

Commentary

Missing the Obvious in Arctic Shipping Regulations: A Maritime Lawyer's Observation from Svalbard

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As a participant to the interdisciplinary Ph.D. and Post-Doc summer school organized by the Norwegian Scientific Academy for Polar Research (NVP), I visited Svalbard this August (2017) and spent 10 busy days attending more than 50 lectures and presentations, talking to experts from all over the world, and finally exploring the place. Here is my observation as a maritime lawyer.



Svalbard

As an IMO-International Maritime Law Institute Ph.D. candidate, I have long been dealing with research related to the Law of the Sea and Arctic Navigation, but unfortunately, I had never visited the Arctic region. Therefore, the invitation from the NVP was a big deal for me. This actually was, without a doubt, the most important occasion of the year. I was so excited to finally get to visit the High North. The destination was Longyearbyen, a town on the island of Spitsbergen in the Svalbard Archipelago, Norway. The archipelago of Svalbard is critically located midway between the North Pole and the mainland of Norway.

Figure 1. Standing by the famous Svalbard sign, simply saying that beware of polar bears all over the Svalbard.

I say *critically* because, considering the trend in sea ice retreat in the Arctic Ocean, this place is potentially a future hub for Arctic shipping. With the northernmost town of the world brand, the Longyearbyen is already a popular destination for Arctic cruise vessels.

When I arrived, the first thing that caught my eye in Longyearbyen was the lack of ice, not even sea ice. It was the summer period and, apparently, it wasn't wise to expect ice around this time; but I had 24 hour daylight, and I have to say it requires some adjusting.



Figure 2. Here is a picture in front of the University Centre in Svalbard (UNIS), enjoying a perfect sunny summer day with the fellow Arctic researchers and lecturers.

The Local Perspective

There were countless edifying lectures and classes during this one week period, but the discussion panel with the local representatives we had in our 4th summer school day was the most interesting and perhaps important one for me because it was a great opportunity to finally understand what the locals thought about the increased maritime activity and the Polar Code.

The topic of the panel was “The local perspective from Longyearbyen: Challenges and Opportunities for Sustainable Development as a Result of the Increased Activity in the Arctic.” The local experts were: Merete Nordheim from Basecam Spitsbergen; Terje Aunevik from the Svalbard Business Council and Rooney Brunvoll from Visit Svalbard.

The panelists reflected their experiences as they all represented different parts of the community in Longyearbyen. Issues such as difficulties to raise political awareness about Svalbard in the mainland, Norway; benefits of the increased shipping activity for the local businessmen; and the challenges and opportunities related to local tourism were discussed. This last topic regarding Arctic tourism received the highest attention because on that weekend, Longyearbyen, with 2,000 local residents, expected to have three cruise ships and potentially 5,000 visitors on its shores. Having experienced similar situations before, the panelists expressed their concerns and frustration for not being prepared for this kind of “invasion.” They complained about the lack of capacity to host these people, and more importantly, even if they had the capacity, interestingly, these visitors

were not generating income for the local community because cruise vessels were providing all-inclusive services. Additionally, according to the panelists, cruise vessels stay in the port for a few short hours, therefore they have very limited time to visit the place. This is actually one of the most damaging aspects of Arctic tourism for locals because tourists don't get to stay long enough to actually see, experience and commit to the local economy. Lastly, the panelists complained about the tourists' behaviours. They said, "tourists are not well informed, and they don't have respect

for the nature and the traditional way of life up here".

After the panel, it was time for the Q & A session, and I asked two questions. First, I wondered if the locals were aware of the environmental protection and safety measures brought by the Polar Code. And I asked, "If they knew that those cruise vessels traveling around Svalbard right now probably won't be able to visit the place unless they meet the higher vessel standards required by the Polar Code in 2018." The impression I got is that they did not know the content of the Polar Code, therefore, couldn't relate, but, to my surprise, they knew that there were efforts to build new ice strengthened cruise vessels, and they actually gave me numbers for the vessels undergoing construction in the area.

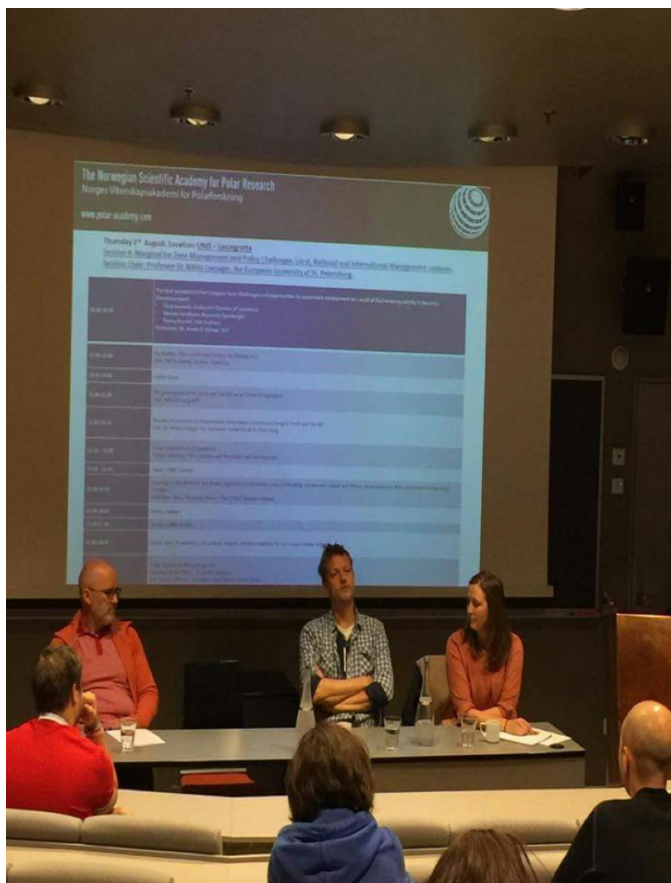


Figure 3. Discussion Panel with the Locals in NVP.

My second question was about the coastal state navigational aid and charts. I asked if they "have any knowledge about the competency of their coastal state navigational aid, and additionally, if they have comprehensive and up to date bathymetry, hydrographic data for modern charts for the vessels calling for the port in Longyearbyen." After this question, panelists immediately referred to an incident, the grounding of MS/Expedition back in 2012, (Spitzbergen/Svalbard) and said "we don't have navigational aid competency, and our charts are not up to date, let alone comprehensive enough." Moreover, they said, "this is actually one of our biggest concerns, and we keep asking ourselves what if the same thing happens again".

Actually, they have all the reasons to worry because there have been 48 ship accidents in Svalbard over the past 15 years, which means there is a risk of having similar accidents in every six years, and most importantly, the passenger vessels have accounted for most of the ship accidents since 1998 and 14 of these cases involved grounding (Palm, 2014).

This whole panel was eye opening for me because, for the first time, I realized how overwhelming increased shipping activity could be for the local people living in the coastal areas of Arctic shipping routes. After this panel, it was clear to me that we were missing the big picture in Polar Code. We were missing the obvious. And the obvious was the people on the shore. But before going down that road and criticizing the Polar Code for this, I, as a legal professional, would like to first set the stage by emphasizing the importance of the Code because we sometimes criticize without a second thought, and this does more harm than good.

Recognize Before Criticize

I think we have to first recognize the importance of the [Polar Code](#), and acknowledge the fact that it is a historical achievement in terms of international environmental cooperation and maritime safety for various reasons. First, prior to the adoption of the Polar Code in early 2017, the Arctic waters received far less international legal protection from shipping activities than the Baltic Sea, Mediterranean Sea and the North Sea (Chirchop, 2016). Second, the Polar Code is the first proactive solution that the International Maritime Organization (IMO) has taken since its establishment in 1958. Historically, international maritime conventions were often created as a response to major maritime accidents and disasters. For example, the Convention on the Safety of Life at Sea (SOLAS) was adopted in 1914 as a result of the loss of the Titanic liner in the Northwest Atlantic after striking an iceberg in 1912. Similarly, accidents such as the Amoco Cadiz, Andrea Doria, Torrey Canyon, Exxon Valdez, and Costa Concordia have all spurred changes in maritime regulatory measurements. Thankfully, however, we have managed to put the rules and regulations in place without such a major incident in the Arctic Ocean. Third, in addition to safety and security measures, the Polar Code has another function, which is to create a level playing field for the maritime industry. This is hugely important because all the key players, such as insurers, investors, ship owners and the shippers, rely on hard rules and take them as a reference point in their actions (Brigham, 2014).

And lastly, as Aldo Chirchop observes, “the Polar Code is a first generation instrument whose scope and content will be subject to adaptive learning. It is the product of compromise through negotiation, therefore, it reflects what was commonly acceptable at the global level. It can be easily criticized for its shortcomings” (2016a, p.57).

The Missing Part is the People on the Shore

According to the IMO’s own description, the Polar Code is intended to cover the full range of shipping-related matters relevant to the navigation in waters surrounding the two poles – ship design, construction and equipment; operational and training concerns; search and rescue; and equally important, the protection of the unique environment and eco-systems of the polar regions. Thus, it is the ship, people on board, and the environment that are given emphasis in the Polar Code thus far.

The question is then, what about the people on the shore? Aren’t they the ones who are being directly affected by the increased shipping activity? Perhaps, they are the most affected and in need of protection. If we recall the BP oil spill incident, we would realize that coastal communities, such as local fishermen, hoteliers, and the restaurant owners were the most vulnerable and affected ones. Therefore, if something is left out in the Polar Code, it is the interests of the people on the shore, and this sends an unfortunate message.



Figure 4. Hiking in Longyearbyen.

I have advocated for the creation of the Polar Code because it sets a great example to demonstrate how regional states can be instrumental in finding solutions to their collective maritime problems, and how they can actually lead the way for the IMO to set international maritime rules. The establishment of the Arctic Council with its numerous components relating to sustainable development and environmental protection, with the interests of Indigenous peoples at its core, is another novel idea and has proven its merits over the past 20 years.

However, it is ironic that these same local people are not considered vulnerable in the face of increasing Arctic shipping activity and provided with legal protection under the Polar Code.

As I described above, the immediate threat for locals is Arctic tourism. People are vulnerable to ever increasing Arctic tourism activities on their lands. However, in addition to Arctic tourism, these people are exposed to both tanker and container shipping related threats as well. And they need help with a number of major infrastructural problems, such as the system for emergency response, capacity or plan for immediate reaction to oil, sewage, or noxious substance pollution, access to the accident site, pre-placed cleanup materials and technologically advanced and Arctic ready equipment.

Locals have Responsibility

Coastal communities in shipping routes need to raise their voice and collectively demand their own protection. They have to, of course, find their venues for that. And this still could be best achieved via the Arctic Council or their own governmental bodies.

However, we have to realize that the local institutions can also be instrumental in these efforts. This brings me to another highlight of the summer school, which was the introductory lecture about the newly established UNIS Arctic Safety Centre, given by Ann Christin Auestad, the project manager and the director of the Centre. The Center has the mandate to share knowledge, experience and create awareness for the challenges related to increased human activity in Svalbard. With support from the Norwegian government, this Centre has a very promising future. In a short period of time, the Centre can take the lead in identifying the problems and risks associated with the increased Arctic shipping. And it can represent local people in efforts to reach out to decision makers. In other words, it can be a bridge between law makers and the local community. Similarly,

it can help industry to have a better understanding about local concerns. And lastly, the Centre could easily be an example for other Arctic and non-Arctic states as well.

Conclusion

Overall, my stay in Svalbard was very productive. I have built potentially lifelong friendships and gained important knowledge. Unfortunately, however, I faced an inconvenient truth: That unless people on the shore are protected, the Polar Code will always appear as an industry driven legal instrument created to protect the industry's self-interests. Even the environmental protection measures in the Code will be framed as a prolongation of this motive.

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