity Decree, *supra* note 51, at art. 6.

areas,⁵⁴ including those specifically designed to protect species.⁵⁵ The Council of Ministers is charged with designating most of these areas.⁵⁶ Buffer zones—transition zones designed to minimize pressures of human activities, protect ecological corridors, and achieve other environmental goals⁵⁷—must be established around integral nature reserves of a national park and special reserves.⁵⁸ A management plan must be prepared for each protected area.⁵⁹

Fishing is only prohibited in nature reserves,⁶⁰ although acts that may cause disturbances to the preservation of ecological processes, flora, fauna, and cultural heritage are prohibited in national parks and special reserves.⁶¹ In other areas, the extent to which fishing is allowed depends on the management plan.⁶² For example, several of the MPAs include some no-take zones and other areas where only local residents are allowed to fish, subject to harvest and gear restrictions.⁶³ However, there does not appear to be an MPA for which the entire coverage area has been designated as a no-take zone.

The Biodiversity Decree also includes provisions for restoration of habitat, regardless of whether that habitat exists within protected areas.⁶⁴ Restoration may occur whenever the damage or reduction in habitat or a population occurs that compromises their natural equilibrium.⁶⁵ For species, recovery must occur when a population of a threatened species falls below the minimum viable population or if its reduction has affected the male/female ratio.⁶⁶ Other ecosystem-based reasons are provided for mandating recovery.⁶⁷

B. Conservation Plan or Regional Action Plan

As noted in the preceding section, management plans are required for protected areas. Management plans for three of the MPAs were located. Of those plans, only the one for Parque Nacional do Arquipélago de Bazaruto (PNAB) included any substantive mention of whale sharks. While acknowledging that whale sharks (and 13 other marine species that inhabit the park) are classified as endangered by the International Union for the Conservation of Nature, the management plan observes that Mozambique does not protect marine megafauna species such as

⁵⁴ *Id.* at arts. 7, 9–13.

⁵⁵ *Id.* at art. 17 (sanctuaries).

⁵⁶ *Id.* at art. 20. Provincial governments and the municipal assembly have authority to designate certain types of protected areas, which are unlikely to be of relevance for whale sharks. *Id.* at art. 20(3)-(5).

⁵⁷ *Id.* at art. 37(3).

⁵⁸ *Id.* at art. 37(2).

⁵⁹ *Id.* at art. 66.

⁶⁰ *Id.* at art. 78(1).

⁶¹ *Id.* at art. 78(2)-(3).

⁶² *Id.* at art. 79.

⁶³ See, e.g. <http://www.mpatlas.org/mpa/sites/121/> (MPAtlas webpage describing Parque Nacional do Arquipélago de Bazaruto); see also <https://www.bazarutopark.org/pdf/Zone%20Regulations.pdf> (chart describing zonal restrictions in the MPA).

⁶⁴ *Id.* at art. 106.

⁶⁵ *Id.* at art. 106(1)(f).

⁶⁶ *Id.* at art. 107(1)(b).

⁶⁷ *Id.* at art. 107(1).

whale sharks.⁶⁸ The plan further acknowledges that, by not protecting such species, Mozambique is in violation of its commitments made as a CMS party – additionally recognizing the need to enact laws that protect these species given their “high biological, ecological and ecotourism value.”⁶⁹

V. Tourism

Many Range States rely on tourism as an important source of income and development. However, absent sensible regulation, tourism can have a negative impact on a species or its habitat. As such, national tourism legislation should take into account the potential for harm to the marine ecosystem by providing a framework for the licensing of different activities such as diving, fishing, or other boat-based activities. The Concerted Action for the Whale Shark emphasizes the need for “unified basic tourism guidelines to limit negative impacts from tourism interactions with the species.”⁷⁰

Mozambique does have some legislation regarding tourism and tourism infrastructure.⁷¹ For example, Decree No. 88/2009 of December 31 (Ecotourism Regulation) sets forth general principles governing ecotourism, requires the submission of environmental impact statements for ecotourism projects, mandates territorial planning to ensure sustainability, implements a licensing scheme, and imposes penalties for noncompliance.⁷² Additionally, other laws mention “ecotourism” as being part of their overall goals and objectives, but do not provide substantive regulatory language regarding tourism activities.⁷³ The Biodiversity Decree also requires tourism activities to be ecologically sustainable within protected areas and that permitted activities must be defined in a management plan.⁷⁴

Nonetheless, it does not appear that Mozambique is fulfilling these mandates. Whale sharks are an important aspect of diving tourism in Inhambane Province,⁷⁵ particularly at Praia do Tofo. A 2012 report, however, noted that “[t]his aggregation site in Mozambique is the only sizeable ‘hot-spot’ for the species in the world that presently has no species- or habitat level protection or focused management in place.”⁷⁶

⁶⁸ Plano de Maneio do Parque Nacional do Arquipélago de Bazaruto (PNAB) 2016, at 32.

⁶⁹ *Id.* at p.32 n.4.

⁷⁰ CMS, Concerted Action for the Whale Shark, UNEP/CMS/Concerted Action 12.7, at 2 (2017), *available at* http://www.cms.int/sites/default/files/document/cms_cop12_ca.12.7_whale%20shark_e.pdf.

⁷¹ *See, e.g.* Decree No. 88/2009 of December 31 [hereafter Ecotourism Regulation]; Law n.º 4/2004 of June 17, *available at* <http://www.anac.gov.mz/bio-arquivo/#1497448284089-42f8d2d2-f7da>.

⁷² *See*, Ecotourism Regulation, arts. 4, 7, 8, 29, 48, & 49.

⁷³ *See e.g.*, Biodiversity Law, *supra* note 8, at art. 12(2)(k) (defining one objective of conservation areas as the promotion of ecotourism); art. 17(2)(b) & (e) (stating that one purpose of national monuments is to promote ecotourism).

⁷⁴ Biodiversity Decree, *supra* note 51, at art. 80.

⁷⁵ Pereira et al., *supra* note 12, at 65.

⁷⁶ Peter J. Haskell, “Is Whale Shark Tourism Ecologically Sustainable in Mozambique?”, at 11 (2012), *available at* <https://www.rufford.org/files/Is%20whale%20shark%20tourism%20ecologically%20sustainable%20in%20Mozambique.doc>.

VI. MARPOL and Pollution Prevention

Pollution from fishing vessels can also have a negative impact on marine species, including whale sharks. In fact, the International Convention for the Prevention of Pollution from Ships (MARPOL) includes an array of provisions, protocols, and annexes, regulating and preventing pollution of the marine environment by ships from operational or accidental causes.⁷⁷ Annex V of MARPOL prohibits the disposal of plastics and other garbage, including fishing nets, into sea. More specifically, it prohibits

[D]ischarge into the sea of all plastics, including but not limited to synthetic ropes, synthetic fishing nets, plastic garbage bags and incinerator ashes from plastic products.^[78]

Accordingly, MARPOL parties must regulate the discharge of pollutants such as plastic, fishing gear, and other noxious substances that might affect the habitat of whale sharks specifically and the marine ecosystem generally.

A. Dumping of Fishing Gear and other Pollutants from Ships

Mozambique has ratified MARPOL and Annexes I through V.⁷⁹ Mozambique implements its MARPOL obligations through its general environmental law, which prohibits the production and deposition of any toxic and polluting substances in soils, subsoils, water or the atmosphere.⁸⁰ Decree No. 35/2007 of 14 August also states that vessels engaged in commercial or private maritime transport are subject to national legislation and international treaties to which Mozambique is a party.⁸¹ Mozambican law also grants the authorities the right to retain vessels at a Mozambican port for inspection with relevant laws, including those relating to the prevention of pollution.⁸²

Implementation of specific MARPOL requirements, however, is done primarily through Decree No. 45/2006 (Pollution Decree), which includes the regulations to prevent and limit

⁷⁷ For more about MARPOL, see Int'l Maritime Org., History of MARPOL (International Convention for the Prevention of Pollution from Ships), <http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofMARPOL/Pages/default.aspx>.

⁷⁸ Int'l Maritime Org., Resolution MEPC.201(62), Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (Revised MARPOL, Annex V), at Regulation 3 (adopted July 15, 2011; entered into force on 1 January 2013), available at [http://www.imo.org/en/OurWork/Environment/PollutionPrevention/Garbage/Documents/2014%20revision/RESOLUTION%20MEPC.201\(62\)%20Revised%20MARPOL%20Annex%20V.pdf](http://www.imo.org/en/OurWork/Environment/PollutionPrevention/Garbage/Documents/2014%20revision/RESOLUTION%20MEPC.201(62)%20Revised%20MARPOL%20Annex%20V.pdf).

⁷⁹ IMO, Status of Conventions: Excel Chart Listing Ratifications by State, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

⁸⁰ Law n.º 20/1997 of October 1997, art. 9, available at <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC015370>.

⁸¹ Decree n.º 35/2007 of 14 August, at art. 6, available at <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC111525>. The precise scope of this decree is difficult to discern. The provision requiring application of national and international law refers simply to “vessels.” However, Article 3 of the decree states that the regulation (decree) apply to national shipowners. Other provisions inconsistently refer to “shipowners” and “national shipowners.”

⁸² Law n.º 4/96, *supra* note 14, at art. 30.

pollution and illegal dumping by ships, among many other things.⁸³ This Pollution Decree applies to all legal persons conducting activities—including discharges from fishing vessels⁸⁴—that can harm, among other things, the environment and marine waters under the jurisdiction of Mozambique.⁸⁵ Vessels must, except under limited circumstances, deposit all wastes at a port reception facility.⁸⁶ It is also illegal to discharge harmful or dangerous substances, as well as oil and oily mixtures, into waters under Mozambican jurisdiction except as allowed by international law.⁸⁷ In addition, the Ministry for the Coordination of Environmental Action must take appropriate measures to prevent and control land-based discharges of harmful substances into the sea.⁸⁸ A number of standards, criteria, and exceptions apply.⁸⁹

While these laws and decrees cover discharges well, they may not regulate the disposal of plastics, nets, and other items covered by Annex V of MARPOL. The Pollution Decree specifically references Annexes I and II of MARPOL but not Annex V. That said, the requirements to deposit all waste at a port reception facility could be read to include MARPOL Annex V materials, even if that Annex is not expressly referenced in the law.

B. Additional Pollution Provisions

Mozambican law prohibits the production and deposition of any toxic and polluting substances in soils, subsoils, water or the atmosphere.⁹⁰ Mozambique also prohibits fishing or attempting to fish with explosives and toxic substances.⁹¹

VII. CITES

The whale shark (*Rhincodon typus*) is included in Appendix II of the Convention on International Trade in Endangered Species (CITES).⁹² The export of specimens of Appendix II species requires issuance of an export permit.⁹³ Prior to issuing an export permit, the State of export must determine that the trade will not be detrimental to the survival of the species, that the specimen was legally acquired, and, for any living specimen, that the specimen will be prepared and shipped in a way that minimizes the risk of injury, damage to health, or cruel treatment.⁹⁴

⁸³ Decree No. 45/2006 of 30 November 2006 on Regulations for the Prevention of Pollution and Protection of the Marine and Coastal Environment, art. 2, available at <http://www.fao.org/faolex/results/details/en/c/LEX-FAOC111422> [hereinafter Pollution Decree].

⁸⁴ “Vessels” is defined broadly to include any kind of floating construction. *Id.* at art. 1(22).

⁸⁵ *Id.* at art. 3. Military vessels and fisheries vessels conducting research are exempted. *Id.* at art. 4.

⁸⁶ *Id.* at art. 8(1).

⁸⁷ *Id.* at arts. 15, 18.

⁸⁸ *Id.* at art. 43.

⁸⁹ *Id.* at arts. 44–52.

⁹⁰ Law no. 20/1997, *supra* note 78, at art. 9.

⁹¹ Fisheries Law, *supra* note 14, at art. 50.

⁹² Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), signed Mar. 3, 1973, entered into force July 1, 1975, 27 UST 1087; 993 UNTS 243, available at: <http://www.cites.org/eng/disc/text.php> [hereinafter CITES]. For a complete list of all species listed on Appendix II, see *id.* at Appendices I, II, and III, valid from 4 April 2017, at <https://cites.org/eng/app/appendices.php>.

⁹³ CITES, *supra* note 92, at art. IV

⁹⁴ *Id.* at art. IV(2).

Additionally, when a vessel flagged by one State takes a specimen of a CITES-listed species in the marine environment beyond the jurisdiction of any State and transports that specimen into that same State, the State must issue an “introduction from the sea” (IFS) certificate.⁹⁵ For Appendix II specimens, the State of introduction must determine that the introduction will not be detrimental to the survival of the species involved and that any living specimen will be handled in a way that minimizes the risk of injury, damage to health or cruel treatment.⁹⁶

In order to implement these permit and certificate obligations, a Party must ensure that its domestic CITES legislation and regulations apply to Appendix II species. Further, a Party must ensure that its legislation and regulations cover “specimens,” as defined by CITES. Similarly, legislation or regulations must define international trade, as defined under CITES. Finally, the legislation or regulations must identify the prerequisites required by CITES prior to the issuance of any permit or certificate. The legislation or regulations may be stricter than CITES requires but may not be less strict as regards any CITES-listed species or aspect of the CITES permit regime.

Under the CITES national legislation project, a category 1 country is a Party that has designated at least one Management Authority and one Scientific Authority and has legislation that prohibits trade in specimens in violation of the Convention, penalizes such trade, and provides for the confiscation of specimens illegally traded or possessed.⁹⁷ Mozambique, a Party since 1981,⁹⁸ has made significant progress in recent years to improve its legislation,⁹⁹ but it is still listed as a priority country¹⁰⁰ with category 2 legislation,¹⁰¹ meaning it has implemented some but not all of the major requirements for adequate implementing legislation.

Generally, Mozambique adequately implements CITES provisions, but it does have some significant gaps. The Fisheries Law creates an obligation for the State to implement “relevant conventions”¹⁰² and the Biodiversity Law provides the State “shall take appropriate measures to ensure the application” of CITES provisions.¹⁰³ Mozambique has adopted CITES regulations to implement those appropriate measures, which apply to all persons and legal entities within the territory of Mozambique.¹⁰⁴

A. Designation of Management and Scientific Authorities

CITES Article IX requires that each Party designate “one or more Management Authorities competent to grant permits or certificates on behalf of that Party and one or more Scientific

⁹⁵ *Id.* at art. IV(6); CITES, *Introduction from the Sea*, Resolution Conf. 14.6 (Rev. CoP16) (clarifying the meaning of “introduction from the sea”).

⁹⁶ CITES, *supra* note 92, at art. IV(6).

⁹⁷ CITES, National Laws for the Implementation of the Convention: Report of the Secretariat, SC69 Doc. 27 (Rev. 1), ¶ 2 (2017), at <https://cites.org/sites/default/files/eng/com/sc/69/E-SC69-27-R1.pdf>.

⁹⁸ CITES, List of Contracting Parties, <https://cites.org/eng/disc/parties/chronolo.php>.

⁹⁹ *Id.* at ¶ 20.

¹⁰⁰ *Id.* at ¶ 43.

¹⁰¹ CITES, Status of Legislative Progress for Implementing CITES, CoP17 Doc. 22, Annex 3 (Rev.1), at 7 (2016), at <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-22-A3-R1.pdf>.

¹⁰² Fisheries Law, *supra* note 14, at art. 6(4).

¹⁰³ Biodiversity Law, *supra* note 8, at art. 47(1).

¹⁰⁴ Decree No. 34/2016 of August 24, art. 2 [hereinafter CITES Regulations].

Authorities.”¹⁰⁵ The Ministry overseeing conservation areas is designated as the Management Authority¹⁰⁶ and Scientific Authority.¹⁰⁷ The CITES country profile for Mozambique indicates that the Management and Scientific Authorities have been designated. In particular, the National Administration of the Conservation Areas of the Ministry of Land is the Management Authority and a professor at the University Eduardo Mondlane is the Scientific Authority.¹⁰⁸

B. Coverage of Whale Shark under National Legislation

Mozambique appears to include whale sharks in its CITES regulations. The regulations were published in 2016, at which time the whale shark was already included in Appendix II. The CITES regulations state that the Appendices are attached to the regulations¹⁰⁹ (although the version sent to me by Mozambican authorities did not include any of the annexes). Law No. 43/2003 provides Annexes with protected fish species listed at the end, but it does not include the whale shark. While the provisions in the Fisheries Law and the Biodiversity Law do not expressly or implicitly incorporate the CITES Appendices, the Biodiversity Law does direct the State to take appropriate measures to apply CITES and for the competent authorities to determine the import and export mechanisms for “live and dead species.”¹¹⁰ It also imposes prison terms and fines for those who remove, import, or export CITES-listed specimens without legal permission,¹¹¹ but relevant legislation, including Mozambique’s CITES regulations, does not appear to identify the species covered by those regulations.

C. Coverage of “Specimens” as Defined by CITES

Given that CITES regulates trade in “specimens” of listed species, the term “specimen” is one of the most important in CITES. CITES defines “specimen” as any whole plant or animal, whether dead or alive, plus “any readily recognizable parts or derivatives.”¹¹² The Parties further defined the term “readily recognizable part or derivative” in Resolution Conf. 9.6 (Rev. CoP16) to include “any specimen which appears from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be a part or derivative of an animal or plant of a species included in the Appendices.”¹¹³ Applying this definition to whale sharks, “specimen” covers meat, skin, fins, jaws, teeth, and any other part. Trade in these parts triggers the need for CITES permits. As such, to regulate whale sharks consistently with CITES, a Party’s legislation must define “specimen” broadly.

¹⁰⁵ CITES, *supra* note 92, at art. IX.

¹⁰⁶ CITES Regulations, *supra* note 104, at art. 5(1).

¹⁰⁷ *Id.* at art. 6.

¹⁰⁸ CITES, Mozambique, <https://cites.org/eng/cms/index.php/component/cp/country/MZ>.

¹⁰⁹ CITES Regulations, *supra* note 104, at art. 1(2).

¹¹⁰ Biodiversity Law, *supra* note 8, at art. 47.

¹¹¹ *Id.* at art. 62(1)(a)–(c).

¹¹² CITES, *supra* note 92, at art. I(b).

¹¹³ CITES, *Trade in Readily Recognizable Parts and Derivatives*, Resolution Conf. 9.6 (Rev. CoP16), available at <https://cites.org/sites/default/files/document/E-Res-09-06-R16.pdf>.

Mozambique’s CITES regulations very likely include a definition of “specimen;” all definitions are included in a glossary appended to the regulations. However, attempts to obtain the annexes to the regulations were unsuccessful.

The Biodiversity Law does define “specimen.” While this definition is not controlling, it may provide some insight into the definition included in the CITES regulation. The Biodiversity Law defines “specimen” as:

[A] specimen or sample of any material or living being. More specifically, it individually designates an identifiable part, used as a representative sample for the study of the properties of a population of the species or subspecies to which it belongs.^[114]

This definition is not as broad as the CITES definition. It does not expressly include “dead” specimens, although potentially “any material” could cover dead specimens. In addition, while it incorporates reference to an “identifiable” part of a species, it does not include a reference to labels or other means of identifying a specimen.

D. Authority to Issue Adequate IFS Certificates and Export Permits

The heart of the CITES permit regime is the findings required prior to issuance of each permit. The findings establish the terms under which trade in specimens of CITES-listed species is legal. As such, in order to properly regulate trade—and to prohibit trade in violation of CITES—legislation or regulations must make clear that permits may only be issued by the proper authority after the necessary findings have been made. In order to adequately protect its whale shark population, a Party must properly issue export permits and IFS certificates.¹¹⁵

The listing of a species in a particular Appendix determines the permit rules that apply to trade in that species. Trade in specimens of Appendix II species, such as whale sharks, requires issuance of an export permit or an IFS certificate.¹¹⁶ If a specimen is caught in the territorial sea or EEZ of a coastal State and the specimen is exported to another State, whether directly from the vessel that caught the specimen or after landing in the coastal State, then the State in which the specimen was caught must issue an export permit. Before an export permit may be issued:

- the *Scientific Authority* must advise that the export will not be detrimental to the survival of the species involved;
- the *Management Authority* must be satisfied that the specimen was not obtained in contravention of domestic law; and

¹¹⁴ Biodiversity Law, *supra* note 8, at Glossary, “espécimen.”

¹¹⁵ CITES provides that “trade” means import, export, re-export, and introduction from the sea. CITES, *supra* note 87, at art. I(c). The term “introduction from the sea” is further defined as “transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State.”

¹¹⁶ CITES, *supra* note 92, at art. IV. *Id.* at art. I(e).

- the *Management Authority* must be satisfied that living specimens will be prepared and shipped in a manner that minimizes the risk of injury, damage to health, or cruel treatment.¹¹⁷

Mozambique's CITES regulations implement most of the CITES permit requirements. Prior to issuance of an export permit for an Appendix II specimen, the Management Authority must ensure that the specimen was legally obtained¹¹⁸ and that any living specimen will be transported consistent with the most recent edition of the Regulations of the International Association of Live Animal Air Carriers (IATA).¹¹⁹ The CITES Parties have recommended that the IATA Regulations be followed for transport of living animal specimens.¹²⁰ The CITES regulations, however, omit the requirement that the Management Authority make a finding that the export will not be detrimental to the survival of the species involved (the "non-detriment finding"). The omission is peculiar because the CITES Regulations require the Scientific Authority to make a non-detriment finding prior to introductions from the sea¹²¹ and prior to importation of an Appendix I specimen.¹²² The Mozambique CITES regulations meet the requirements for IFS of Appendix II specimens except, again, for omitting the non-detriment finding requirement.¹²³

¹¹⁷ *Id.* at art. IV(2).

¹¹⁸ CITES Regulations, *supra* note 104, at art. 12(4)(a).

¹¹⁹ *Id.* at art. 12(4)(b).

¹²⁰ CITES, *Transport of Live Specimens*, Resolution Conf. 10.21 (Rev. CoP16), ¶ 2 (1997).

¹²¹ CITES Regulations, *supra* note 104, at art. 15(1)(a).

¹²² *Id.* at art. 13(2)(a).

¹²³ *Id.* at art.15.