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Volume 47  
Issue 1 2015

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2015

# Freezing Out Noncompliant Ships: Why the Arctic Council Must Enforce the Polar Code

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## Recommended Citation

Richard Wanerman, *Freezing Out Noncompliant Ships: Why the Arctic Council Must Enforce the Polar Code*, 47 Case W. Res. J. Int'l L. 429 (2015)

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# FREEZING OUT NONCOMPLIANT SHIPS: WHY THE ARCTIC COUNCIL MUST ENFORCE THE POLAR CODE

*Richard O.G. Wanerman*<sup>1</sup>

*The International Maritime Organization's Polar Code is intended to regulate the nature of commercial shipping in the Arctic and Antarctic by setting minimum standards for ships transiting though Polar waters. This region of the world is unique, and has certain characteristics that make it both attractive and dangerous. However, the Polar Code, which is still in draft form, does not currently have an enforcement mechanism apart from traditional state party monitoring, which may result in oversights that lead to catastrophic accidents in remote parts of the Arctic. This Note analyzes how the absence of a clear enforcement mechanism and uncertainty regarding the draft Code could result in the failure of the Code to protect the Arctic while still permitting shipping through it. This Note further analyzes how the Arctic Council, an institutional assembly of states with an Arctic territorial presence, could assume a monitoring and enforcement role within the Polar Code, due to its existing experience with the Arctic and with its recent expansion of responsibilities. This Note concludes that the International Maritime Organization needs an active enforcement mechanism for the Polar Code to avoid noncompliance through negligence and the risk of catastrophic accidents, as well as to encourage industry compliance with the Code. This Note recommends that the International Maritime Organization make the Arctic Council and its member states the enforcement mechanism for the Polar Code, based on the Council's prior success with a Search and Rescue Agreement. These states have the capacity and interest in enforcement, and can help bring about rapid international acceptance of the Polar Code as the Arctic Ocean becomes a viable sea route.*

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1. Editor-in-Chief, *Case Western Reserve Journal of International Law*; B.A., Lawrence University (Jun. 2011); J.D., Case Western Reserve University School of Law (expected May 2015). Thanks to Faculty Advisor Prof. David Kocan and the staff of the Journal, especially Jeremy Saks and Garret Bowman, for their advice and assistance on this Note.

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I. INTRODUCTION

The Arctic Ocean is changing faster than the international community can currently respond. The sea ice is retreating at an uncomfortably rapid rate,<sup>2</sup> making the Arctic Ocean increasingly accessible for commercial uses. The Arctic states, with high volumes of natural commodities found within the Arctic Circle, want to transport these commodities to market by ship, which remains the most cost-effective means of cargo and freight transportation.<sup>3</sup> Yet, no comprehensive, Arctic-centric legal regime currently exists for shipping regulation.<sup>4</sup> The International Maritime Organization (IMO) released an official draft of the intended Polar Code for such shipping in late January, 2014, after many years of work; its projected date of earliest implementation in 2016.<sup>5</sup> The lack of rapidity regarding such an agreement is troubling, given the rate of expansion of open water

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2. See, e.g., Rani Gran & Maria-José Viñas, *NASA Finds Thickest Parts of Arctic Ice Cap Melting Faster*, NAT'L AERONAUTICS & SPACE ADMIN. (Feb. 29, 2012), <http://www.nasa.gov/topics/earth/features/thick-melt.html> (detailing the results of satellite analysis regarding the retreat of sea ice and the ice cap, which results in expanded open water in the Arctic Ocean).
3. ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 76-77 (2009), available at [http://www.arctic.gov/publications/AMSA\\_2009\\_Report\\_2nd\\_print.pdf](http://www.arctic.gov/publications/AMSA_2009_Report_2nd_print.pdf) [hereinafter ARCTIC MARINE SHIPPING ASSESSMENT].
4. ØYSTEIN JENSEN, THE IMO GUIDELINES FOR SHIPS OPERATING IN ARCTIC ICE-COVERED WATERS: FROM VOLUNTARY TO MANDATORY TOOL FOR NAVIGATION SAFETY AND ENVIRONMENTAL PROTECTION? 5-7 (2007), available at <http://www.fni.no/doc&pdf/FNI-R0207.pdf>.
5. See *Shipping in Polar Waters: Development of an International Code of Safety for Ships Operating in Polar Waters*, INT'L MAR. ORG. (last visited Mar. 16, 2015), <http://www.imo.org/MediaCentre/HotTopics/polar/Pages/default.aspx> [hereinafter *Shipping in Polar Waters*].

in the Arctic,<sup>6</sup> and is a policy area into which the Arctic Council must play a more important role.

An Arctic shipping agreement has been a priority issue for the Arctic Council since the ministerial meeting in 2000.<sup>7</sup> The IMO, which had an interim set of guidelines for Polar operations,<sup>8</sup> is now working on integrating the draft Polar Code into the existing IMO guidelines for safety and pollution to make it a mandatory instrument.<sup>9</sup> However, neither the existing guidelines nor the final Polar Code will have active enforcement powers; as a result, “actual application is evident only through state practice and the extent to which international shipping complies.”<sup>10</sup> This legal void will pose a serious problem for the future integrity of the Arctic, and is one that the Arctic Council should fill. It has already demonstrated its ability to work together on issues of mutual safety and welfare in the enactment of a search and rescue agreement (SAR Agreement),<sup>11</sup> and can build on the principles of that agreement in creating an enforcement regime for the Polar Code in the Arctic that is amenable to the IMO. Such role within the pending Polar Code establishes the Council’s position as a unified body for the region while also establishing a clearly enforceable legal system for maritime standards in the Arctic by the states whose shores border it and whose people mostly utilize its waters.<sup>12</sup>

The Arctic Council must have an enforcement role in the Polar Code for the Code to be effective in the Arctic. Part II will briefly examine the special nature of the Arctic region, and why close cooperation between the Arctic Council states is vital to the successful management of this region. Part III will discuss the nature of the Polar Code, why it needs an active enforcement mechanism, and how the recent history of the Arctic Council demonstrates its viability as the best entity to enforce the Polar Code. Part IV will

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6. See, e.g., Gran & Viñas, *supra* note 1.
  7. ARCTIC COUNCIL, THE BARROW DECLARATION: THE SECOND MINISTERIAL MEETING OF THE ARCTIC COUNCIL, ¶ 11 (2000), available at <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations> [hereinafter Barrow Declaration].
  8. See generally INT’L MAR. ORG., GUIDELINES FOR SHIPS OPERATING IN POLAR WATERS (2010), available at <http://www.imo.org/Publications/Documents/Attachments/Pages%20from%20E190E.pdf> [hereinafter Polar Code].
  9. See *Shipping in Polar Waters*, *supra* note 4.
  10. See JENSEN, *supra* note 3, at v.
  11. See *Secretary Clinton Signs the Arctic Search and Rescue Agreement with Other Arctic Nations*, U.S. DEP’T OF STATE (May 12, 2011), <http://www.state.gov/r/pa/prs/ps/2011/05/163285.htm>
  12. See ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 77.

then lay out the appearance of the proposed enforcement regime. Part V will conclude with a look at the future of binding Arctic Council agreements and cooperation with the IMO on matters of Arctic Ocean affairs.

## II. THE SPECIAL NATURE OF THE ARCTIC

The Arctic is a global region with unique characteristics. Of the Arctic's approximately thirty million square kilometers,<sup>13</sup> fourteen million are water.<sup>14</sup> Ice covers the majority of this water for most of the year.<sup>15</sup> Unlike any other ocean in the world, landmasses almost entirely surround the Arctic Ocean, with only a few notable points of clear transit to either the Pacific or Atlantic Oceans. In essence, it is a semi-enclosed sea.<sup>16</sup> Four million people live within this thirty million square kilometer region, a mix of indigenous peoples and settlers from southern locations. The majority of these people rely on the Arctic Ocean in some capacity for their existence in the far north.<sup>17</sup> This permanent population also lives in an environmentally extreme, yet also very sensitive, region of the world. The Arctic region is defined by its extremes and its cold. The Arctic Circle, the commonly accepted delimitation of the Arctic region, is defined as the southernmost boundary of 24-hour sunlight at the Summer Solstice, as well as the northernmost boundary of 24-hour darkness at the Winter Solstice.<sup>18</sup> That darkness aids in the constant cooling of the seawater into nearly impenetrable ice,<sup>19</sup> which has been an assumed factor in Arctic navigation for centuries.<sup>20</sup>

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13. JENSEN, *supra* note 3, at 1.

14. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 16.

15. JENSEN, *supra* note 3, at 1.

16. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 18 (2009). Although a number of rocky archipelagos lie at the outer edges of the accepted boundary of the Arctic Ocean, through which one could theoretically travel to leave Arctic waters, the two main points of entry and exit from the Arctic Ocean are: the Fram Strait between Greenland and Svalbard, which connects to the Atlantic Ocean; and the Bering Strait, between Alaska and eastern Russia, which connects to the Pacific Ocean. *Map of the Arctic Ocean*, NAT'L SNOW & ICE DATA CTR. (last visited Nov. 10, 2013), <http://nsidc.org/arcticseaicenews/map-of-the-arctic-ocean/>. However, unlike the Mediterranean Sea, a classic example of a closed sea, the exchange of water into and out of the Arctic Ocean is much greater, thus not making it a true closed sea. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 16.

17. JENSEN, *supra* note 3, at 1.

18. *See* ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 19.

19. *See id.* at 20.

20. *See id.* at 25.

This old way of thinking about Arctic navigation is rapidly evolving due to the effects of climate change. Satellite scans of the Arctic over the past thirty years demonstrate a rapid loss of sea ice during the summer months, and predictive models do not show any replacement of the lost ice.<sup>21</sup> By 2050, the Arctic Council believes that the Arctic Ocean will have a completely ice-free summer, permitting full circumnavigation of the Arctic Ocean by cargo ships.<sup>22</sup> While this is a crisis from an environmental standpoint, it is a strategic gauge from a shipping standpoint. More ship traffic could enter the Arctic, and with the effects of the increased traffic in an environmentally weakened region yet unknown, the international legal regimes have yet to adequately address the potential impact of such activity.<sup>23</sup>

Even with the presence of permanent sea ice closer to the North Pole and Northern Pole of Inaccessibility,<sup>24</sup> the Arctic environment and human knowledge of the Arctic presents certain distinct challenges for shipping, which forms part of the basis for the creation of the Polar Code. Only two main sea routes exist within the boundary of the Arctic Ocean, the Northern Sea Route and the Northwest Passage.<sup>25</sup> Although mariners have now used both these routes for some years, their conditions are still not fully known, as the Arctic Ocean is the least studied of the world's oceans, and thus most hazardous for mariners.<sup>26</sup> The constant presence of ice (for now) requires both certain kinds of ships and a certain level of competency with Arctic waters, which functionally limits many Arctic maritime operations to Arctic states.<sup>27</sup> Further, even if Arctic sea ice becomes permanently smaller and weaker than it is today, such ice will still require monitoring by authorities and care by mariners to avoid any catastrophic disasters in a part of the world from that it is very difficult to be rescued.<sup>28</sup>

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21. *See id.* at 26–27.

22. *Id.* at 27.

23. *See* JENSEN, *supra* note 3, at 3–4.

24. The Pole of Inaccessibility is the point in the Arctic Ocean furthest from any coastline, and thus the most difficult to reach in an emergency. It is located at 84° 3' N, 174° 51' W. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 27.

25. These routes will be described *infra*, Part IV.

26. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 16.

27. *See* JENSEN, *supra* note 3, at 3–4.

28. *See* ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 25 (emphasizing that, even with climate change that severely reduces the extent of permanent polar ice, “there will always be Arctic sea ice cover to contend with”); *see* JENSEN, *supra* note 3, at 3–4 (recounting the near-sinking incident of the T/S *Maxim Gorky* in 1989 and the extreme

### III. THE NEED FOR AN ENFORCEABLE POLAR CODE

The predicted rise in maritime activity in the Arctic and the very delicate nature of the Arctic environment require a substantial response on the part of the Arctic Council states soon if they wish to achieve an effective solution to a growing problem. The coordinate factors of climate change and resource extraction are pushing maritime activity northward,<sup>29</sup> into a part of the world that is rather small and ecologically sensitive, yet does not currently have an effective means of policing who goes into the Arctic and how they operate in the region. Although a combination of international legal standards theoretically governs regional maritime activity, none is yet comprehensive and region-specific.<sup>30</sup> The Polar Code will provide the regulatory framework necessary to ensure the integrity of future Arctic shipping, but will leave no functional enforcement mechanism. This leaves the Arctic Council as the international body best suited to enforce the Polar Code and to establish the way forward in Arctic maritime affairs. Part A will discuss how the Arctic will become a more viable way of shipping goods around the world. Part B will discuss how the existing legal framework governing any Arctic shipping is inadequate to the pressing needs of the Arctic region. Part C will discuss how the Polar Code will make Arctic shipping a more viable and safe option for international trade, but also point out its flaws. Part D will use the Arctic Council's SAR Agreement as a point of legal precedent for how the Arctic Council can act as an enforcement arm of the Polar Code.

#### *A. The Northward Push of Shipping*

The Arctic Ocean is the last frontier in commercial shipping, capturing the imagination of merchant traders and explorers for centuries. It is also increasingly becoming a realistic means of transporting goods and commodities around the world, saving time and fuel for large container ships moving between Northern Hemisphere ports.<sup>31</sup> Without a comprehensive regulatory system for deciding which ships may operate in the Arctic, the international

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conditions encountered by the ship, crew, and passengers “despite the prompt Norwegian reaction”).

29. See JENSEN, *supra* note 3, at 3.

30. See RONALD O’ROURKE, CONG. RESEARCH SERV., R41153, CHANGES IN THE ARCTIC: BACKGROUND AND ISSUES FOR CONGRESS 20 (2013).

31. See Heike Deggim, Int’l Mar. Org., Mar. Tech. Section, Progress Toward the Development of an International Polar Code, presented at the Annual General Meeting of the Royal Institute of Naval Architects (Apr. 25, 2013), available at <http://www.imo.org/MediaCentre/HotTopics/polar/Documents/polar%20RINA%2004-13.pdf>.

community and the Arctic region will have a difficult task of ensuring the reliability of all the ships that want to use the Arctic sea routes.

Shipping in the Arctic primarily occurs on two major routes: the Northern Sea Route and the Northwest Passage. The Northern Sea Route is almost entirely within Russian territorial waters, and runs along Russia's northern shore. Under Russian law, its route is set from the Kara Gate to the Bering Strait, and runs 2,551 nautical miles; from the Bering Strait to Murmansk, Russia's largest port at the western end of the Northern Sea Route, it is 3,074 nautical miles.<sup>32</sup> For a hypothetical transit from the port of Rotterdam to the port of Yokohama, the current route through the Suez Canal, Gulf of Aden, and Straits of Malacca is up to 4,500 nautical miles longer than using the Northern Sea Route. Thus, opening up this route to commercial shipping would save on the cost and duration of intercontinental shipments.<sup>33</sup> The Northern Sea Route, however, remains little used outside of local Russian traffic.<sup>34</sup> Although four ships fully transited the route in 2010, which increased to 46 by the 2012 shipping season, it remains relatively untested for regular use.<sup>35</sup> Further, the Northern Sea Route poses significant navigational challenges for the untrained mariner. Almost the entire length of the Northern Sea Route has depths of fewer than 100 meters, and in certain key areas can be as shallow as 10 meters, necessarily restricting the dimensions of the ships permitted to transit it.<sup>36</sup> Although Russian authorities do monitor ships currently using the Northern Sea Route, the impact on ships that do not ordinarily transit the Northern Sea Route is unknown.

The Northwest Passage, the Western Hemisphere's counterpart to the Northern Sea Route, is the more heavily explored, if less direct, Arctic shipping route. Indeed, the Arctic Council identifies five routes through which ships may use the Northwest Passage, though not all

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32. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 23. The Kara Gate is the water passage between the island of Novaya Zemlya and the Russian mainland. *See id.*

33. Deggim, *supra* note 30.

34. O'ROURKE, *supra* note 29, at 17. The Northern Sea Route has also suffered from a lack of global exposure. Although officially opened to commercial traffic by the Soviet Union in 1931, the route remained exclusively under Soviet control for the next sixty years, until the Soviet authorities finally opened the route to international traffic in 1991. *Id.*

35. Scott Borgerson, *The Coming Arctic Boom*, FOREIGN AFF., Jul.-Aug. 2013, at 76, 82.

36. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 23. At its eastern entry point, north of the Bering Strait, the Northern Sea Route's depth is only 10 meters, forcing Russian maritime authorities to restrict access to ships with a draft of no greater than 6.7 meters. *Id.*

five routes are considered suitable for shipping.<sup>37</sup> Generally, it is roughly 2,400 kilometers in length, from Baffin Island to Alaska, running along the northern Canadian shore and through the many archipelagos of the Canadian Arctic.<sup>38</sup> In a hypothetical routing from the port of Rotterdam to the port of San Francisco, the Northwest Passage route would be at least 3,900 nautical miles shorter than the current route through the Panama Canal.<sup>39</sup> Although once believed to be the fastest route between Europe and Asia, the reality of the Northwest Passage is a more complex balancing of ease of navigation and absence of ice. The southern routes of the Northwest Passage have less ice year-round, but also pose threats to navigation, both from the narrowness of the channels and the water depth. The northern routes are deeper, but have more year-round sea ice, and thus are less consistently reliable.<sup>40</sup>

These two routes combine to serve an expanding economic zone that makes the Arctic more of a destination and origin region at the moment than a transiting region. Almost all the cargo ships in the region arrive to deliver supplies to Arctic communities and to natural resource extraction facilities, and leave with natural resource commodities. Resource extraction is becoming a key element of future Arctic development, with Russia becoming very active in drilling, and making no indications that it will reduce its extraction in the near future.<sup>41</sup> The United States has also had long-term interests in natural resource extraction from the Arctic. Although the Alaska Pipeline has long been a major outlet for American Arctic oil, the Obama administration has expressed interest in studying the viability of Northwest Passage shipping for natural resources,<sup>42</sup> which has thus far been absent from any American strategic plans.<sup>43</sup> When cruise ships

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37. *Id.* at 21.

38. *Id.* at 20.

39. Deggim, *supra* note 30.

40. O'ROURKE, *supra* note 29, at 17 In a footnote to the report, O'Rourke posits that shipping firms might find the transcontinental railroad routes in Canada and the United States to be a faster means of moving goods and commodities from the Atlantic to the Pacific than the Northwest Passage. This author believes this statement to be partly political, given the nature of the intended audience of the report. *Id.*

41. *See, e.g.*, Andrew E. Kramer & Clifford Krauss, *Russia Embraces Offshore Arctic Drilling*, N.Y. TIMES (Feb. 15, 2011), <http://www.nytimes.com/2011/02/16/business/global/16arctic.html?pagewanted=all>.

42. *See* EXEC. OFF. PRESIDENT, NATIONAL STRATEGY FOR THE ARCTIC REGION 5 (May 2013), *available at* [http://www.whitehouse.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf).

43. Borgerson, *supra* note 34, at 88.

do enter the Arctic, they do not typically do so to transit the length of either the Northern Sea Route or the Northwest Passage, but rather to visit the environmental tourism sites of Greenland, Svalbard, and Jan Mayen.<sup>44</sup>

*B. The Patchwork Nature of Existing International Law in the Arctic*

The Arctic is not without coverage by binding international law, but none of the existing laws adequately addresses Arctic-specific needs. Several general agreements cover Arctic shipping, but only insofar as they are binding on all ships throughout the world. The Safety of Life at Sea Convention (SOLAS) addresses the requirements for crew and passenger well-being in the event of an emergency at sea. The Standards for Training, Certification and Watchkeeping for Seafarers (STCW) addresses the minimum competency requirements for crew and officers onboard ships. These agreements, overseen by the IMO, are designed for general global use, from tropical waters to polar seas, and offer a baseline for global marine standards.<sup>45</sup> However, none specifically covers the particular nature of Arctic maritime conditions, with its consistently shallow and frigid waters. Additionally, since existing IMO regulations depend on flag state enforcement, some ships wishing to access Arctic ports may fall short of the necessary requirements because of the known lax enforcement found on ships operating under flags of convenience.<sup>46</sup> Since crew and passenger welfare are vital when operating in polar waters, allowing a ship that operates under a flag of convenience in accordance with the existing IMO regime could be a genuine hazard to the environment of the Arctic.

The United Nations Convention on the Law of the Sea (UNCLOS) is a major governing agreement for the Arctic Ocean that provides a framework for future rules regarding shipping.<sup>47</sup> Despite its near-universal acceptance, and its passage into customary international law, its application in the Arctic has problems. First, the United States is not yet a party to UNCLOS, and while the United States does accept UNCLOS as customary international law, it does not yet enforce some of the provisions of UNCLOS through state

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44. O'ROURKE, *supra* note 29, at 18. Tourism through the sea routes is not impossible, however: the M/S *Explorer* transited through the Northwest Passage, following the route taken by Road Amundsen, in 1984. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2 at 21.

45. O'ROURKE, *supra* note 29, at 20.

46. *Id.* at 20–21. While the majority of shipping lines are based in developed states, many elect to register their ships in such countries as Panama, Liberia, the Bahamas, the Marshall Islands, Cyprus, and Malta, due to their attractive tax structures and the nature of their ship inspection regimes. *Id.*

47. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 50.

mechanisms.<sup>48</sup> Second, even if the United States were a party to UNCLOS, Article 234, which addresses ice-covered waters, is controversial. Nominally, it is intended to allow states with claims to ice-covered waters to regulate shipping activities in those waters to minimize the environmental effects of the transit while still permitting free navigation.<sup>49</sup> Yet, this implicit allowance of some sovereign control over free navigation has been regarded as “probably the most ambiguous, if not controversial, clause in the entire treaty,” due to the lack of clear interpretation as to what the UNCLOS drafters meant by certain elements of the text.<sup>50</sup> Thus, the international community has yet to come to a consensus on how to address special issues of Arctic maritime operations.

### *C. The State of the Polar Code*

The IMO has been working on the Polar Code, the future binding guidelines for Arctic maritime operations, for over ten years.<sup>51</sup> Since 2002, it has released the Guidelines for Ships Operating in Polar Waters (IMO Guidelines). Created out of a need for some form of standards for shipping in the sensitive polar regions, the IMO Guidelines establish target safety goals for commercial ships operating in commonly-recognized Arctic and Antarctic waters.<sup>52</sup> The IMO Guidelines also establish the concept of a Polar-class ship, one that would be certified to operate in polar regions with minimal concerns for the safety and integrity of the vessel and crew.<sup>53</sup> The IMO has now released the codified form of the guidelines as the Polar Code, though due to the nature of the Code and existing IMO regulations, its earliest implementation date is scheduled to be in 2016.<sup>54</sup>

The current form of the IMO Guidelines, adopted in late 2009,<sup>55</sup> form a comprehensive regulatory structure for almost all matters

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48. See *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 29 October 2013*, U.N. DIV. FOR OCEAN AFF. & L. SEA (Sept. 20, 2013), [http://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm) (noting the absence of the United States).

49. JENSEN, *supra* note 3, at 6–7.

50. *Id.* at 7.

51. See O’ROURKE, *supra* note 29, at 21.

52. See generally Polar Code, *supra* note 7.

53. Polar Code, *supra* note 7, at ch. 1.1.3.

54. See generally *Shipping in Polar Waters*, *supra* note 4.

55. Int’l Maritime Org. [IMO], *Guidelines for Ships Operating in Polar Waters*, IMO Assemb. Res. A.1024 (26) (Dec. 2, 2009), at 1, available at [http://www.imo.org/blast/blastDataHelper.asp?data\\_id=29985&filena me=A1024\(26\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=29985&filena me=A1024(26).pdf) [hereinafter *Guidelines for Ships Operating in Polar Waters*].

related to ship operations in the designated Arctic and Antarctic zones, from construction to crewing to emergency operations.<sup>56</sup> New ship design for the Polar regions must conform to a set of requirements that depend on (1) when the ship will transit through the Polar regions, and (2) the conditions of the sea ice at the time of the transit.<sup>57</sup> Regardless of the specific timing and type of transit, Polar-class ships must all conform to certain minimum environmental minimum requirements, including: a more rigorous construction method of double hulls and double bottoms for all ships, especially those carrying hazardous cargoes;<sup>58</sup> having engineering plants and electrical machinery that can withstand the cold and rigors of ice;<sup>59</sup> minimizing the crew's exposure to frigid exterior conditions;<sup>60</sup> having lifesaving equipment on-board specifically designed for cold-weather operations;<sup>61</sup> and special navigational equipment that enhance the ability of the officers to navigate through polar waters.<sup>62</sup> It establishes the position of Ice Navigator, a new officer of the deck department whose task is to monitor polar waters for any ice that places the integrity of the ship at risk. It is a position for which "consideration should be...given...when planning voyages into polar waters."<sup>63</sup> The requirements are significant, and are a sizable expansion to the requirements already imposed by the IMO on commercial vessels, but are necessary to ensure the integrity of ships and crews navigating through these waters. The recent experience of the M/V *Akademik Shokalskiy* in the Antarctic speaks to the omnipresent dangers to ships in the Polar regions, even those like the *Akademik Shokalskiy*, which were designed for such waters.<sup>64</sup> The maritime community needs a strong polar code to ensure that the *Akademik Shokalskiy* is not another *Exxon Valdez*.<sup>65</sup>

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56. *Id.* at 4.

57. *Id.* at 10 (explaining the seven classes of Polar ships and the specific conditions through which these ships may operate).

58. *Id.* at 14.

59. *Id.* at 14–15.

60. *Id.* at 17–19.

61. *Guidelines for Ships Operating in Polar Waters*, *supra* note 54, at 21–24.

62. *Id.* at 24–27.

63. *Id.* at 11.

64. See Henry Fountain, *Second Icebreaker Nears Ship Stranded off Antarctica*, N.Y. TIMES (Dec. 29, 2013), <http://www.nytimes.com/2013/12/30/world/antarctica-ship.html>.

65. See Philip Shabecoff, *Largest U.S. Tanker Spill Spews 270,000 Barrels of Oil off Alaska*, N.Y. TIMES, Mar. 25, 1989, at A1, available at ProQuest.

The existing IMO Guidelines, however, have many flaws if they are to be implemented as is in the Polar Code. First, the IMO Guidelines are just that – guidelines. They are not currently binding, and Polar-class ships so far exist primarily on paper.<sup>66</sup> While the IMO has a timeline for implementation of the Code based on the Guidelines, its recent history with acceptance of its guidelines and regulations is frustrating. At the 2012 conference of the Marine Environment Protection Committee, the IMO Secretary-General pledged at the opening of the conference that binding greenhouse gas limitations would be in force worldwide by 2015.<sup>67</sup> However, certain major maritime nations, such as China and Brazil, sought concessions on the emissions reduction quantity, frustrating the intent of the IMO.<sup>68</sup> At the end of that week, IMO Secretary-General Koji Sekimizu voiced the IMO's frustration at its member states' failure to achieve meaningful progress, stating, "I have, at this moment, no idea how we can achieve [a binding greenhouse gas emissions protocol]."<sup>69</sup> This recent history demonstrates that the IMO's enforcement capabilities through mutual cooperation are not strong on potentially controversial issues such as greenhouse gas emissions. Thus, if an issue as important as the Polar Code is to have full acceptance, it needs an enforcement mechanism to avoid the kind of standards reduction and possible regulatory avoidance seen with the greenhouse gas conference.

Second, the Code would only apply to ships greater than 500 gross tons engaging in international voyages. Domestic, security, and leisure voyages are not covered under the current IMO Guidelines.<sup>70</sup> Even with fishing vessels, only those with a length of at least 12 meters are treated by the IMO, and vessels between 12 meters and 24

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66. See generally INT'L ASS'N OF CLASSIFICATION SOC'YS, REQUIREMENTS CONCERNING POLAR CLASS (2011), available at [http://www.iacs.org.uk/document/public/Publications/Unified\\_requirements/PDF/UR\\_I\\_pdf410.pdf](http://www.iacs.org.uk/document/public/Publications/Unified_requirements/PDF/UR_I_pdf410.pdf).
67. *Marine Environment Protection Committee (MEPC), 63<sup>rd</sup> Session, 27 February to 2 March 2012: Opening Address by IMO Secretary-General Koji Sekimizu*, INT'L MAR. ORG. (Feb. 27, 2012), <http://www.imo.org/MediaCentre/SecretaryGeneral/SecretaryGeneralsSpeechesToMeetings/Pages/MEPC-63-Opening.aspx>.
68. David Thorpe, *IMO Failure to Tackle Shipping Emissions May Force EU Action*, LINK2 (Mar. 6, 2012), <http://www.link2portal.com/imo-failure-tackle-shipping-emissions-may-force-eu-action>.
69. *Marine Environment Policy Committee (MEPC), 63<sup>rd</sup> Session, 27 February to 2 March 2012 (closing remarks): Closing Remarks by IMO Secretary-General Koji Sekimizu*, INT'L MAR. ORG. (Mar. 2, 2012), <http://www.imo.org/MediaCentre/SecretaryGeneral/SecretaryGeneralsSpeechesToMeetings/Pages/MEPC-63-closing.aspx>.
70. O'ROURKE, *supra* note 29, at 21 (2013).

meters operate under a voluntary regime.<sup>71</sup> Although all are bound by existing rules regarding oil in marine environments, they are still subject to domestic laws rather than international ones with respect to their operations in the Arctic. And even though many domestic laws regarding ship standards in the Arctic are robust and well-enforced, they are not standardized.<sup>72</sup> This can be a liability in a region as compact as is the Arctic. Thus, since the Arctic Council states promulgate the domestic laws governing fishing vessel standards, and since the Arctic Council states enforce these standards on their own vessels in the Polar Code zone, the IMO ought to include the Arctic Council as an enforcement body in its final draft of the Polar Code.

*D. Lessons from the SAR Agreement*

If the Arctic Council does take an enforcement role with the Polar Code, such a role needs to follow the precedents the Council has set for itself regarding the enforcement of its own agreements. Swedish Foreign Minister Carl Bildt's succinct description of the work style of the Council—"firmly based in established principles of international law, but with particular responsibilities for the directly adjacent nations"<sup>73</sup>—formed the basis of the first binding, enforceable agreement created under the auspices of the Arctic Council, the Search and Rescue Agreement (SAR Agreement). Although search and rescue is a clearer point of unified action than other key Arctic issues, the SAR Agreement is nevertheless a useful template for how the Arctic Council can better assert itself on the world stage when other international organizations are unable or unwilling to do so in a region as sensitive as the Arctic.

The terms of this agreement mark a critical path forward for the Arctic Council with respect to its ability to enforce binding agreements in a unified manner. This agreement is narrow in scope—it does not seek to overhaul the entire Arctic Council's existing structure, nor directly impede on existing agreements or applicable international law. However, despite its narrow scope, it has broad-reaching implications for relations among the Arctic states. The agreement finalizes territorial claims on a functional basis by delimiting which states have search and rescue priorities within the

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71. Deggim, *supra* note 30.

72. JENSEN, *supra* note 3, at 7–8.

73. Carl Bildt, Op-Ed., *Northern Beacon*, N.Y. TIMES (May 13, 2013), <http://www.nytimes.com/2013/05/14/opinion/global/Carl-Bildt-Why-the-Arctic-Council-Matters.html>.

Arctic zone.<sup>74</sup> This establishes the Arctic Council's ability to function as both an administrative and an enforcement body, even when conceding that international legal disputes may yet alter the specifics of the agreement.<sup>75</sup>

The SAR Agreement also asserts certain minimum levels of information sharing and standards regulation, which is a necessary element of a unified Polar Code enforcement scheme. Article 9 of the Agreement lays out the minimum ways in which the states must cooperate with each other, which includes but is not limited to: sharing of communications and meteorological information; sharing of resources; knowledge of each other's search-and-rescue capabilities; and supporting joint initiatives to improve search-and-rescue in the Arctic.<sup>76</sup> The 2009 Tromsø Declaration asks that the same interactions occur regarding shipping and maritime standards, noting that increased marine access to the Arctic will require greater cooperation amongst the Arctic Council states to craft a suitable policy.<sup>77</sup>

Finally, the provision allowing for periodic review and revision of the Agreement is highly significant for the Arctic Council and perhaps for the Polar Code. Up until 2011, the Council served as a body through which the Arctic states could confer on issues and policy of mutual import, but has few actual powers. With this regular meetings provision, however, the Arctic Council was able to fulfill the promise of the Nuuk Declaration of 2011.<sup>78</sup> Now, it can position itself to become a more significant international legal body by reviewing agreements for what works and what does not, and seek to improve on the shortcomings of the Arctic Council's binding agreements. This framework can be extended to an enforcement mechanism of the Polar Code, by using the institutional body of the Arctic Council as a means of improving on Polar shipping while conserving the Polar environment.

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74. Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, Multilateral (Arctic Council), May 12, 2011, T.I.A.S. No. 13-119 [hereinafter SAR Agreement].

75. *Id.* ("The delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States or their sovereignty, sovereign rights or jurisdiction.").

76. *Id.*

77. See ARCTIC COUNCIL, THE TROMSØ DECLARATION: THE SIXTH MINISTERIAL MEETING OF THE ARCTIC COUNCIL 4 (2009), available at <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations> [hereinafter Tromsø Declaration].

78. See ARCTIC COUNCIL, THE NUUK DECLARATION: THE SEVENTH MINISTERIAL MEETING OF THE ARCTIC COUNCIL 2 (2011), available at <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations> [hereinafter Nuuk Declaration].

#### IV. WHY THE ARCTIC COUNCIL MUST BECOME INVOLVED IN THE POLAR CODE

The Arctic Council has already expressed its interest in having a binding shipping agreement for the Arctic, and now is the time for the Council to act on that interest and integrate its interests into the Polar Code. The Council has addressed the need for a shipping agreement many times in its seventeen-year history, starting with the Barrow Declaration in 2000 that endorsed the work of the IMO in creating what would become the IMO Guidelines.<sup>79</sup> In 2006, the Arctic Council emphasized its desire to promote greater cooperation among its member states regarding standards for marine safety, emphasizing the desire for the Arctic Council states to find a collective solution to a pending problem.<sup>80</sup> The Council grew more concerned in its Tromsø Declaration of 2009, urging the IMO to make its IMO Guidelines mandatory. The Council specifically requested that “global IMO ship safety and pollution preventions conventions be augmented with specific mandatory requirements or other provisions for ship construction, design, equipment, crewing, training and operations, aimed at safety and protection of the Arctic environment.”<sup>81</sup> The Arctic Council has reiterated the Tromsø request since 2009, urging the IMO to complete the work of the Polar Code in 2011,<sup>82</sup> and encouraging greater cooperation between the Arctic Council and the IMO in 2013.<sup>83</sup>

The logical nexus of these parallel interests is the inclusion of the Arctic Council as both an advisory and enforcement arm of the Polar Code in the Arctic. While the IMO has expertise in the field of maritime shipping, the Arctic Council has expertise in Arctic affairs, and recognizes the interconnected nature of economics, law, and environment in the Arctic.<sup>84</sup> As Foreign Minister Bildt put it, “[t]he Arctic Council brings together the eight states, and the indigenous

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79. Barrow Declaration, *supra* note 6, at ¶ 11.

80. ARCTIC COUNCIL, THE SALEKHARD DECLARATION: THE FIFTH MINISTERIAL MEETING OF THE ARCTIC COUNCIL 7–8 (2006), *available at* <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations>.

81. Tromsø Declaration, *supra* note 76, at 4.

82. Nuuk Declaration, *supra* note 77, at 4.

83. ARCTIC COUNCIL, THE KIRUNA DECLARATION: THE EIGHTH MINISTERIAL MEETING OF THE ARCTIC COUNCIL 4 (2013), *available at* <http://www.arctic-council.org/index.php/en/document-archive/category/5-declarations>.

84. *About the Arctic Council*, ARCTIC COUNCIL (last visited Nov. 10, 2013), <http://www.arctic-council.org/index.php/en/about-us/arctic-council/about-arctic-council>.

peoples, in a pragmatic cooperation to tackle the common challenges and shape the events ahead of the curve.”<sup>85</sup> The Council empowered itself in 2011 to act more independently to “address emerging challenges in the Arctic,”<sup>86</sup> and has set a pattern of making its decisions “[f]irmly based in established principles of international law, but with particular responsibilities for the directly adjacent nations.”<sup>87</sup> Further, at the IMO’s recent Workshop in Safe Ship Operations in the Arctic Ocean, held on February 28, 2014, Prof. Oran Young of the University of California-Santa Barbara specifically pointed to the Arctic Council as an institutional body capable of enforcing the Polar Code. He focused on the Council’s experience with the SAR Agreement and a more recent agreement on Arctic marine pollution as indicative of the Council’s ability to work within the scope of existing IMO agreements and specifically incorporate and enforce the Polar Code within the realm of the Arctic Council.<sup>88</sup> Thus, any partnership between the IMO and the Arctic Council regarding the Polar Code can and will be mutually beneficial.

The Arctic Council thus has both the capacity and the will to bring the Polar Code into practical force, based on its analysis of shipping conditions in its comprehensive 2009 analysis of Arctic marine shipping. Drawing on data going back to 1970, the Arctic Council found that sea ice in the Arctic was at its smallest extent in the mid-2000s. Predictive models then warned of the possibility of a completely ice-free summer by 2050.<sup>89</sup> This gradual retreat of sea ice from the Arctic Ocean could permit “the possibility of moving straight across an ice-free Polar area during parts of the year,” eliminating the long-term need for the Northern Sea Route and Northwest Passage.<sup>90</sup> The Arctic Council recognizes this now, while it is unclear if the IMO does. This ability to merge the Arctic Council’s environmental data into pressing economic and political problems into the IMO’s Polar Code work is why the Arctic Council is well suited to become a future partner for the IMO.

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85. Bildt, *supra* note 72

86. Nuuk Declaration, *supra* note 77, at 2. In so doing, the Arctic Council finally institutionalized itself with the creation of an Arctic Council Secretariat in Tromsø, Norway, a key element in transitioning the Arctic Council from a cooperative group to an administrative one. *Id.*

87. Bildt, *supra* note 72.

88. See Oran R. Young, *Institutional Interplay in the Arctic Ocean*, INT’L MAR. ORG. (Feb. 28, 2014), <http://www.imo.org/MediaCentre/HotTopics/polar/Documents/Arctic2014/14.%20Prof.%20O.%20Young.pdf>.

89. ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 26–27.

90. Bildt, *supra* note 72.

The IMO-mandated, Arctic Council-enforced Polar Code policing regime would be a consistent program of inspection, certification, and necessary quarantine by the competent agencies of each Arctic Council state. The SAR Agreement already united these maritime police agencies for a common purpose, including the United States Coast Guard and the Russian Federal Agency for Maritime and River Transport, and on a matter of such import to the Council, these agencies can be bound together again for mutual maritime policing. At any of the designated entry points into Arctic waters, ships would submit themselves to an inspection by one of the named agencies to ensure that they meet the requirements of the Polar Code, especially those regarding ship design, lifesaving measures, and cold-weather operations. If the enforcement agencies know that a particular ship meets Polar class standards, as laid out in the Polar Code, then the agency will permit that ship to enter Arctic waters. If a ship fails to meet code, then it will be escorted to a port where it will be quarantined and not permitted entry into Arctic waters.

The Arctic Council states must be the ones to carry out this task because the IMO relies entirely on voluntary state party enforcement, which can produce potentially catastrophic oversights. This risk is best explained through the following hypothetical, whose reality is not too far-fetched. Ten years from now, when enough of the Arctic Ocean will be ice-free to permit more consistent transit of the entirety of either the Northern Sea Route or the Northwest Passage, a company in Southeast Asia contracts to ship hazardous industrial materials from Europe to Vietnam by ocean freighter. The freighter, flagged in Liberia, would be able to make the transit safely by way of the Suez Canal, but to save time and expenses, decides to take the Northern Sea Route, despite it not being properly outfitted per Polar Code regulations. Taking that risk, but believing the conditions safe enough to make the transit anyway, the ship leaves Rotterdam and heads north for Norwegian waters and the Kara Gate. All is well until it is well into the Arctic Circle, near the Norwegian-Russian border, at which point an early winter squall hits the ship. Since it does not meet Polar Code regulations, it is not insulated well-enough to prevent the interior of the ship from dropping in temperature. As a result, the engine starts malfunctioning due to the cold, and the Chief Engineer turns it off to fix it. Now adrift, and without a pilot trained for Polar waters, the ship is blown off-course and onto a poorly charted rock formation, which breaches the hull. The Captain orders the ship abandoned, but the lifeboats are neither built nor equipped for the Arctic. Although all the crew get away safely, the cold and wind cause two crew to succumb to the cold and two more to suffer hypothermia before Russian forces can get to the scene and rescue the crew. Meanwhile, the abandoned ship starts leaking its hazardous cargo into the water, which begins fouling the shoreline a few nautical miles away. Despite receiving aid from the Norwegians, neither the

Russians nor the Norwegians are able to easily stanch the leak of hazardous chemicals into the water, and so the Russians must commence an environmental cleanup. The Russian authorities file a suit in admiralty against the shipowner for failure to maintain a navigable ship, and although they win judgment, the recovery is paltry compared to the cost of cleanup. At the end of all this, two crew have died, one ship with cargo is lost, and Russia's remote northern shore has suffered hundreds of millions of dollars' worth of environmental damage. If the Arctic Council states had police power over enforcement of the Polar Code in the North Pole region, then either Norwegian or Russian forces could have stopped the ship, inspected it, found it out of compliance, and compelled it to dock at the nearest port pending an adequate solution.

This scenario, while not an everyday one, is not unreasonable, and has been one of the primary criticisms of the Polar Code as it exists now: without an active enforcement mechanism and without a clear protocol for retrofitting.<sup>91</sup> It also speaks to the current problem with IMO regulation adherence: the means of enforcement and compliance. The IMO concedes that it is voluntary,<sup>92</sup> and is classic problem of sovereignty and international compliance described by Chayes and Chayes: the competing systems of coercive enforcement and compliance management.<sup>93</sup> In coercive enforcement, when one state party violates the terms of an international treaty or regulatory system, other state parties to the same treaty or regulatory system impose monetary or other penalties on the offending state, intending to compel compliance. In many instances, states may sign on to a treaty with good intentions, but later decide that compliance is not worth the benefits of membership if it can avoid the obligation.

The Polar Code may yet have issues that require coercive enforcement, but the more likely problems with the Code would stem from compliance management issues. In compliance management, state parties perceive an obligation to follow an agreement to which they have subscribed themselves, and so do not seek to violate the terms of the agreement, unlike states that meet coercive enforcement. However, the agreement itself may be flawed in either its structure or

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91. See IMO's 'Polar Code' Ignores Environmental Dangers of Increased Arctic and Antarctic Shipping, TRANSP. & ENV'T (Jan. 24, 2014, 2:21 PM), <http://www.transportenvironment.org/press/imo%E2%80%99s-%E2%80%98polar-code%E2%80%99-ignores-environmental-dangers-increased-arctic-and-antarctic-shipping>.

92. See *Implementation, Control and Coordination*, INT'L MAR. ORG., <http://www.imo.org/OurWork/Safety/Implementation/Pages/Default.aspx> (last visited Mar. 16, 2014).

93. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 2-3 (1995).

monitoring mechanisms, and so states may find themselves out of compliance with an agreement due to misunderstandings about its application. In such instances, Chayes and Chayes argue, attempting to coerce compliance through sanctions is a costly and misguided mistake.<sup>94</sup>

This dilemma—not requiring sanctions but encountering confusion regarding compliance—can be resolved through Arctic Council enforcement, if applied properly. Individual states may not have the capacity to conduct all the necessary inspections all the time, but if an independent or commonly recognized entity carried out the inspections, one that all parties respected and that followed a set of accepted technical parameters, then that inspection entity could better guarantee regulatory compliance. Here, the Arctic Council forces would carry out the monitoring and compliance verification, and if they had the power to escort noncomplying ships into port to make the necessary changes, then over time the global shipping community will recognize better the minimum standards and monitoring mechanisms of the Code. Further, under this inspection system, the standards for Code enforcement can start quite high, which can help insure better global compliance.<sup>95</sup> A previous IMO regulatory code, regarding marine oil pollution, suffered from lack of compliance until the IMO changed the code to require separate ballast tanks for oil and water. The change was costly to shipping lines, but the cost of noncompliance rose very quickly as state parties like the United States demanded full compliance,<sup>96</sup> and marine insurers and protection & indemnity clubs (P & I) refused to grant coverage to ships until they complied.<sup>97</sup> This need for high initial standards may be essential, due to concerns that the Code does not adequately address issues of pollution and retrofitting,<sup>98</sup> and the United States has already begun analyzing how the Code will shape the safety, security, and commercial interests and operations of American and international corporations in the Arctic off Alaska.<sup>99</sup>

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94. *See id.* at 2.

95. *See id.* at 184.

96. *See id.* at 185.

97. *See id.* Protection & indemnity clubs (P & I) are mutual insurance groups created by *clubs* of shipping lines for their own benefit when traditional marine insurers such as Lloyd's of London capped their coverage. *See* NICHOLAS J. HEALY ET AL., ADMIRALTY 171–72 (5th ed. 2012).

98. *See* TRANSP. & ENV'T, *supra* note 90.

99. *See* Timothy Gardner & Andrea Shalal-Esa, *White House Releases Plan to Make Arctic Shipping Safer*, REUTERS (Jan. 30, 2014, 8:06 PM), <http://www.reuters.com/article/2014/01/31/us-usa-arctic-whitehouse-idUSBREA0U00X20140131>.

With the Polar Code, the costs to shipping lines for noncompliance would be high, if someone actually monitors the ships. If, for example, a Russian ship were to find a merchant carrier in the Arctic in violation of the Code, it might escorted the ship to the port of Arkhangelsk until the shipper came up with a solution. The shipping line would then need to find a ship that was Polar Code compliant to go to Arkhangelsk, have the cargo transferred from the noncompliant ship to the compliant ship, then have the noncompliant ship finish the trip, probably at a higher expense than expected. Then, the shipping line would need to somehow get the noncompliant ship out of Arkhangelsk—perhaps under special escort—then either never send it into the Arctic again or retrofit it to meet Code prior to another Arctic crossing. Since P & Is have already capped their coverage of pollution damage from ship negligence,<sup>100</sup> the shipping lines cannot afford to avoid compliance, lest they suffer from a horrific accident such as the one described *supra*. Indeed, one Norwegian P & I club has already stated that while the existing Code is a good step, it cannot be the final expression of the IMO regarding commercial shipping in the Arctic.<sup>101</sup> By comparison, the costs to the Arctic Council states would most likely not be very high, and since the Arctic Council already has provisions for mutual operations due to the SAR Agreement, issues regarding coverage overlap and operational expenses would be minimal, especially in comparison to the cost of a horrific accident in the event of noncompliance.

This system would compel expanded compliance with the Polar Code by shipping lines that might wish to skirt around IMO regulatory requirements. The prospect that a line's ship, with valuable cargo, would be denied access to a valuable shipping route would compel the lines into a calculation of the value of Polar Code-compliance compared to using longer sea routes. For those lines that would find the Polar routes more attractive, the prospect of having ships detained due to non-compliance with the Polar Code will hopefully incentivize those lines to either order new ships that meet the Polar Code, or to retrofit ships so that they come up to code. This is especially important for those ships that use flags of convenience, since shipping lines often use such registrations to avoid compliance with strict maritime regulations. Now, with a uniform, regional enforcement regime, these lines will have no choice but to abide by the Polar Code.

This enforcement regime will put a burden on the Arctic Council states, but they need to bear that burden for the sake of the Arctic. The purpose of the Polar Code is to create “additional provisions [beyond existing maritime regulations] deemed necessary...to take into

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100. See HEALY ET AL., *supra* note 96, at 214.

101. See Gardner & Shalal-Esa, *supra* note 98.

account the climactic conditions of polar waters and to meet appropriate standards of maritime safety and pollution prevention.”<sup>102</sup> The Arctic Council has already addressed some issues of maritime safety through the SAR Agreement, and agreed within the past year on a united response plan to marine oil pollution.<sup>103</sup> Both these agreements require monitoring, response, and prevention capabilities on the parts of the Arctic Council states, which presumably have the capacity to fulfill all their stated obligations. As the Polar Code bolsters these existing agreements, it behooves the Arctic Council to assume a greater burden of enforcement responsibility if they wish to ensure the future integrity of the Arctic.

## V. IMPLICATIONS FOR THE FUTURE OF THE ARCTIC

If the IMO agrees to work together with the Arctic Council on Polar Code enforcement, the Arctic Council can come into its own as a stronger global leader in regional management. This precedent is critical to the future of Arctic affairs because of how the rest of the world will need to adapt to a more robust Arctic regime. The Arctic is not a region sealed off from the rest of the world. To the contrary, it is an economically expanding region, with commodities and tourism on the rise, and a steadily growing need for reliable transportation.<sup>104</sup> With key actors coming from all parts of the world to engage in Arctic activities, these actors may become discouraged if they encounter a confusing or complex regulatory scheme for this emerging region, one that may be unnecessarily burdensome.<sup>105</sup> Rather, the Arctic Council and the IMO can assert to the world that the Arctic is a region open to the world with certain necessary restrictions, if it is to be conserved for the future. In this way, non-regional actors can adapt their approach to the Arctic before they elect to economically engage with the region.

While shipping and search and rescue agreements have had widespread and consistent support, future Arctic Council issues will likely be more contentious. The Council is already precluded from addressing issues related to security,<sup>106</sup> and has consistently held itself

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102. *Guidelines for Ships Operating in Polar Waters*, *supra* note 54, at 4.

103. *See generally* ARCTIC COUNCIL, AGREEMENT ON COOPERATION ON MARINE OIL POLLUTION PREPAREDNESS AND RESPONSE IN THE ARCTIC (2013), *available at* <http://www.arctic-council.org/eppr/agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic/>.

104. *See* ARCTIC MARINE SHIPPING ASSESSMENT, *supra* note 2, at 72.

105. *See* JENSEN, *supra* note 3, at 5–6.

106. *See* ARCTIC COUNCIL, DECLARATION ON THE ESTABLISHMENT OF THE ARCTIC COUNCIL 2 (1996), *available at* <http://www.arctic-council.org/>

out to be more concerned with issues of economics and the environment.<sup>107</sup> This leaves open three major areas that touch on both economics and the environment: fishing, mining, and oil drilling. The last of these may prove to be the most contentious, given the drive by certain Arctic Council states to expand their domestic energy capacity.<sup>108</sup> The other two may face similar problems, since these are income sources for residents of the North. Whether or not international law will be able to assist the Arctic Council in addressing these problems remains to be seen, since this pattern of adapting existing law to the regional specifications of the Arctic is the common pattern of successful Arctic Council action. It may be that the Arctic Council will need to have a new mandate in the biennial declarations, similar to the Nuuk Declaration mandate, that allows it to craft new agreements where none exist in international law. Further, since almost all of these issues will require the use of the Arctic Ocean, the Polar Code may need to be regularly updated, perhaps to include fishing activities in addition to commercial shipping. For now, though, the Council has proven that its model of regional management and enforcement can work. The SAR Agreement came into force this way, and cooperation with the IMO on the Polar Code will only strengthen the position of the Arctic Council for the future. In spite of some initial hesitation on the part of the Council, it is ready to act in the name of Arctic welfare.

## VI. CONCLUSION

The Arctic needs the Polar Code, and the Arctic Council must be a part of the Polar Code. Although only seventy-one ships transited the entire length of the Northern Sea Route in 2013, more than one thousand entered Arctic waters for commercial purposes.<sup>109</sup> These ships may bring benefits to the four million Arctic residents, but they also pose special dangers to the Arctic waters and environment that the international community has yet to encounter. The Polar Code is the best chance to ensure the future integrity of the Arctic in the face of increased commercial activity, but the only clear method of ensuring the Code's full effect is for the IMO to incorporate the Arctic

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[index.php/en/document-archive/category/4-founding-documents](http://index.php/en/document-archive/category/4-founding-documents)  
[hereinafter *Ottawa Declaration*].

107. See *About the Arctic Council*, *supra* note 83.

108. See Andrew E. Kramer & Clifford Krauss, *Russia Embraces Offshore Arctic Drilling*, N.Y. TIMES (Feb. 15, 2011), <http://www.nytimes.com/2011/02/16/business/global/16arctic.html?pagewanted=all>; see EXEC. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR THE ARCTIC REGION 5 (May 2013), available at [http://www.whitehouse.gov/sites/default/files/docs/nat\\_arctic\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf).

109. See Gardner & Shalal-Esa, *supra* note 98.

Council as an entity into the Code's enforcement and success. Arctic experts have already indicated the importance of incorporating the Council,<sup>110</sup> and already individual Council states have begun the process of analyzing the Code to see how they can best adapt to its mandates.<sup>111</sup> But Canada, Norway, and the United States cannot complete the task alone—they need the partnership of all the Arctic Council states, which necessarily requires the Council as an international institution to act in partnership with the IMO. Arctic Council enforcement of the Code will ensure that shipping lines come into compliance with the Code, help minimize the effects of using flags of convenience to avoid potentially costly yet safe retrofits to ships, and ensure that the expanding Arctic maintains its core environmental integrity. If the Arctic Council states will not enforce the Code, then too many noncompliant ships will slip through, and given the rise of Arctic oil drilling, only one ship needs to have an accident to experience another *Exxon Valdez*. The IMO must embrace the concept of active enforcement of its regulations, and the Arctic Council can and should act to enforce the Polar Code, not only for themselves, but for the rest of the world.

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110. See Young, *supra* note 87.

111. See Gardner & Shalal-Esa, *supra* note 98.

