

The urgent need for the Polar Code – Getting it right

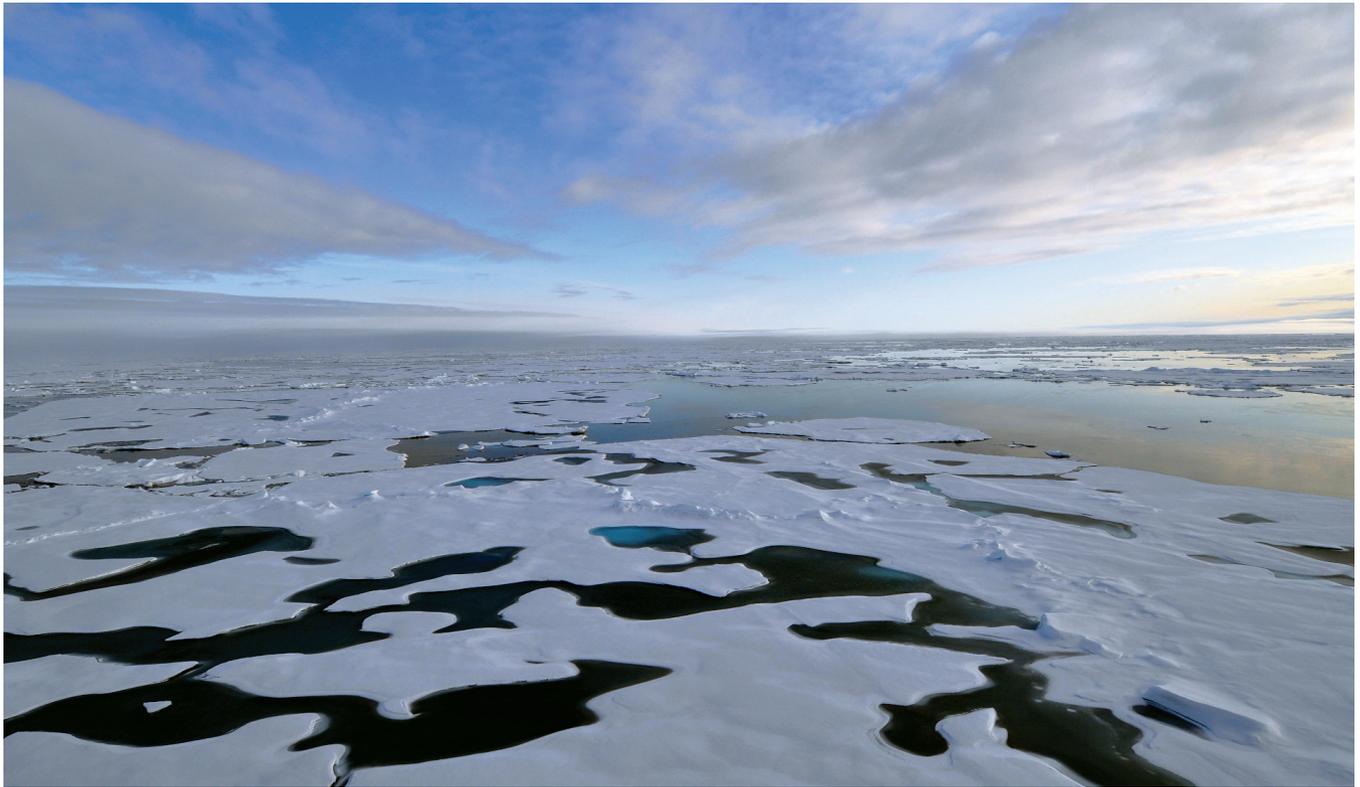


Photo: USGS

Commercial vessels engaged in Arctic shipping are exposed to a number of unique risks, including frequent hostile weather, sea-ice cover, lack of navigational infrastructure including charting and aids to navigation, and communication problems. Cold conditions can impact the operational effectiveness of crews, and can impose additional loads on the vessel's hull, propulsion system and ship's gear. The article that follows this one highlights the difficulties of rescue in this remote and often hostile environment, and the ongoing international efforts being made to minimize Arctic shipping risks and protect both ships and the marine environment.

The International Maritime Organization (IMO), a United Nations agency made up of 167 member states, has been working for over 15 years on a Polar Code that would create a code and a legal framework to govern Arctic shipping, over and above the existing international shipping conventions that apply globally to all commercial vessels. The formal title is *Code of Safety for Ships Operating in Polar waters – the Polar Code*. This draft international code of safety is very comprehensive and covers the full range of design, construction, equipment, operations, training, search and rescue and environmental protection matters relevant to ships operating in Polar waters.

The goal of the Polar Code is to harmonize Arctic states' regulatory and operational requirements for vessels operating in ice-covered waters in both the Arctic and Antarctic. The idea is to avoid a patchwork of regulatory requirements with each of the five Arctic coastal states (Russia, United States, Canada, Greenland (Denmark) and Norway) having their own regulatory requirements. There would be a uniform regulatory regime for commercial shipping, which would also protect the Arctic marine environment. At present, the Arctic coastal states have the legal authority to implement their own regulations and requirements. However, an internationally agreed regime is preferred.

In addition to meeting the marine regulations of individual Arctic states, or meeting the regulations of the internationally agreed Polar Code, as the case may be, vessels must meet the private Polar ice-

strengthening requirements of the classification society. All commercial vessels are normally required to be "in class". That is to say for the particular marine trade, they must meet the classification society rules and requirements. Marine insurance requires commercial vessels to be entered into a recognized classification society and remain in class during a voyage. The cost of marine insurance can be a major cost component of Arctic shipping.

The IMO's Sub-Committee on Ship Design and Equipment, a specialized committee consisting of a variety of technical experts from the government and the private sector has been tasked with coordinating this work, reporting to the Maritime Safety Committee (MSC) and Marine Environmental Protection Committee (MEPC) set up as part of the IMO process which develops the international shipping conventions and takes into account both governance and commercial interests. This follows along from the adoption in 2009 by the IMO Assembly of a resolution to address additional provisions deemed necessary for consideration beyond existing requirements of the International Convention for the Safety of Life at Sea (SOLAS) and The International Convention for the Prevention of Pollution from Ships (MARPOL) for Arctic shipping. These two international conventions govern all Convention ships worldwide. A Convention ship is usually over 300 gross tonnes, which essentially includes all commercial bulk cargo, container vessels and marine tankers.

The Polar Code is seen by many commentators and environmental groups as a complete solution to the risks created in Arctic shipping. At a minimum, it represents an excellent start. The Polar Code was recently criticized at the International Polar Year (IPY) wrap-up conference in Montreal for moving at glacial speed through the IMO consultation process among groups which include coastal states, vessel owners and flag states. In addition, various environmental groups have observer status at IMO. The objective among stakeholders is to develop a specific geographic approach to regulating shipping in Polar waters which includes both the Arctic and Antarctic. At present, there is a set

of guidelines entitled *Guidelines for Ships operating in Polar Waters* which was developed at IMO solely for Arctic operations and provides guidance. The guidelines were an interim attempt to ensure that the coastal states would follow classification society rules on ship construction for Arctic operations.

The Polar Code is a voluntary code of rules, policies, standards and best practices for Arctic shipping, and forms the basis of a risk-based approach to Arctic shipping. It does not replace commercial best practices for those engaged in Arctic shipping operations but buttresses this management approach. There would only be one standard for shipping firms to meet, which would be less costly and more efficient than a patchwork of national requirements. Without a Polar Code, ice-class vessels would potentially have to meet several different regulatory requirements on a transpolar voyage. This would add to the cost of shipping and potentially restrict commercial activity, and serve as a barrier to commercial shipping and development of resource projects. The lack of a Polar Code could also serve to be an effective ban or restriction on vessels entering certain waters because they might not meet the particular regulatory requirement. For example, a vessel may be able to operate in Canada but not in Greenland waters or vice versa.

Article 234 of the *United Nations Law of the Sea Convention* allows coastal states to “have the right to adopt and enforce non-discriminatory laws in regulation for the prevention, reduction and control of marine pollution from vessels in ice-covered waters within the limits of their exclusive economic zone (EEZ) where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of marine environment based upon the best available scientific evidence”.

It is against this backdrop that the discussion about the Polar Code needs to be considered in a broader ocean and Arctic governance context. This is especially important because of the increased interest on the part of non-Arctic players in Arctic shipping and the need to reach consensus and international support for regulations. In other words, there needs to be international buy-in by all the various stakeholders.

It is also important to consider that, for maritime insurance purposes, vessels engaged in Arctic shipping need to meet the classification rules that apply to Arctic shipping. The International Association of Classification Societies has developed a Unified Requirement for Polar Ships that seeks to harmonize ice-class rules.

Discussions on the Polar Code have been ongoing and it is not likely that this will come into play until at least 2015, and likely much later. Ship construction standards are very technical in nature, giving rise to much divergent opinion on numerous issues. Flag states want freedom of navigation to be permitted with minimum standards and coastal states wish to protect the marine environment. In the interim,

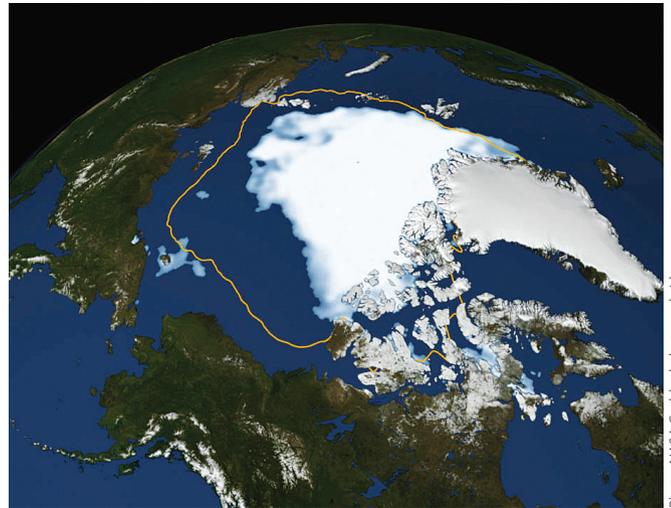


Photo: NASA/Goddard photo and video

Arctic sea-ice shrinks to new low in satellite era.

the Arctic Council has been arguing that if agreement cannot be reached, individual Arctic states should go it alone. The Arctic Council is a high-level intergovernmental forum that addresses issues faced by the Arctic governments and the indigenous people of the Arctic. It has eight member countries: Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the United States. The Arctic Council has no official status at the IMO, and has no direct control over shipping, but it could develop an international convention of the Arctic coastal states on Arctic shipping such as the agreement that was developed on search and rescue referenced in the next article that follows. An Arctic marine pollution convention is being worked on.

Back in 1970, ice-classification rules for Polar shipping were in their infancy, and most of the ice-class rules were developed for the Baltic and more Southern ice-covered waters. Canada and Russia carried out considerable work in the development and implementation of ice-strengthening rules particularly for operations in multi-year ice environments like the Arctic in their national legislation. Since that time, Arctic shipping activities have greatly increased with predominantly resource development taking place, and classification societies have developed Polar ice classification rules based on actual experience with Arctic operations.

In the Arctic Ocean basin there are various legal regimes depending on the status of the waters. In the middle of the Arctic Ocean basin we have an area of high seas commonly referred to as “the doughnut hole” where there is no restriction on navigation, subject to international conventions that would apply to the flag state of the vessel transiting these waters. In the EEZ, there is a right of navigation known as innocent passage which allows for safe passage. In addition, there is a right of transit passage in international straits, such as Canada’s Northwest Passage. Canada considers these as domestic waters subject to Canadian sovereignty. Therefore, on any Arctic voyage, a vessel could be transiting through a number of nations’ waters and be subject to a variety of legal regimes for shipping governance. For those reasons, harmonization of shipping regulations was seen as essential to the protection of the Arctic’s pristine environment and to encourage sustainable shipping.

The Polar Code does not apply to what is known as non-Convention vessels. Non-Convention vessels are those that are outside the scope of the international Convention and their definition is normally based on either the vessel’s tonnage (less than 300 tonnes) or the nature of the voyage – domestic versus international. There are many that ply Arctic waters, such as fishing vessels.

There are multiple differences that need to be resolved to get all of the Arctic states on board. The IMO has a good track record of reaching consensus on difficult issues. The Polar Code is no different from

CCG icebreaker/research vessel Amundsen in the Western Beaufort Sea.



Photo: IPY-Canadian Coast Guard Captain Stephane Julien

other issues that the Organization has successfully dealt with, such as marine pollution response. If the shipping world does not get this right, there will be a patchwork of regulatory regimes, which will make it very difficult for commercial activity to take place in a sustainable fashion. In addition, non-Arctic players will not buy into the regime and inexperienced operators could put a lot of stress on marine infrastructure and shipping services in search-and-rescue and marine-pollution incidents, which could further impact future Arctic shipping. The Polar Code is a work in progress that needs to move forward to make it a reality. It is in the interest of commercial shipping to have a clear and harmonized regulatory regime through an international agreement, which in the long term will pave the way for increased Arctic shipping activity. While bilateral agreements between coastal states can be developed, they may in the long term create more of a barrier to shipping.

Maritime law seeks uniformity of regulation as ships are mobile. The Arctic is no different. The rapid changes in the Arctic have created a sense of urgency which may be more perceived than real. There has been push back on the Polar Code from the flag states that seek to minimize any regulatory requirement. Coastal states and many other nations want strong environmental standards through a robust Polar Code. The bringing together of shipping best practices is seen as a good risk management tool, which will benefit both commercial interests and the coastal states. It will not substitute for experience and a risk-based approach by commercial shipping interests, but it will provide a solid foundation from which to move forward. Getting it right is hard work. The process has been slow, but the IMO must consider the diverse shipping interests and rights of coastal states. There must be a

balance. The IMO approach works and has produced solid lasting results for commercial shipping and is poised for new shipping developments in this century.

The Polar Code can serve as a benchmark for discussion and dialogue - yet be flexible enough to embrace new activities in a risk-based approach to Arctic shipping. Coastal states always have the option of going it alone with national legislation, but this will be costlier in the long run, and will not have the force that an international agreement would have. There is a clear need for the Polar Code, but it is critical that we get it right: we must move slowly and carefully, just like navigating through ice. The guidelines and the Polar Code are important but, to get compliance in the long term, as Arctic shipping increases, commercial shipping will likely be subject to mandatory regulation under the SOLAS Convention. The Polar Code and the groundwork laid for a harmonized shipping regime in the Arctic will be important for future economic development. A robust Polar Code will require strong and clear leadership from the Arctic Council states. Canada, which is chairing the Arctic Council next year for two years, will have a key role to play, as it has had at the IMO in the past. On this important issue, Arctic shipping interests need to move faster than the diminishing sea ice.

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