

Sea-change in polar shipping: from Arctic to Antarctic Polar Code initiatives

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The International Maritime Organisation’s (IMO) mandatory Polar Code – or to use its official title: International Code for Ships Operating in Polar Waters (see [Resolution MEPC.264\(68\)](#), 15 May 2015) – has just [entered into force](#) with the turn of the New Year. However, this is not the end of the developments with regard to the regulation of shipping in Arctic and Antarctic waters. With experience gained from the operation of the Polar Code, it is expected that work will start to extend the coverage of the Code to additional vessel types and new issues. But who is going to take the leadership role in pushing this agenda? Is it going to be the Arctic states, who have been instrumental in the development and content of the Code? Or are we going to witness the emergence of new leaders? In this post, I argue that we should be looking to the Antarctic states for leadership in this new phase of the Polar Code.

The mandatory Polar Code experienced a bumpy voyage to its adoption following years of negotiations and even longer since the idea of a Polar Code first appeared in the 1990s. Many issue areas and types of vessels have been left out of the scope of the Code, for which it has been heavily criticised by environmental non-governmental organisations (ENGOS): see [here](#) and [here](#). Notably, fishing vessels, pleasure craft and mobile offshore drilling units are yet to be regulated, as well as many sources of pollution, such as heavy fuel oil in the Arctic and grey water (wastewater other than from toilets on board ships). Many of these issues are complicated by the fact that they lack a “parent convention” through which they can be made mandatory. Leadership and bold initiatives in the negotiations will be vital to commence much-needed work and to find solutions and include new issues in the Polar Code. The question is who might assume this leadership role?

While the focus in recent years has been on the Arctic as a consequence of the possibility of new sea routes opening up due to reduced sea ice cover, there are signs that the wind is changing and starting to blow from the South. What is motivating this change? Besides highlighting some of the gaps left in the Polar Code that are very much of importance in the Antarctic context, I explore recent developments that have occurred since the adoption of the Polar Code in 2014/2015 that underscore my notion that the Antarctic states are going to be instrumental in the further development of the Code.

Early developments: Arctic initiatives

First, though, to understand the changes that might be coming with regard to leadership, we need to take a step back and examine what has been going on so far in the development of regulations for polar shipping. I first highlight pre-2009 developments, i.e. before two of the IMO’s Committees – the Maritime Safety Committee (MSC) and the Marine Environment Protection Committee (MEPC) – agreed to put the development of a mandatory Polar Code on the agenda of the Sub-Committee on Ship Design and Equipment (DE) and later its successor, the Sub-Committee for Ship Design and Construction (SDC). Then I offer a brief discussion of the IMO’s negotiation process for the Polar Code. The aim of these discussions is to highlight

the difference in prominence between the Arctic and the Antarctic states in the negotiation process so far.

The first proposal for amendments to the 1974 International Convention for Safety of Life at Sea ([SOLAS](#)) to address concerns with regard to ship operations in polar waters came from Germany. The IMO, headquartered in London, is the right forum to regulate such issues as it is the specialised UN agency responsible for the regulation of international merchant shipping for the safety of navigation and for the protection of the marine environment. The advantage of using the IMO is that its instruments apply to ships of all flags, thus providing universal application, as opposed to regional organisations that can only bind their members. The work on the development of a code regulating polar shipping was referred by the IMO to an Outside Working Group of experts which met under the leadership of Canada from 1993 to 1997. The draft Polar Code that came out of this Group had a strong emphasis on Arctic shipping, thus giving the document a northern focus. This led to criticism in the ensuing debates, for not having taken into account the uniqueness of Antarctica, emphasising the differences between the Arctic and the Antarctic. These notably include:

- governance and the lack of coastal and port states in Antarctica as a consequence of the freeze on sovereignty claims in the 1959 [Antarctic Treaty](#);
- geographic and ice conditions, especially the particular isolation of the Antarctic waters from ports and places of human habitation, as well as the small proportion of multi-year ice in Antarctic waters compared to the Arctic; and
- patterns of shipping, with mainly fishing vessels, passenger ships and vessels operating on behalf of governments dominant in Antarctic waters, and the absence of cargo vessels characteristic of the Arctic where resource extraction is also a major activity unlike in Antarctica.

It was also emphasised that Antarctic waters were already protected by their designation as special areas for protection from oil, noxious liquid substances and garbage pollution by the 1973 International Convention for the Prevention of Pollution from Ships ([MARPOL](#)), while the 1991 [Madrid Protocol](#) on Environmental Protection to the Antarctic Treaty had recently entered into force in 1998. As a result, the guidelines developed by the IMO were restricted in their sphere of application to Arctic ice-covered areas, and only [extended](#) in 2009, at the request of the Antarctic Treaty Consultative Parties, to include Antarctic waters.

The 2000s were a busy time for the Arctic states under the auspices of the [Arctic Council](#). The 2005 [Arctic Climate Impact Assessment](#) highlighted the likely increase in ship traffic as a result of reduced sea ice, necessitating a shipping assessment. The resulting [Arctic Marine Shipping Assessment](#) 2009 Report recommended harmonisation of standards for ships operating in Arctic waters at the IMO as well as mandatory application of the IMO's Arctic Guidelines. This is often viewed as the precursor of the proposals submitted to the IMO in 2009 by three Arctic coastal states, Denmark, Norway and the United States, to develop a mandatory Code for ships operating in polar waters.

Development of the mandatory Polar Code 2009-2015: Arctic leadership

The IMO's negotiation process of the *mandatory* Polar Code can be characterised by prominent Arctic leadership. However, it is important to note that three of the Arctic coastal states (Norway, Russia and the United States) are also [Antarctic Treaty Consultative Parties](#), and Norway also claims sovereignty over part of the Antarctic territory. These were also some of the most active states in the negotiation of the Polar Code as judged by the number of proposals submitted to the process. However, while Norway and the United States cooperated with other states in sponsoring many proposals together, none of these included other Antarctic Treaty Consultative Parties, but rather more frequently other Arctic Council member states. Russia did not co-sponsor any proposal with other delegations. There is also a northerly

focus in the content of the submissions of these three states, with new measures proposed mostly for the Arctic, while no specific attention is paid to Antarctic conditions.

Of all the states that submitted proposals with regard to the Polar Code, Canada was the most prolific. In fact, Canada alone submitted more proposals from 2009 to the adoption of the Polar Code than those Antarctic Treaty Consultative Parties that are not Arctic states taken together! This is important as these proposals serve to introduce issues for the debates. Furthermore, as early as the first Sub-Committee meeting at which the details of the Polar Code were discussed in 2010, Canada submitted a comprehensive draft for the Code, to fire the starting pistol on the development (see Canada, *Development of a mandatory code for ships operating in polar waters: Proposed framework for the Code for ships operating in polar waters* (IMO Doc. [DE 53/18/2](#), 20 November 2009)). At the same time, it was Norway that first submitted a far-reaching proposal with regard to the environmental protection chapter of the Polar Code that served as the basis for discussions of these issues (see Norway, *Any other business: Environmental aspects of polar shipping* (IMO Doc. MEPC 60/21/1, 12 January 2010)). This document, again, did not contain an explicit reference to Antarctic waters. Norway also provided the chairmanship for the working groups established to hammer out the technical details of the Code for most of the duration of the negotiations.

Such disparity in the level of participation in the debates also influenced the outcome, that is, the Polar Code and its content. From among those Antarctic states that are not members of the Arctic Council, Argentina tabled most of the proposals. While this was still only a third of those submitted by Canada, Argentina was the most influential of the Antarctic states on the content and form of the Polar Code. The Argentinean proposals concerned, among others, training requirements for ship crew, setting temperature parameters that ship equipment and material must be able to withstand, as well as legal comments on how to structure the Code and make it mandatory.

One reason for the relative inactivity of Antarctic states can be attributed to the scope of application of the Polar Code's safety part. As the Code stands now, its safety-related measures only concern SOLAS vessels, namely passenger vessels and cargo ships of more than 500 gross tonnage. While the former are characteristic of vessel traffic in Antarctic waters, many other ship types that are important in the Antarctic context are excluded from the application of the regulations, most importantly fishing vessels, pleasure yachts and special purpose ships. At the same time, the Polar Code's environmental part does not add significantly to the protection of the Antarctic marine environment, as these matters are already covered by many specific MARPOL regulations. Both the various vessel types and many of the additional environmental measures were left out of the Polar Code due to the absence of an IMO convention through which such regulations could have been made mandatory. To provide solutions for these issues, so vital for enhancing safety and environmental protection in the Antarctic, firm leadership and inventive initiatives will be needed. However, there is not much sign that the Arctic states will reprise their previous leadership role.

Future developments: Antarctic initiatives

Since the adoption of the Polar Code, it appears that Antarctic states have been more prominent in the early efforts both for the implementation and for the extension of the Code. As further development was made contingent on experiences learnt from the operation of the Code, Antarctic states have worked to facilitate implementation efforts. As an example, many delegations have offered to develop model courses for training seafarers for operations in polar waters (*Report to the Maritime Safety Committee*, IMO Doc. [HTW 3/19](#), 23 February 2016, para. 3.19). These include Argentina and Chile, in a promising cooperation with Arctic states that could draw upon experiences of ship operations in both poles.

However, most notable is the push coming from the Antarctic states to start work on phase 2 of the Polar Code and extend its application to additional types of vessels. These efforts did not start with the adoption of the Code, however. For instance, New Zealand has advocated from

the very beginning of the negotiations that the Code should cover all ships. Furthermore, less than a year before the safety part of the Code was adopted, New Zealand argued in the context of search and rescue challenges and the precautionary approach to environmental protection that the IMO should keep on its agenda the possible application of the Code to non-SOLAS vessels (see New Zealand, *Development of a mandatory code for ships operating in polar waters: Phase II – non-SOLAS ships* (IMO Doc. SDC 1/3/4, 15 November 2013)). Vessel types mentioned in this regard are, first and foremost, fishing vessels and pleasure craft, but also offshore drilling units and special purpose ships. Calls to commence work on regulating these ship types have only intensified since the adoption of the Code.

Documents discussing this issue have been submitted to all three meetings of the MSC since the adoption of the Polar Code. Commencing with the 95th meeting of the MSC, just after the Code's adoption, New Zealand and South Africa together with Iceland called on IMO member states and observer organisations to submit information on non-SOLAS vessels operating in polar waters and accidents and incidents involving these kinds of vessels, in order to aid the further development of the Code (see Iceland, New Zealand and South Africa, *Any other business: Request for data on incidents within polar waters* (IMO Doc. [MSC 95/21/3](#), 24 March 2015)). This proposal was supported by fellow Antarctic states Argentina and Australia, but also by Canada, Latvia a state with well-developed fishing traditions and a high seas fishing fleet, and the Marshall Islands, a major flag State. Furthermore, ENGOs have also welcomed this document and submitted information on such incidents to the three recent MSC meetings. Taking the lead after the call for information, New Zealand, Iceland and Chile have submitted papers in support of the commencement of phase 2 of the Polar Code's development (see New Zealand, *Any other business: International Code for Ships Operating in Polar Waters (Polar Code)* (IMO Doc. MSC 96/24, 14 December 2015); Iceland, *Any other business: International Code for Ships Operating in Polar Waters (Polar Code)* (IMO Doc. [MSC 96/24/3](#), 8 March 2016); and Chile, *Any other business: International Code for Ships Operating in Polar Waters (Polar Code)* (IMO Doc. [MSC 97/21/8/Rev.1](#), 21 November 2016)). In the course of discussions that followed, South Africa expressed the opinion that sufficient information was already available for phase 2 and that this should start without delay.

It is remarkable that the Arctic states, which had been very active in the negotiation of the Polar Code up until its adoption, have stayed largely silent. It appears that it is only Iceland, which had been relatively inactive in the previous years of Polar Code negotiations, that believes that it is particularly important to commence work on phase 2 of the Code. Iceland, a traditional fishing nation, considers itself an Arctic coastal state, and has protested in the past when left out of negotiations by the Arctic states bordering on the Central Arctic Ocean, such as that of the [2015 Oslo Accord](#) regarding commercial fishing. With regard to the new phase of the Polar Code, Iceland has highlighted that it especially wanted to see information on non-SOLAS vessels from Arctic states. Both Norway and Canada responded that they are still verifying the data to submit to IMO.

However, there have been disheartening voices as well. The Netherlands questioned whether there has been a definitive decision on further developing the Polar Code and suggested that discussion should rather focus on whether such developments were desirable, necessary and proportionate. Japan highlighted the view that new regulations should be added to already existing instruments as had been done in the first phase of the Polar Code, such as the [Cape Town Agreement](#) for fishing vessels. However, this Agreement is far from entering into force. Concerns regarding the lack of mandatory IMO instruments for some of the vessel types that have been suggested for inclusion in phase 2 have also been voiced by Canada. Such challenges, however, should not stop work commencing on the next phase of the Polar Code. Unless the issue is on the agenda there will be no opportunity to find solutions.

What does this mean for future negotiations?

There is no doubt that the Antarctic states, especially those with search and rescue responsibilities in the region, are concerned by the lack of polar-specific regulations for the

many vessel types that sail in these inhospitable waters, notably those not covered by the Polar Code in its current form. Certainly, the previous lukewarm participation of these states in the process is now changing markedly.

With the coming of the 4th meeting of the SDC in February this year, proposals are already being submitted by environmental NGOs and New Zealand for the inclusion of work on phase 2 in the agenda of the Sub-Committee. As this issue is already on the post-biennial agenda of the MSC (i.e. the agenda after the current 2016-2017 biennium), the hope is that, once the proposal is accepted, further development can start with the 5th meeting of SDC, sometime in 2018.

While no dissenting voices can be heard from Antarctic states regarding these proposals (and their leadership would be welcome, especially if sovereignty questions can be excluded from the negotiations), it is concerning that Arctic states appear to be relatively lukewarm. While an interim moratorium on commercial fishing in the Central Arctic Ocean has been agreed among the Arctic coastal states, a [process](#) that might result in the establishment of a regional fisheries management organisation or arrangement is also in the [works](#). Furthermore, fishing is still a significant industry in many areas under the fisheries jurisdiction of Arctic coastal states, for instance Russia. As well, China, Japan and South Korea, all relatively quiet during the Polar Code negotiations so far, could be negatively affected by regulation of fishing vessels and fishing support vessels regarding their distant-water fleets in the Antarctic. Furthermore, the regulation of drilling rigs operating in the harsh Arctic environment is also important and urgent. While the Obama-administration with its last breath banned the exploitation of these resources in the United States' [offshore Arctic](#), this ban might not last with the new Trump-administration's drive for resource extraction and lack of regard for climate implications. At the same time, Norway and Russia are expanding their activities ever farther north. How a potential new "race" for the extraction of Arctic resources would impact the further development of the Polar Code is a matter for concern. Moreover, pleasure yachts and other smaller vessels sailing in Arctic and Antarctic waters have been becoming more popular but remain largely unregulated. The dangers to even such small vessels are amply illustrated by the 2011 disappearance and sinking of the Norwegian yacht [Berserk](#) in Antarctica with a loss of three lives.

These issues highlight the need and the political – besides the legal – challenges of further development of the Polar Code. Therefore, it is particularly important that the Antarctic States show a unified front and lead the way in achieving a much-needed speedy solution for the inclusion of regulations for new vessels in the Code. Beyond being instrumental in keeping discussion on phase 2 alive in the past years, Antarctic states' experience regarding challenges to non-SOLAS ships' operations in polar waters will be invaluable, and taking leadership of further negotiations at this crucial time is very welcome. Much depends on the outcome of discussions at SDC 4 in February. Watchful eyes, at least from the Antarctic, are on London.

The author has provided hyperlinks to IMO documents where these are publicly available. All proposals cited in this post are available in the IMO's database, [IMODOCS](#), after registration.