

THE LEGAL FRAMEWORK OF WHALE WATCHING IN THE INDIAN OCEAN



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I. Introduction

Whales have long sparked admiration and fascination among humanity, but their history is marked by a fierce struggle for survival, from the dark days of whaling to the emergence of whale watching—a crucial turning point in the conservation of these iconic species.

While whales are now observed in large numbers near the coasts of certain countries and territories in the Indian Ocean during their migration period, this has not always been the case.

Whaling, a practice spanning centuries, has left an indelible mark on maritime history, shaping the destinies of nations and triggering global controversies. Once considered a source of wealth and essential elements, whaling has evolved into a symbol of the dramatic consequences of unregulated exploitation of marine resources and emblematic marine species.

Initially motivated by subsistence needs, coastal populations hunted whales for food and utilized various parts of the animal for practical purposes, such as crafting tools from whale bones. Over the centuries, whaling evolved into a significant commercial activity due to the demand for whale oil, used for lighting, manufacturing margarine, soap, and even nitroglycerin, a key component of dynamite. Various whale species were hunted, including the gray whale, blue whale, humpback whale, right whale, and others. Some species were more prized than others due to the amount of oil they could provide.

Throughout the centuries, whaling methods underwent a significant transformation. Initially, whalers used hand harpoons from sailboats to pursue cetaceans. However, over time, more efficient hunting techniques emerged, such as the use of harpoon cannons and the deployment of factory ships for whale processing on the high seas. This evolution paved the way for extensive exploitation of whales, not only for the production of their oil but also for the consumption of their meat, especially in Japan following World War II.

Whaling has led to the massive decline of numerous whale populations, prompting growing concerns about the conservation of these species. Faced with the urgent need to halt the decline in whale populations, a Conference involving nineteen States and the Food and Agriculture Organization of the United Nations (FAO) was held in Washington. During this Conference, the U.S. Secretary of State notably announced the establishment of a "permanent and effective international body responsible for regulating the whaling industry". Following this Conference,

the International Convention for the Regulation of Whaling (ICRW) was adopted in 1946. It succeeded in gaining the support of many whaling nations by establishing the International Whaling Commission (IWC). According to some States, this Commission was created to promote the sustainable development of the whaling industry.

In response to concerns arising from whaling and declining stocks, several countries had then banned or regulated whaling. The most significant prohibition was adopted within the framework of the ICRW in 1986, through the establishment of a moratorium prohibiting commercial whaling. This moratorium has allowed whale stocks to recover and has contributed to preventing certain species from being critically endangered.

However, although whaling is now limited to a small number of nations persisting in this practice, whales face other anthropogenic threats that require appropriate management for the preservation of these mammals.

For example, during their migration, whales are at risk of collisions with ships. This phenomenon poses a major threat to these cetaceans. Due to the increased maritime traffic in areas where whales travel, the chances of collisions have significantly risen, jeopardizing the lives of many cetacean species. Moreover, when whales find themselves in the path of merchant ships, cargo vessels, or even cruise ships, maneuvering becomes very challenging. This is partly due to the fact that whales are often spotted at the last moment, and also because diverting a multi-ton ship over short distances is not easy. These impacts can result in severe injuries and often the death of whales.

To minimize these collisions, efforts have been deployed in some regions of the world. Speed restriction zones, areas to avoid during whale migrations, traffic separation schemes, and observation systems have been developed to help ships avoid these mammals.

The acoustic disturbances associated with maritime traffic also pose significant threats to whales that use low-frequency sounds for vital activities such as reproduction. Acoustic disturbances can also result from activities such as seismic surveys, maritime operations, or the use of sonars. Such disturbances can affect both individual whales and entire populations.

Industrial fishing, in addition to ship collisions, also poses a risk of whale entanglement in fishing gear. Nets, fishing lines, and other equipment, sometimes abandoned at sea, represent a potential danger for whales that may get entangled during their migrations. The risk of

accidental captures, especially during certain fishing techniques that can cause serious injuries or death to whales, is also very real. To mitigate these risks of entanglement and accidental captures, more selective fishing technologies now exist, incorporating marine mammal detection devices to avoid areas where whales are present. These initiatives aim to protect both whales and the fishing industry by reducing losses and environmental impacts.

Finally, among the growing threats to whales are those resulting from the development of whale watching. This activity involves observing whales in their natural environment, not exclusively from the sea. Based on Erich Hoyt's definition, a researcher specializing in the conservation of cetaceans, whale watching can be conducted from a nautical, terrestrial, or aerial base. Sea-based observation from a boat is particularly common in the waters of certain countries and territories in the southwestern and southeastern Indian Ocean. Indeed, during the austral winter, whales migrate from Antarctica to the southwestern and southeastern Indian Ocean near the coasts of these regions to reproduce and give birth. In the southwestern Indian Ocean region (covering South Africa, Mozambique, Madagascar, Mayotte, the Comoros, and the Mascarenes), humpback whales are the main focus of whale watching. This is also the case in the southeastern Indian Ocean, especially on the west coast of Australia, which hosts many humpback whales and southern right whales. In the northern Indian Ocean region, whale watching is also booming, especially in Sri Lanka, which hosts blue whales off Mirissa, and where Bryde's whales or sperm whales can also be spotted.

While threats resulting from whale watching may sometimes escape the perception of practitioners of this activity, they remain very real and, more than ever, current. Approaching ships or swimming with whales can disturb these mammals at a critical stage of their lives, especially during periods of nursing or reproduction. This activity, which has considerably developed in recent years, also increases the risks of collisions between boats and whales, often accompanied by their calves near the coasts.

To preserve the tranquility of cetaceans and ensure the safety of practitioners, it is imperative to regulate whale watching activities. Some States in the Indian Ocean have taken the initiative to regulate the practice by implementing various rules. However, these measures sometimes prove insufficient to fully achieve the objective of preserving the tranquility of cetaceans.

II. The international legal framework of whale watching

Some States and territories in the southwest Indian Ocean have developed various tools within their domestic legal frameworks to regulate whale watching activities, with varying degrees of normativity. The regional normative landscape is illustrated by both non-binding soft law instruments and binding hard law instruments.

Hard law consists of commands and prohibitions, found at the international level in conventions, treaties, protocols, and at the national level in laws. It differs from soft law, such as recommendations from international organizations or non-conventional coordinated instruments (declarations or final acts of Conferences, etc.). These norms, usually residing in written instruments (unilateral or collective), lack binding force compared to hard law. Nevertheless, soft law is not devoid of legal effects.

In the context of regulating whale watching, there is no internationally legally binding norm (hard law). In other words, no international convention regulates this activity in its provisions. This lack of regulation is explained in part by the fact that only a few States are directly concerned with this activity and also because the management of it varies considerably from one State to another. Thus, each country practicing whale watching has developed its own rules (hard or soft law) to regulate this activity.

However, thanks to certain international organizations, there are numerous international instruments falling under soft law aimed at better regulating the practice of whale watching.

A. The recommendations of international organizations for whale watching activity

In the Indian Ocean, two international organizations stand out in the development of "recommendatory" law (i.e., in the field of soft law) related to the practice of whale watching: the International Whaling Commission (IWC) and the Indian Ocean Rim Association (IORA).

1. The global influence of the International Whaling Commission

The IWC was established by the International Convention for the Regulation of Whaling (ICRW) adopted in Washington on December 2, 1946, and entered into force on November 10, 1948. Initially, its mandate included both the management of whaling and the conservation of whales. However, over time, the IWC's mandate has evolved significantly to address new concerns affecting whales. Thus, the IWC's work program now includes issues such as bycatch and entanglements, ship strikes, noise pollution, pollution and debris, as well as sustainable whale watching. The IWC has been involved in whale watching since 1975 and has adopted several resolutions on this sector (particularly in 1993 and 1994) before establishing a permanent sub-committee on whale watching under the auspices of the Scientific Committee in 1998. The sub-committee works on the identification and assessment of the potential impacts of whale watching. Since 2018, in collaboration with the Convention on the Conservation of Migratory Species of Wild Animals (CMS), the IWC has developed the Whale Watching Handbook, an online, evolving tool that includes an interactive map of whale watching worldwide, a directory of national and regional regulations, case studies, resources for education on board ships, and a searchable database of scientific literature. New content is regularly integrated, taking into account the evolving legal frameworks of States, and currently, it includes more than five hundred reports and articles, regulations from seventy States related to whale watching, and over twenty case studies. The Handbook also incorporates six IORA member states (France, Sri Lanka, Oman, Australia, Kenya, and South Africa), where the regulations for whale watching and the species encountered in these States are listed.



Whale Watching Handbook
(Source: <https://wwhandbook.iwc.int>)

In addition to the Whale Watching Handbook, in 2022, the IWC revised a document from 1996 titled "General Principles for Whale Watching." These principles were developed in collaboration with scientific experts, conservationists, and policymakers to minimize the negative impacts of whale watching. Through its resolutions, the Handbook, the document "General Principles for Whale Watching," and the work of the Scientific Committee, the IWC significantly contributes to promoting a respectful practice of whale watching. Its global influence enables it to play a central role in advocating for best practices and reaching the numerous member states of the ICRW.

2. The regional influence of IORA in the Indian Ocean

The Indian Ocean is marked not just by the surge in whale watching activities but also by the varied legal framework, encompassing both soft and binding regulations. At times, there is no regulation in place.

Given the significant tourism potential and ecological challenges associated with whale watching, a workshop titled "Development of Sustainable Whale and Dolphin Watching Tourism in the Indian Ocean Region" took place in Colombo, Sri Lanka, in 2016. The objective

was to bring together Indian Ocean States to collaborate and share best practices in whale watching. During this workshop, the desire to establish a sustainable whale and dolphin watching tourism network for the Indian Ocean region emerged. This network was eventually approved during the IORA Committee of Senior Officials meeting in May 2016 and the Trade and Investment Working Group meetings in 2016 and 2017. All IORA member States are part of the network, even if not all are involved in whale watching activities. They also take turns in coordinating the network.

The network aims to provide a regional forum for various stakeholders to facilitate the exchange and sharing of national experiences and expertise, with the goal of identifying best practices in responsible whale watching. Recommendations for adopting best practices in whale watching are also among the network's objectives. To achieve this, the network intends to enhance scientific, academic, and technical cooperation by connecting whale and dolphin research in IORA member States and encouraging collaborations between institutions. By developing guidelines, IORA institutions create soft law to guide member States in establishing rules (hard law or soft law) to responsibly regulate whale watching activities. IORA's role is particularly relevant in the Indian Ocean, where whale watching activities are growing significantly in certain regions, and regulation sometimes lags behind.

The IORA network proves valuable by bringing together coastal States of the Indian Ocean, enriching itself with scientific contributions and specific insights into whale-watching practices in the Indian Ocean region. This approach allows the IORA network to consider the unique characteristics of each territory or country in the Indian Ocean region in its analyses.

B. The international certifications

In addition to the work carried out by the IWC and the IORA, international certifications emerge as another form of international regulation for whale watching activities. Indeed, certifications apply to whale watching operators aiming to distinguish themselves through responsible tourism. They commit to adhering to specific rules designed to ensure a responsible activity after undergoing a paid training. In return for this commitment, operators can promote this certification and are sometimes prioritized by tourists seeking an environmentally responsible activity. The "High-Quality Whale Watching®" (HQWW) label was established in 2014 to

support whale watching operators seeking to ensure a respectful approach to whales during their excursions.



« High Quality Whale-Watching® » Label
(Source : <http://www.whale-watching-label.com>)

This label was developed within the framework of the Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea, and Contiguous Atlantic Area (ACCOBAMS) in collaboration with the Pelagos Sanctuary. It stems from the observation that the code of conduct for approaching cetaceans, established by the Pelagos Sanctuary, was often disregarded and not well-known among sea users.

The HQWW label incorporates numerous rules in its code of conduct to ensure a respectful approach to whales, including a prohibition on swimming with whales and restrictions on approaching animals closer than one hundred meters, taking into account the presence of calves during observations.

Whale watching operators seeking this certification must undergo a three-day training to raise awareness of the impacts of the activity on cetaceans, enabling them to contribute better to their preservation during sea excursions.

This certification is available to operators from the twenty-four ACCOBAMS member States. Although this regional agreement does not seem to cover the Indian Ocean, France, as a member State to the Convention, allows french operators to request this certification, even within its overseas territories such as Mayotte and La Réunion in the Indian Ocean. Mayotte was one of the first regions to test the system between 2018 and 2022, certifying a few operators, but the

label has not been implemented on this territory since 2022. As for La Réunion, the HQWW label has not gained popularity, possibly because swimming with cetaceans is permitted and practiced by many whale watching companies, while the label prohibits this practice.

Another certification, however, has gained more traction in the Indian Ocean. It is the Responsible Whale Watching Certification issued by the non-governmental organization World Cetacean Alliance (WCA), based in Sussex, England.



Responsible Whale watching Certification
(Source : <https://worldcetaceanalliance.org>)

The NGO was created in 2013 and has established numerous partnerships with scientists, passionate individuals, and operators eager to promote a respectful approach to cetaceans.

The NGO provides comprehensive guidelines for whale watching activities to ensure they are conducted with the utmost respect for marine mammals. It also offers training for operators seeking certification. Unlike the HQWW label, swimming with cetaceans is allowed but regulated to minimize its impact on the animals. In the Indian Ocean, several operators have pursued this certification. As of 2023, four operators in Australia, five in Mozambique, and three in South Africa are certified by the WCA. In Mauritius, two operators are not certified but have practices recognized as responsible by the WCA.

It is crucial to note that the choice of certification must align with the current national legislation (hard law). Therefore, an operator seeking WCA certification, which allows swimming with

cetaceans in strict adherence to animal welfare, cannot provide this experience if national regulations prohibit it.

However, the situation differs for an operator looking to restrict their activities by opting for a certification like the HQWW label, which prohibits swimming with cetaceans, even if national regulations permit such activity. Once certified, the operator commits not to offer swimming with cetaceans.

III. The legal framework of whale watching by the Indian Ocean States

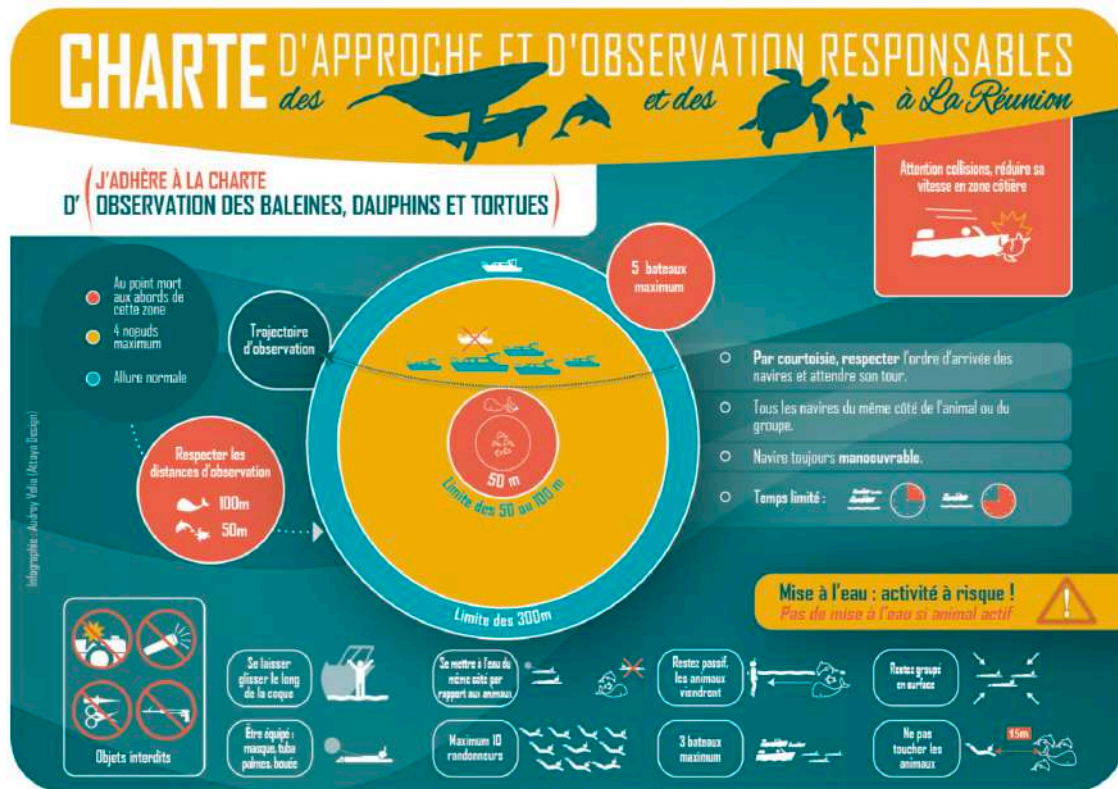
The Indian Ocean stands out for its diversity of States and territories, each having specific rules, more or less developed, regarding whale watching. Some States have a particularly elaborate legal framework, including legally binding rules (hard law) and sanctions for non-compliance, while others are still in the preliminary stages of developing their legal framework.

Several States and territories in the Indian Ocean where whale watching is practiced have been chosen to illustrate this point.

A. A comprehensive legal framework of whale watching

1. France (Reunion Island - Mayotte)

In Reunion Island, there were no binding rules regarding whale watching until the prefectural decree of June 12, 2019, regulating the approach and observation of cetaceans, which has since been replaced by another regulation. Before this regulation, only a charter for approaching cetaceans was in place to raise awareness among sea users about this practice.



Charter for Responsible Approach and Observation of Whales, Dolphins, and Turtles
(Source : CEDTM)

The charter remains in effect and proves particularly useful in guiding sea users, especially non-professionals, in the practice of whale watching. In addition to the charter, the local prefectural decree of July 7, 2021, now regulates this activity on the island. This decree establishes specific rules, including defining a quiet period during which cetacean observation is only allowed from 9 am to 6 pm, while maintaining a distance of one hundred meters from the whales.

Entering the water with cetaceans is limited from 9 am to 4 pm, under certain conditions. It should be noted that approaching within one hundred meters is strictly prohibited in the Marine Reserve zone, located west of the island, thus making swimming with whales and dolphins at this distance impossible.

Outside the Marine Reserve, entering the water is still possible in the presence of cetaceans. This restriction stems from the ministerial decree of September 3, 2020, adopted at the national level, to which local regulations must comply. According to this ministerial decree, swimming with cetaceans is prohibited in all french marine protected areas. This prohibition has been

incorporated into local regulations, allowing only entering the water with cetaceans outside the Marine Reserve.

In Reunion Island, whale watching can be practiced without requiring any specific diploma or training. In this regard, the rental of boats by individuals, in the presence of a person holding a boat license, is a widespread practice.

The adoption of the ministerial decree of September 3, 2020, at the national level had more significant repercussions in Mayotte, another french territory. Indeed, unlike Reunion Island, Mayotte is surrounded by a vast marine protected area, 'the Mayotte Marine Natural Park,' which covers the entire french exclusive economic zone. This means for Mayotte operators that it is impossible to engage in water activities with whales and dolphins or approach them within one hundred meters.

Similarly to Reunion Island, whale watching in Mayotte does not require any specific training or diploma.

2. Mauritius Island

Mauritius government regulates whale watching activities through the "Tourism Authority (Dolphin and Whale Watching) Regulations" of 2012. Only boat captains who have undergone training and obtained a certificate are authorized to conduct commercial whale watching activities. This certificate is obtained after a two-day training that provides knowledge about dolphins and whales, instructs on the appropriate behavior in the presence of cetaceans, and recommends maneuvers to be performed with the vessel. A captain without this certificate cannot receive payment for whale watching activities, risking both legal consequences and unfair competition. The binding Mauritian law restricts commercial whale watching to trained individuals but does not explicitly prohibit uncertified individuals from engaging in whale watching without remuneration. The practical implementation of this rule, however, remains challenging, as it implies that a non-certified captain offering paid sea trips cannot stop at sea to observe a group of whales, which may be difficult to adhere to.

Mauritian regulations prohibit approaching whales within one hundred meters and swimming with them, regardless of whether the activity is conducted professionally or on a non-profit basis.

3. Madagascar

Madagascar adopted binding regulations for whale watching as early as 2000. The country set an example by issuing an interministerial decree establishing regulatory provisions for the commercial observation of humpback whales.

Commercial whale-watching activities are strictly regulated. A permit to conduct the activity must be requested from the Ministry of Tourism, where an interministerial commission reviews the application. If the response is positive, the permit is valid for one year. However, Article 20 of the interministerial decree specifies that an authorized guide from the competent authority representing the Ministry of Tourism must be present on the boat during each outing dedicated to the commercial observation of whales. Certified ecovolunteers from the NGO Cétamada undertake this role.

Regarding the approach to whales, the Malagasy decree provides various options depending on the number of individuals and the presence of a calf. Similar to other States in the region that have regulated whale watching, a distance of one hundred meters must be maintained between the boat and a single whale or a pair. Beyond four individuals or if a whale is with its calf, the minimum distance to be respected is two hundred meters. A code of conduct for approaching cetaceans exists alongside the interministerial decree.



Charter for responsible marine mammal watching
(Source : Cétamada)

In Madagascar, the interministerial decree prohibits swimming with whales. However, by only establishing regulatory provisions for the commercial observation of whales, the decree raises the question of swimming activities conducted in a non-commercial context. The provisions of the decree regulating whale watching for commercial purposes do not seem to apply to recreational boaters undertaking whale watching trips, even in terms of swimming with cetaceans.

4. South Africa

In South Africa, whale watching activities are regulated by the Marine Living Resources Act of 1998, which has been amended several times and was notably strengthened by the adoption of Maritime Notice 11 in 2008. According to these regulations, whale watching operators are only allowed to conduct this activity after obtaining a specific permit. The competent authority for issuing these permits is the Ministry of Environment, Forestry, and Fisheries.

Permits are granted for a twelve-month period and can be renewed annually, provided certain conditions are met, such as the obligation to have a qualified guide on board for each outing. Permit-holding operators also commit to adhering to a code of conduct that includes approach protocols. In this context, operators with permits are allowed to approach whales at a minimum distance of fifty meters. In the absence of a permit, the minimum distance to be observed is three hundred meters. The legislation also prohibits anyone without a permit from offering whale watching services or advertising them.

Since the regulation of whale watching by the Marine Living Resources Act in 1998, swimming with cetaceans has been prohibited.

5. Australia

The Australian government regulates whale-watching activities at the national level through the Environment Protection and Biodiversity Conservation Regulations of 2000 (EPBC Regulations).

These legally binding rules apply to a specific area defined by the Environment Protection and Biodiversity Conservation Act of 1999 (EPBC Act). This legislation enabled the creation of a whale sanctuary surrounding Australia, covering Commonwealth waters, which extend from 3 nautical miles to 200 nautical miles (limit of the exclusive economic zone) from the coast. Within this sanctuary, all cetaceans are protected by law.

The nationally defined rules for whale watching (EPBC Regulations) only apply in the whale sanctuary waters, i.e., Commonwealth waters, from 3 nautical miles off the coast. In this zone, certain motorized vessels, such as jet skis, must not approach within 300 meters of whales. Other vessels, however, are allowed to approach up to a distance of 100 meters. Swimming with whales is not recommended but is permitted under certain conditions.

In coastal waters, up to 3 nautical miles, it is the Australian States and territories that are responsible for regulating whale watching at the local level. To ensure some consistency, governments are guided in developing their regulations by comprehensive guidelines consolidated in the document "Australian National Guidelines for Whale and Dolphin Watching" of 2017. This recommendatory text, replacing the previous guidelines of 2005, was

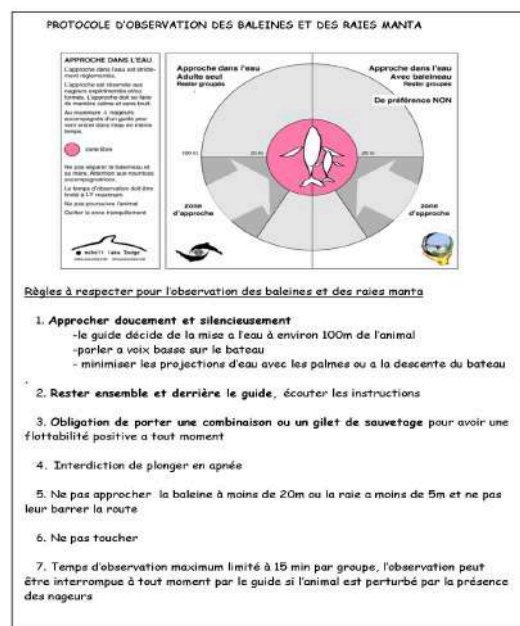
developed nationally in consultation with the governments of Australian States and territories, as well as with whale watching operators.

In a coordinated effort, Australia has thus established strict regulations to oversee whale watching, both nationally in the whale sanctuary waters and in coastal waters, ensuring the protection of cetaceans while allowing for a responsible and environmentally respectful observation activity.

B. An incomplete legal framework of whale watching

1. The Comoros

In some States of the Indian Ocean, the legal framework for whale watching remains incomplete. The practice of this activity is primarily guided by soft law, such as codes of conduct, designed to steer sea users. An illustrative example is found in the Comoros, which has a "protocol for approaching whales and manta rays." This code of conduct does not specifically focus on whale watching. It should evolve to better address the inherent risks associated with whale watching, especially during the migration of humpback whales in the southwest Indian Ocean region, where they are often accompanied by their calves.



Whale and Manta Ray Observation Protocol (Source : Moheli Marine Park)

The "protocol" has been in existence since 2001 but has been updated, with the latest version dating back to 2018. It contains few rules and primarily focuses on the approach to whales during swimming. The rules outlined in the "protocol" follow a simple pattern, recommending not to approach whales closer than 20 meters while swimming. It is also suggested that swimmers be accompanied by a guide, although there are no further details provided regarding the guide's qualifications.

2. Seychelles

To our knowledge, there are no rules regulating whale watching in Seychelles. The practice is not as developed as in islands further south, such as Reunion Island, because humpback whales, in particular, are less common there, although some operators offer this activity. However, swimming with whale sharks is regulated by a comprehensive code of conduct known as "the whale shark encounter code".

3. Mozambique

Mozambique has not regulated the practice of whale watching within a legislative framework. To address this gap, codes of conduct have been developed to guide sea users toward responsible cetacean observation practices.

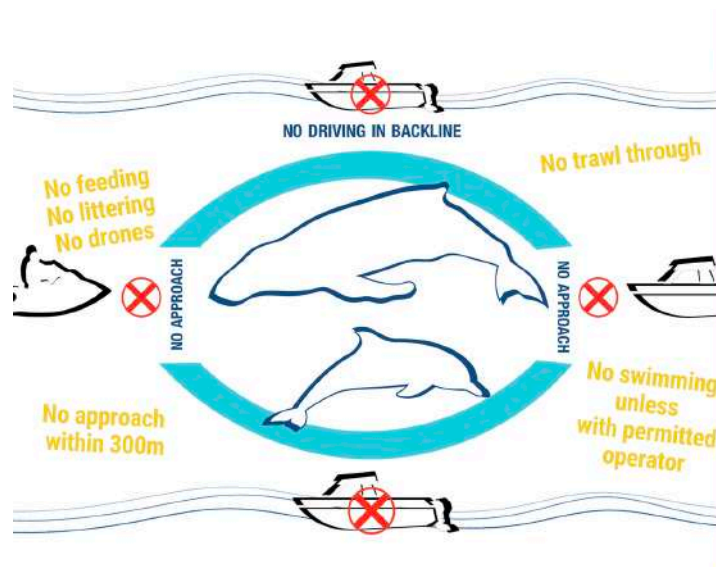
The "DolphinCare" code of conduct was originally designed for the Dolphin Encountours Center in Ponta do Ouro, dedicated to dolphins and whales in South Mozambique, which paved the way for ethical and responsible marine mammal tourism, specializing in passive encounters at sea with cetaceans, specifically dolphins.

The codes of conduct were developed in collaboration with scientists, academics, and NGOs, based on the findings of long-term field research using a reliable methodology for observing cetaceans in the wild.

There are two distinct codes to regulate cetacean observations, one for a recreational whale watching enthusiasts and the other for professional operators. The first advises enthusiasts to maintain a minimum distance of 300 meters from cetaceans and refrain from swimming with

them. In contrast, for professional operators, swimming with dolphins is allowed in the presence of a guide and subject to a code of conduct, while swimming with whales is not recommended.

Recreational Boat Code	Operator Code
Maintain a slow, steady speed & keep a look out.	Adheres to a one boat policy, follows a 20 minute viewing time & have experienced guides in water.
Refrain from altering course to approach dolphins and whales.	Follow a two drop*, no touch, chase & dive down policy.
Move off if signs of distress are seen; change of direction, fast erratic swimming & tail slapping.	Approach animals calmly & slowly.
<ul style="list-style-type: none"> • No Approach within 300m of marine mammals.* • No swimming with marine mammals.* • Avoid driving in backline. 	Rest time for dolphins between in-water encounters between operators should be given.
* Marine mammal operators are permitted to approach and enter into the water	Swimming with newborns not permitted.
	Avoid in-water encounters with whales.
	The use of flash photography & underwater scooters are not permitted.
	The same applies to whale-sharks and manta rays.
	* During peak season operators follow one pod one drop policy.



Codes of conduct and Charter for the observation of marine mammals
 (Source : <https://www.dolphincountours.org>)

C. A fragmented legal landscape in the Indian Ocean

Legal framework of whale watching in the Southwest Indian Ocean



The regulation of whale watching is illustrated by both international recommendations and national regulations, which can be legally mandatory or advisory and vary from one State to another. These different national legal frameworks surrounding a common activity highlight a lack of coherence between States, even though their waters under jurisdiction are sometimes traversed by the same whales during their migration, as is occasionally the case in the southwest Indian Ocean.

However, it seems challenging to envision legal cohesion through a common regulation of whale watching. Indeed, the Indian Ocean States have different priorities, making a multilateral

agreement on whale watching regulation unrealistic. Additionally, the economic benefits of the practice are sometimes so significant that States might be reluctant to "tighten" their regulations.

Beyond the inconsistency among the regulations of different States, the standards governing whale watching vary in their normativity. Sometimes, this practice is regulated by binding norms (hard law), leading to sanctions such as fines for non-compliance. This is not the case when non-binding norms (soft law) guide participants through codes of conduct or cetacean approach charters. This observation raises several questions: are rules better adhered to when accompanied by sanctions? Do whales benefit from better protection in the presence of hard law? On the other hand, does soft law suffice to ensure a responsible whale watching activity?

To answer these questions, it is essential to analyze the effectiveness of these norms more closely, examining how they are implemented and their compliance, meaning their adherence by sea users.

IV. Effectiveness of hard law and soft law in whale watching activity

The effectiveness of the norms regulating whale watching depends on several criteria, whether they are rules of soft law or hard law. Non-binding norms developed within the framework of whale watching take various forms, but their ultimate purpose is common. Charters, codes of conduct, and labels can serve as sources of protection for the rules they disseminate and the responsible behaviors they encourage. Easy to create, soft law helps avoid the sometimes lengthy procedures associated with legally binding rules.

Soft law also helps occupy the normative space in the absence of any regulatory norms. It can thus be a first step before the potential development of legally binding rules. Often presented in the form of diagrams illustrating approach distances with cetaceans, charters or codes of conduct are easily understandable. It is worth noting that in some States, the practice is not exclusively reserved for professionals, and the diagrams in codes of conduct or approach charters prove particularly useful in guiding users in the responsible practice of whale watching.

It should be added that the intelligibility of the norm leads to a form of compliance that calls for respect for norms: the clarity and precision of the rules guide the user in compliance. In the presence of hard law, sea users do not always take the time to read long legislative texts, sometimes with complex vocabulary, before engaging in the activity, hence the utility of schematic codes of conduct or charts that can support hard law.

Furthermore, the often "schematic" nature of codes of conduct or charters makes them easily distributable and simple to display on board a boat. The flexible nature of soft law is also a significant asset. Soft rules can evolve according to the context, quickly and clearly, while legislative text requires longer procedures to achieve this.

In the case of non-compliance with codes of conduct, sea users do not risk pecuniary sanctions such as fines. However, the loss of a label by a company, for example, following irresponsible whale watching practices, represents a form of sanction, with potentially significant economic implications. Indeed, awarding a label to whale watching operators can influence the choices of tourists considering participating in this activity.

Another form of sanction arises in the case of non-compliance with legally binding rules. In the presence of hard law, depending on the States and offenses committed, penalties vary from a simple fine to imprisonment. However, control means must exist to ascertain the violation of the rule. These control means can be of various kinds and require human as well as material resources. It is necessary to ensure surveillance of the activity at sea and have the technical means to identify the violation. It is not always easy to determine distances at sea, and it can be tricky to know if it is the whales who have decided to approach the ships. If conditions are met to identify the violation, it is also necessary that the penalty incurred be deterrent. A too lenient sanction (for example, a derisory fine) may not be enough to dissuade operators from approaching cetaceans too closely, especially in the face of the economic benefits that the activity generates.

The intelligibility of standards, the associated sanctions in case of non-compliance, awareness, and the dissemination of rules are then criteria for the effectiveness of standards regulating whale watching. To legally regulate whale watching responsibly, it would be recommended to combine these criteria of effectiveness.

V. Recommendations for the legal framework of whale watching.

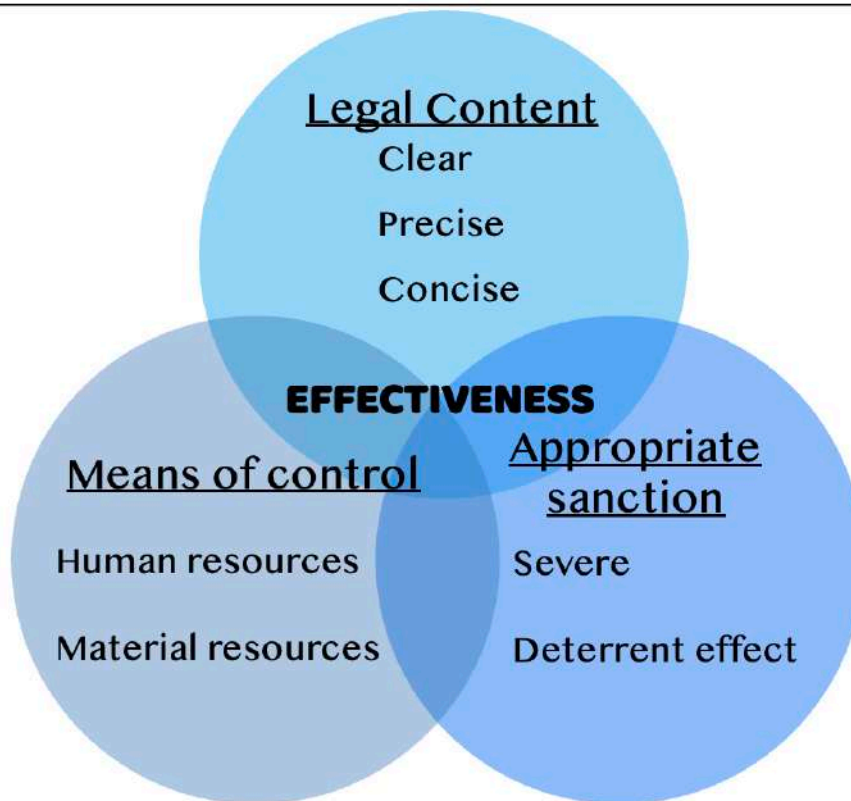
It is crucial to regulate whale watching, both to strengthen the protection of cetaceans and to minimize the risks that this activity can pose to sea users. All States involved in this activity should, at least, have a code of conduct to guide operators and other sea users toward a respectful practice of cetaceans, and this is not yet the case. NGOs specializing in the preservation of the marine environment can play a decisive role in the development and promotion of these codes of conduct in a State where no norm exists yet. NGOs can directly build on international recommendations issued by competent organizations to develop, for example, a responsible whale watching charter at the national level. They can promote this charter not only to operators but also to decision-makers, thus encouraging the adoption of binding rules.

There is no perfect model for regulating whale watching, as both soft law and hard law have advantages and disadvantages. These two approaches differ significantly: hard law relies on a coercive approach, with mechanisms of sanctions in case of rule violations, while soft law favors an incentive-based approach. For example, adherence to a code of conduct can result in the recognition of the operator by awarding them a label for the respectful observation of cetaceans.

Despite their differences, it is entirely possible to combine hard law and soft law, with one potentially compensating for the shortcomings of the other and vice versa. Several States have indeed chosen this complementarity in regulating the activity; however, the rules developed must accumulate different effectiveness criteria for a responsible regulation of whale watching.



Legal Criteria for the Effectiveness of Hard Law in Whale Watching



In conclusion, the regulation of whale watching is a crucial issue for the protection of cetaceans and the safety of sea users. States, in their diversity, have adopted various approaches, ranging from soft law to hard law, or a combination of both, each with its advantages and disadvantages. However, there are still States that have no regulations to govern the practice. A balance must be struck between strict regulation and the promotion of ethical practices, with the aim of preserving marine biodiversity while providing enriching experiences for whale watching enthusiasts. The future of whale watching depends on our ability to reconcile economic, environmental, and ethical interests, all while maintaining our commitment to the preservation of the oceans and their majestic inhabitants.