ANNEX

EXTRACTS OF THE LEGAL MEMO SUBMITTED TO THE ANTARCTIC AND SOUTHERN OCEAN COALITION ON 10 DECEMBER 2015 BY JUDITH CREGAN ESQ. ON THE POTENTIAL APPLICATION OF POLAR CODE TO FISHING VESSELS AND YACHTS

Executive Summary

The sea areas covered by the Polar Code encompass high seas, EEZs, and territorial seas as defined by UNCLOS. Subject to various rights of coastal states, the flag state of vessels traversing these waters have sole jurisdiction to regulate vessel registration, construction, operation, voyage planning and manning requirements. Although the IMO member states have adopted a number of IMO conventions, those conventions by and large regulate only shipping and passenger vessels, not fishing boats or yachts not used to carry cargo.

Amending SOLAS to add a separate chapter or subchapter would be the best method by far to apply particular safety provisions of the Polar Code to fishing vessels and yachts, but likely many IMO member states will challenge such an effort. Secondarily, the IMO could try to amend the SFV’s Cape Town Agreement of 2012 via a new protocol to apply the desired Polar Code vessel safety provisions to fishing vessels without regulating yachts, which lie outside the jurisdiction of either version of the SFV. This is problematic because neither version of the SFV has come into effect, and the conventions would have to be renegotiated by all participants. In the alternative, the IMO might draft voluntary guidelines for fishing vessels and yachts sailing in Polar Code waters with the intent to make the guidelines mandatory at some point via SOLAS and MARPOL.

Beyond SOLAS and the SFV, the STCW-F is limited to manning and training of certain fishing vessel personnel, so only the Polar Code’s chapter 12 would fit within this convention’s jurisdiction, and would have no application to yachts. Finally, interested nations under IMO guidance could draft a completely new convention to apply Polar Code provisions to fishing vessels and yachts, though this process would be a lengthy process and likely be as unsuccessful as amending the SFV.

Outside of the IMO’s conventions, the CCAMLR covers fishing vessels in Polar Code waters of the Antarctic, but currently only monitors and regulates fish catch and fishing equipment, not vessel safety, navigation, vessel structure or routing, and does not apply in any way to yachts. There is no similar convention for the Arctic region, although the Arctic Council nations could sponsor such a convention.

Part III. Review of IMO Conventions for Application of the Polar Code to Fishing Vessels and Yachts

There are four IMO conventions concerned with the seaworthiness of ships: SOLAS, the International Convention on Load Lines of 1966, the 1971 Agreement on Special Trade Passenger Ships (with its Protocol of 1973), and the 1977 Torremolinos International Convention for the Safety of Fishing Vessels (SFV).1 The Load Line Convention prescribes the minimum freeboard (minimum draught) for a shipping vessel to be loaded, and the Special Trade Passenger Ships Agreement applies only to the safety of ships carrying large numbers of unberthed passengers in special trades, such as the pilgrim trade, and are thus...

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1 See Churchill supra note 7 at 266.
inapplicable to application of the Polar Code safety provisions. Only the SOLAS and SFV conventions potentially apply to implement the vessel safety regulations of the Polar Code to fishing vessels, and only the former to yachts as well.

A. SOLAS.

The SOLAS Convention 1974 is the most far-reaching and important of all international treaties regarding the safety of merchant ships. Originally adopted as an international treaty in 1914 in the aftermath of the Titanic disaster, when the UN formed the IMO (originally the IMCO) by international treaty in 1958, among other directives it was charged with keeping SOLAS up to date. The IMO first adopted a new version of SOLAS and then amended it several times. In 1974 the IMO rewrote SOLAS and has continued to amend it. To date, 162 States or parties have ratified the SOLAS Convention 1974, which entered into force on 25 May 1980. It currently contains 12 chapters, with chapters XIII and XIV set to come into effect within the next year.

In general, SOLAS applies only to shipping vessels and passenger ships. By its terms, it does not apply to fishing vessels or pleasure yachts not engaged in trade, unless a specific SOLAS chapter so states. Therefore, as regards applying the Polar Code or parts thereof to fishing vessels and pleasure yachts not engaged in trade, any SOLAS chapter intended to apply to such vessels must so state explicitly at the beginning of that particular chapter. Further, SOLAS generally applies only to vessels on an “international voyage,” defined as “a voyage from a country to which the present Convention applies to a port outside such country, or conversely.” This type of voyage is typical of shipping vessels and passenger ships that leave the territorial seas of their flag state to motor to foreign ports. This is not necessarily typical for many fishing vessels or yachts that may sail or motor from and return to their home port without ever entering a foreign port.

There is precedent for SOLAS chapters that apply to fishing vessels and pleasure yachts: Chapter V, Safety of Navigation, requires all vessels on all voyages to comply with the navigation rules of that chapter, excluding only warships and governmental ships and vessels operating on the North American Great Lakes area. Even Chapter V, however, allows the government of the state flagging the vessel to determine the extent some of

References:

2 Id.
5 See Churchill supra note 7 at 265.
6 Id.
8 A new chapter, Chapter XIII, applies to periodic IMO audits of member states for compliance with SOLAS regulations will come into effect on 1 January 2016. See http://www.dnv.nl/Binaries/StatutoryUpdate_no5_2015-June_tcm141-630984.pdf, last accessed on 20 October 2015.
9 SOLAS Chapter I, Part A., Regulation 3.
10 Id.
11 The IMO has not included fishing vessels in the provisions of SOLAS because of the differences in design and operation between fishing vessels and other types of ships. See http://www.imo.org/en/OurWork/Safety/Regulations/FishingVessels/Pages/Default.aspx, last accessed on 20 October 2015.
12 SOLAS Chapter I, Part A, Regulation 2(d).
Chapter V’s regulations apply to small vessels such as yachts (below one hundred and fifty gross tonnage) and/or to fishing vessels.\textsuperscript{13} As discussed below regarding the SFV conventions, states traditionally have been reluctant to regulate their fishing fleets or yachts in any manner. Similarly, SOLAS' Chapter XI-2, Special Measures to Enhance Maritime Security, applies not only to cargo ships and passenger vessels, but also mobile offshore drilling units, the latter being a category not generally covered by SOLAS.\textsuperscript{14} Chapter XI-2, however, does not apply to fishing vessels or yachts.\textsuperscript{15}

SOLAS allows for the tacit acceptance procedure for amending the Convention\textsuperscript{16} Pursuant to this procedure, an amendment automatically comes into effect with the passage of time unless the amendment is objected to by more than one-third of Contracting Governments or Contracting Governments owning not less than 50 per cent of the world’s gross merchant tonnage.\textsuperscript{17} The Maritime Safety Committee (MSC) may amend the time period, but cannot shorten it to less than one year.

The IMO’s MSC has accepted the Polar Code’s Introduction and Part I-A’s 12 chapters as a new chapter XIV to SOLAS.\textsuperscript{18} Chapter XIV currently applies only to cargo vessels above 500 gross tonnage and to passenger ships.\textsuperscript{19} Yachts that routinely carry more than twelve passengers, however, fall within the definition of passenger ship.\textsuperscript{20}

SOLAS would be by far the best IMO convention to amend to apply Polar Code provisions to fishing vessels and to yachts not engaged in trade. SOLAS has been in force since 1980. With over 162 States and entities having ratified it, SOLAS has the widest international application of all the relevant IMO conventions. It contains the tacit amendment procedure so that it can be amended much more quickly than a convention that has not yet entered into effect, such as the SFV. Moreover, the IMO specifically drafted the Polar Code so that it will apply through SOLAS for all of its safety provisions, and MARPOL for all of its environmental provisions. Therefore, politics aside and from a purely technical and legal view, with some modification, any of the current Polar Code chapters and parts could be applied to “Step 2” type vessels such as fishing vessels and yachts.

\textsuperscript{13} SOLAS Chapter V Regulation 1(4).
\textsuperscript{14} SOLAS Chapter XI-2, Regulation 2 (1).
\textsuperscript{15} SOLAS Chapter XI-2, Regulation 2.
\textsuperscript{16} There are two routes for amending SOLAS. SOLAS Article VIII (a). One is for a Contracting Government to submit proposed SOLAS changes to the IMO’s Secretary General, who then refers the proposed amendments to the Maritime Safety Committee for consideration, and also circulates them to member states at least six months prior to consideration in open session. Id. at (b)(i) and (ii). Contracting Governments, whether or not members of the IMO, are entitled to participate in the proceedings of the Maritime Safety Committee in order to consider and vote on the proposed amendments. Id. at (b)(iii). If at least one third of the Contracting Governments are present at the MSC meeting for the vote, a two-thirds majority vote will allow the amendments to pass. Id. at (b)(iv). As long as the amendments are not to the Articles of the Convention or to Chapter I of the Annex, once the amendments are passed by the MSC as prescribed, the amendments are considered accepted by the Contracting Governments after the time period set by the MSC unless objected to within that period by either more than one-third of the Contracting Governments or by Contracting Governments whose combined merchant fleets constitute at least fifty percent of the gross tonnage of the world’s merchant fleet. Id. at (vi).

The second route is for a Contracting Government to request a Conference of Contracting Governments, agreed to by at least one-third of the Contracting Governments, to consider amendments to the convention. Id. at (c)(i) and (ii). A two-thirds vote of the Contracting Governments attending the Conference is required to pass any amendments. Id. at (c)(ii). The tacit acceptance provisions of acceptance through passage of time unless objected to apply to this route as well as the first. Id. at (c)(iii).

\textsuperscript{17} http://www.imo.org/en/About/Conventions/Pages/Home.aspx, last accessed on 20 October 2015.
\textsuperscript{18} IMO Maritime Safety Committee MSC 94/2.
\textsuperscript{19} IMO Maritime Safety Committee MSC 95/21/3, Agenda Item 21.
\textsuperscript{20} SOLAS Chapter I, Part A, Regulation 2(f). A passenger is any person other than the master, crew members or other persons employed in any capacity on board ship in the business of that ship. Id. Regulation 2(e).
Because, however, neither the current Polar Code nor the new chapter XIV applies to fishing vessels or yachts not engaged in trade, the MSC’s Polar Code Committee would have to draft revisions to the Polar Code to address those vessel types, which the MSC would then have to approve. The new fishing vessel and yacht safety provisions in the revised Polar Code then would have to be made applicable through a revision to SOLAS 1974, perhaps via one or more subparts to the new Chapter XIV, or via a completely new chapter. It would be most logical to amend Chapter XIV to include one or more subchapters applicable to fishing vessels and yachts traveling in polar waters, with a separate annex or subpart of an annex to specify the technical details.

Any subchapter of chapter XIV or new chapter would have to specifically state that its provisions apply to fishing vessels and yachts, so as to satisfy SOLAS' general rules of jurisdictional application. Likewise, such new chapter or subchapter would require a new definition for “international voyage” so that any new Polar Code requirements could apply to fishing vessels and yachts that enter Polar Code waters, but that do not stop at ports other than their home ports.

The Polar Code essentially creates a polar class of vessel for shipping and passenger transport on international voyages. Even though the SOLAS is by far the best IMO convention to apply the Polar Code to fishing vessels and yachts, it will be a pitched battle to make such regulations mandatory to create a similar polar class of fishing vessel or yacht, as the next section explains.


Currently there is no international instrument in force concerning the safety of fishing vessels. The vast majority of shipping and passenger vessels load and discharge their cargo or passengers in port; their function at sea is primarily transportation from port to port. By comparison, a fishing vessel hunts, locates, catches, loads, preserves, and sometimes unloads or processes its cargo at sea in variable weather conditions. Therefore, a fishing vessel is a very specialized vessel, whose size, deck layout, carrying capacity, accommodation, machinery and equipment are all related to specialized functions. Fishing vessel design takes into account factors such as the target fish species, travel distances, fishing gear and methods, its fishing area's geography and climate, vessel seaworthiness and crew safety, catch handling, processing and stowage, vessel financing, boatbuilding and fishing skills, flag state laws and regulations, choice and availability of construction materials and economic viability.

In 1977, the Nations attending a diplomatic conference in Torremolinos, Spain adopted the Torremolinos Convention on the Safety of Fishing Vessels (SFV or Torremolinos Convention) to address the safety concerns that are unique to fishing vessels. Partly due to the reasons stated above, the Torremolinos Convention never entered into force and was superseded by the Torremolinos Protocol of 1993 (Torremolinos Protocol). The Torremolinos Protocol adopted most of the regulations contained in the Torremolinos

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21 See supra note 58.
23 Id.
24 Id.
25 Id.
26 Id.
27 See Fishing Vessels supra note 71.
28 The Torremolinos Protocol’s introduction acknowledges that the Torremolinos Convention contained provisions to which the states with large fishing fleets would not agree.
29 Id.
Almost 20 years later, because insufficient ratifications existed for the Torremolinos Protocol to enter into force, in 2012 a diplomatic conference meeting in South Africa adopted the Cape Town Agreement of 2012 on the Implementation of the Provisions of the 1993 Protocol relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977 (Cape Town Agreement). The Cape Town Agreement adopted most of the Torremolinos Protocol provisions, but amended some of the terms so as to allow the agreement to come into effect as soon as possible. The Cape Town Agreement increased the number of states required to ratify it, but deceased the number of ships required in the aggregate for adoption.

Neither the Torremolinos Protocol nor the Cape Town Agreement is in force at this time. Although either or both documents together could conceivably enter into force if enough states ratify each agreement, the IMO is encouraging states to ratify the Cape Town Agreement rather than the Torremolinos Protocol. At this time, although 17 states have ratified the Torremolinos Protocol, the aggregate fleet is too small to meet the requirements to bring the Protocol into effect. As for the Cape Town Agreement, to date only 3 states have acceded to it, with 2 more states as signatories who will accede to the Agreement by passage of time after the Agreement comes into effect unless that state so indicates. One further state is a signatory awaiting ratification.

The SFV versions define a “fishing vessel” more narrowly than does SOLAS 1974. In the SFV, a fishing vessel is defined as “any vessel used commercially for catching fish, whales, seals, walrus or other living resources of the sea,”(emphasis added) whereas SOLAS 1974 defines a fishing vessel more inclusively as “a vessel used for catching fish, whales, seals, walrus or other living resources of the sea.” Further, both SFV versions apply only to fishing vessels at least 24 meters (about 79 feet) long or longer.

30 Torremolinos Protocol Article I.
31 Entry into force of the Torremolinos Protocol requires ratification by 15 states with a combined fleet of at least 14,000 24-meter or larger ships. Id.
32 Id.
33 Cape Town Agreement Article II.
34 Entry into force of the Cape Town Agreement requires ratification by 22 states with a combined fleet of at least 3,200 24-meter or larger ships. Id.
36 The Torremolinos Protocol will enter into force one year after 15 states with at least an aggregate fleet of 14,000 vessels of 24 meters in length and over, have ratified the Protocol. Torremolinos Protocol Article 10(1). The Cape Town Agreement with come into force one year after at least 22 states with an aggregate fleet of 3,600 vessels of at least 24 meters in length operating on the high seas have ratified the Agreement. Cape Town Agreement Article 4(1).
38 See http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/, last accessed on 24 August 2015. The contracting states for the Torremolinos Protocol are: Bulgaria, Croatia, Cuba, Denmark, France, Germany, Iceland, Ireland, Italy, Kiribati, Liberia, Lithuania, Netherlands, Norway, Saint Kitts and Nevis, Spain, and Sweden. South Africa has signed the Agreement subject to ratification, but has not yet ratified it.
39 The contracting states for the Cape Town Agreement are: Congo, Denmark, Iceland, Netherlands, Norway.
40 Torremolinos Protocol Article 2.
41 SOLAS Chapter I (2).
42 Torremolinos Protocol Article 3(3); Cape Town Agreement Article 1(2).
Both the Torremolinos Protocol and the Cape Town Agreement address fishing vessel construction, equipment and safety. Both briefly address the icing allowances for stability calculations, ship design to minimize ice accretion, and means for removing ice, though the regulations are limited in scope. Both require a certification program with port state control that allows a member state to verify that another member state’s fishing vessel entering its port complies with the certificate’s requirements and allowing the port state authorities to hold a fishing vessel not in compliance with its certificate.

The Torremolinos Protocol contains a tacit acceptance procedure for amendments that is substantially the same as that for SOLAS 1974. The Cape Town Agreement likewise adopts this procedure.

Despite the advantages just mentioned, neither the Torremolinos Protocol nor the Cape Town Agreement version of the SFV would be nearly as effective as SOLAS for making some version of the Polar Code applicable to fishing vessels. First, neither version is yet in effect, with no clear indication if either will ever come into effect. Second, because neither version is in effect, the tacit acceptance procedure contained in both agreements is not yet in effect. To amend either version to include Polar Code provisions would require the long process of drafting another protocol or an entirely new convention, and the record shows that few states have been willing to be bound by either version of the SFV, even without additional Polar Code provisions.

Third, of the top ten fishery producer countries, none have ratified either the Torremolinos Protocol or the Cape Town Agreement. Of the eight Arctic Council member states, four have ratified the Torremolinos Protocol and 3 have ratified the Cape Town Agreement. Of the CCAMLR member states, seven have ratified the Torremolinos Protocol and two have ratified the Cape Town Agreement. This signifies that the nations with major fishing fleets in the Arctic and/or Antarctic areas are unwilling to be bound by the SFV, and may be further unwilling to force their fishing fleets to comply with costly Polar Code construction and safety provisions that would give an economic advantage to non-acceding states.

Lastly, the Torremolinos Protocol and Cape Town Agreement specifically exclude from coverage vessels used exclusively for sport or recreation, vessels used exclusively for processing fish or other living resources of the sea, vessels used exclusively for research

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43 Torremolinos Protocol Annex, Chapter II, Regulations 1(2) and 14(7), Chapter III, Regulations 7(3)(b), 8 (and Attachment 3(2)), and 33 (1)(b)(2).
44 Torremolinos Protocol, Chapter III, Regulation 8.
45 Torremolinos Protocol Article 4.
46 Torremolinos Protocol Article 11.
47 The Cape Town Agreement leaves unchanged most of the Articles of the Torremolinos Protocol. Cape Town Agreement Article 1(2).
49 Canada, Denmark (including Greenland and the Farce Islands), Finland, Iceland, Norway, Russia, Sweden and the United States.
50 See Appendix C. Denmark, Iceland, Norway and Sweden have ratified the Torremolinos Protocol, and Denmark, Iceland and Norway have ratified the Cape Town Agreement. See supra notes 95 and 96.
51 See infra note 136 for the list.
52 See Appendix C. Bulgaria, France, Italy, the Netherlands, Norway, Spain and Sweden have ratified the Torremolinos Protocol, while the Netherlands and Norway have ratified the Cape Town Agreement. See supra notes 95 and 96.
and training, and fish carriers. Therefore, neither version of the SFV would apply to yachts not engaged in commercial fishing or to vessels used exclusively for research and training. The latter category probably would include those vessels that engage in whaling in the Southern Ocean area under the guise of conducting research.

C. Other Potential IMO Conventions to Amend with The Polar Code

Beyond SOLAS 1974, and the SFV (the Torremolinos Protocol and the Cape Town Agreement), the IMO is responsible for more than fifty international conventions. Of these, other than various non-mandatory instruments, only the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F) is potentially applicable to amending to add a small part of the Polar Code safety provisions.

Prior to the STCW-F, the 1978 IMO International Convention on Standards of Training, Certification and Watch-Keeping for Seafarers (STCW) was the first international instrument to address the issue of minimum standards of competence for seafarers. The STCW excluded from its scope workers on fishing vessel and yachts not engaged in trade. Therefore, in 1995 the IMO adopted the STCW-F, which entered into force on 29 September 2012. The STCW-F currently has eighteen member states.

The objective of the STCW-F is to ensure that personnel on board fishing vessels are qualified and fit for the job so that potential threats to safety of life and/or property at sea or to the marine environment are minimized during operations on board sea-going vessels. The STCW-F requires that some fishing vessel personnel possess a minimum proficiency in specific matters and have performed duties on board a fishing vessel for a minimum period of time. It requires that skippers, officers, engineers and radio operators on fishing vessels of 24 meters or longer to obtain a certification regarding age, training and a physical examination. The STCW-F includes provisions for training in the reduction of ice formation and icing allowances for stability calculations for fishing vessels 24 meters in length and over. Only another party to the STCW-F Convention may enforce port state control

53 Torremolinos Protocol, Article 3.
54 See Richard Caddell, Science Friction: Antarctic Research Whaling and the International Court of Justice, 26 J. ENV. L. 331 (2014)(describing the controversy over Japan’s use of the International Whaling Commission’s scientific research exemption to its 1982 moratorium on commercial whaling to continue to hunt large numbers of whales in the Southern Ocean and Antarctic areas). On December 1, 2015, the Japanese vessel the Nisshin Maru and three smaller boats left Japan on a mission to kill 333 minke whales in the Antarctic Ocean, ostensibly for research purposes. www.cnn.com/2015/11/30/asia/japan-whaling-research/, last accessed on 8 December 2015. The Nisshin Maru is not listed on the CCAMLR website’s database of licensed fishing vessels for the period beginning December 1, 2015. See Appendix B. See supra note 5. See Appendix A for list of IMO drafted conventions.
56 Id.
57 Id.
58 Id.
59 Id.
60 The states who are parties to the STCW-F Convention are: Canada, Congo, Denmark, Iceland, Kiribati, Latvia, Lithuania, Mauritania, Morocco, Namibia, Norway, Palau, Poland, Russian Federation, Sierra Leone, Spain, Syrian Arab Republic, Ukraine. China signed in 1996 subject to ratification, but has not ratified the Convention.
62 STCW-F, Annex Chapter II (1).
63 STCW-F Part A, Appendix 10, and Part B, section 3.8; see supra note 2 at 14.
regarding STCW-F certification requirements. Unlike the SOLAS 1974 or the SFV, the STCW-F does not address vessel safety, inspections or construction requirements.

The STCW-F has the same tacit acceptance procedure for amending the convention as that contained in SOLAS 1974. This would be an advantage in adding Chapter 12 on manning and training. Additionally, it might be possible to require that ships officers for vessels entering Polar Code waters be trained on the Polar Operations Manual.

Nevertheless, given the facts that the STCW-F has no jurisdictional grant over the Polar Code provisions for vessel certificate and survey, performance standards, operational assessment, operations manual, vessel structure, subdivision and stability, safety of navigation and voyage planning that ASOC would like to apply to fishing vessels, it has very limited usefulness. Further, given that none of the member states are those most commonly fishing in the Antarctic region, it would not be a viable route to apply the safety provisions of the Polar Code to fishing vessels. As with the SFV, the STCW-F does not apply to pleasure craft such as yachts.

D. Other IMO Options: Voluntary Guidelines or a New Convention

Another alternative the IMO’s MSC might take is to promulgate voluntary guidelines on vessel structure, construction, certificate and survey specifically for fishing vessels and pleasure craft of a certain size in Polar Code waters with the end view of eventual application via a SOLAS 1974 amendment or a new convention. The MSC has already requested that IMO member states look at voluntarily applying the Polar Code to non-SOLAS vessels. The current Polar Code began as voluntary guidelines, first for shipping and passenger vessels in the Arctic and later for such vessels in the Antarctic.

Although MARPOL regulates pollution from fishing vessels and yachts, in the past the IMO has not sought to regulate safety or construction or manning of any fishing vessels smaller than 24 meters in length. It has not promulgated any convention on pleasure craft, though it has published voluntary Guidelines for the Security of Pleasure Craft due to the security threat that pleasure craft falling outside the scope of SOLAS chapter XI-2 and the Port Facility Security Code. There already exist IMO Voluntary Guidelines for the Design, Construction and Equipment of Small Fishing Vessels that contains provisions for ice accretion and combating ice formation for fishing vessels between twelve and twenty-four meters in length. This latter set of guidelines could be a starting point for a new set of guidelines applicable to fishing vessels working in Polar Code waters or the MSC could begin with the provisions of the Polar Code’s Part I-A and tailor them to fishing vessels and yachts.

Another possible route for the IMO to take would be if it were to sponsor a new convention that applied suitably tailored Polar Code safety regulations to fishing vessels and yachts. Such a convention would require a lengthy process because it would have to be negotiated

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64 STCW-F, Article 8 (1)-(2).
65 STCW-F, Article 10.
66 RESOLUTION MSC.385(94), recitation of facts (4).
67 See supra Section II.B.
68 See supra note 32.
69 See supra the discussion in Sections III.B and IV on the SFV and STCW-F.
among all participants and then be subject to ratification by member states that have traditionally been reluctant to accede to safety regulations for their fishing vessels or yachts.

Part IV: Non-IMO Conventions

The last option is to look at non-IMO multilateral conventions that cover the area of the Arctic and/or Antarctic seas. There is one that is potentially applicable to application of the safety measures of the Polar Code to fishing vessels: the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), adopted in 1980. It entered into force in 1982, but applies only to the Antarctic sea area.

The CCAMLR came about after a series of meetings among the Antarctic Treaty Consultative Parties, and to date 35 member states have acceded to CCAMLR. The CCAMLR applies to member state fishing vessels plying the Antarctic waters. Its objective is "the conservation of Antarctic marine living resources," primarily for the purpose of sustainable harvesting of such resources. It covers the oceanographic region south of sixty degrees south latitude to the Antarctic Convergence, the same as the Polar Code. Under the CCAMLR, in order for member states to participate in fishing inside one or more regions of the Convention Area, they must issue a license to their flagged vessels. The license details the specific regions, species and time periods for permitted fishing. The CCAMLR does not apply to yachts or other vessels not engaged in fishing.

Significantly, in 2005 the Antarctic Treaty Consultative Parties adopted a provision that contained the statement that the IMO is the competent organization to enact rules relating to navigation and use of heavy fuels in the Antarctic region. They have extended this grant of authority to the evolution of the Polar Code, specifically requesting mandatory Polar Code requirements for shipping in the Antarctic area.

Unlike the IMO Conventions mentioned above, the CCAMLR does not contain a tacit acceptance procedure. In order to amend the Convention, a consensus of all the member states must accede to any proposed changes.

Although the CCAMLR is in effect presently and has far more member States than either the SFV conventions, applies to fishing vessels, requires vessel certification by member States

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72 There is no similar convention covering the Arctic. Although an Arctic Council exists, it has not adopted a treaty to regulate fishing, similar to CCAMLR and has no legislative or enforcement power. See http://www.arctic-council.org/index.php/en/about-us, last accessed on 24 October 2015.


74 Antarctic Treaty, Dec. 1 1959, 12 U.S.T. 794, 402 U.N.T.S. 71. In 1958 the 12 nations having an interest in Antarctica at that time signed the Treaty, which entered into force in 1961. The primary purpose of the treaty was to ensure that the Antarctic only be used for peaceful purposes. Antarctic Treaty, Preamble. The original signatories were: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom, and the United States. There are currently 53 states that are parties to the Treaty, but only 29 are deemed "Consultative Parties" that can participate in Consultative Meetings. See http://www.ats.aq/devAS/ats_parties.aspx?lang=e, last accessed 24 October 2015.

75 Australia, Argentina, Belgium, Brazil, Bulgaria, Canada, Chile, China, Cook Islands, Finland, France, Germany, Greece, India, Italy, Japan, Republic of Korea, Mauritius, Namibia, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Poland, Russia, South Africa, Spain, Sweden, Ukraine, United Kingdom, United States, Uruguay, and Vanuatu.


77 CCAMLR, Preamble and Article II(1)-(3).

78 CCAMLR, Article I(1).


80 Id. See also CCAMLR, Article IX(1) and (2).

81 See Anderson supra note 16 at 67 (citing ACTM XXVII-CEP VII (Stockholm, 2005), Decision 8). The resolution is available at http://www.ats.aq/devAS/ats_meetings_meeting.aspx?lang=e.

82 ACTM XXXII-sp 006(Uruguay, 2010) at 10.

83 CCAMLR, Article XXX (4).
and covers the same Antarctic oceanographic region as the Polar Code, it would be a major expansion of the CCAMLR’s jurisdictional grant to apply the safety provisions of the Polar Code to fishing vessels, and even more so to yachts. The CCAMLR currently applies only to conservation of marine living resources by monitoring and potentially regulating fish catches, fishing vessel equipment types, catch seasons and protected areas, not vessel construction, safety or inspection.\(^{84}\) It likewise is beyond the CCAMLR’s jurisdictional grant to apply it to vessels not engaged in fishing, such as yachts and other pleasure craft that do not involve conservation of marine living resources.

Because the CCAMLR does not have the jurisdiction to regulate fishing vessel safety within the Convention area, and to seek such a jurisdiction grant would involve an amendment that would require a complete renegotiation of the CCAMLR and another lengthy ratification process, because the SFV versions were drafted to apply to fishing vessel safety, and because the Antarctic Treaty Consultative Parties have explicitly ceded vessel safety issues to the IMO, it would be highly unlikely that the CCAMLR members would agree to such an amendment at this time. Further, the same adamant unwillingness by states to regulate safety on fishing vessels that has stalled entry into effect of either version of the SFV would most certainly stymy any attempt to apply costly safety measures via amendment to the CCAMLR.\(^{85}\) (See Appendix C for a cross reference of CCAMLR members as acceding to other relevant conventions). Any mandatory safety measures applicable to yachts or other pleasure craft would have to come via either another amendment to the CCAMLR that is even further from its jurisdictional grant for conservation of marine living resources or through the auspices of the Antarctic Treaty Consultative Parties.\(^{86}\)

As for the Arctic area covered by the Polar Code, there is no similar convention such as the CCAMLR that applies to fishing vessels and/or yacht safety and construction, though potentially there could be. Although the Arctic Council has no direct authority similar to that of the IMO to draft conventions,\(^{87}\) the Arctic Council member ministers have twice agreed to convene task forces to address cooperatively two Arctic issues: search and rescue and marine pollution preparedness and response.\(^{88}\) The first of these resulted in the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, signed in 2011 and entering into effect in January 2013. A similar task force under the Arctic Council auspices drafted the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, which was signed in May 2013, but has not yet entered into effect.\(^{89}\)

Both of these conventions acknowledge other conventions, including IMO conventions, and provide only for increased cooperation among the parties with no mandatory provisions.\(^{90}\) If fishing vessel and/or yacht construction and safety were to cause significant concerns among the Arctic Council member governments and remain unaddressed by IMO mandatory provisions via SOLAS 1974, the Arctic Council could assign a task force to draft an

\(^{84}\) Although CCAMLR adopted Resolution 20/XXII in 2013 that urged Members to require the minimum ice strengthening classification standard of ICE-1C for their flag vessels licensed to fish in the Treaty area, compliance is voluntary. See www.ccamlr.org/en/resolution-20/xxii-2003, last accessed on 25 November 2015.

\(^{85}\) Because the Antarctic Treaty was originally drafted for scientific purposes, and there is a certain amount of scientific supply vessel traffic to Antarctica, the Consultative Parties might agree to a multilateral agreement to create a polar class of scientific vessel or scientific supply vessel.

\(^{86}\) The Antarctic Treaty Consultative Parties have in place non-mandatory guidelines for tourists landing in Antarctica. See http://www.ats.aq/e/ats_other_tourism.htm, last accessed on 2 December 2015. These could be expanded to include safety guidelines for yachts landing in Antarctica.


\(^{89}\) Id.

\(^{90}\) Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, Preamble and Article 1 and Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, Preamble and Article 1.
agreement that could make mandatory some provisions of the Polar Code, suitably modified for fishing vessels and yachts. Such a multilateral convention would face the same hurdles described above regarding the SFV. (See Appendix C for a cross reference of Arctic Council members as acceding to other relevant conventions).

It is important to keep in mind two things regarding such potential regional agreements. The first is that regional agreements such as CCAMLR bind only the states that accede to them, and create a kind of piecemeal response to the problem of polar water fishing vessel and yacht safety. The second is that historical fishing vessel routes are not necessarily predictive of future routes. As global sea temperatures rise, fish stocks may change concentrations, causing fishing vessels to enter fishery areas where they have not historically fished, thereby causing safety incidents where none or few had previously existed.

**Part V: Other Concerns**

Some states may raise the issue that the IMO’s intervention into regulation of fishing and yachts exceeds its grant of authority. The IMO is considered to have wide competence in matters affecting shipping.  

91 In its 2008 contribution to the UN Secretary General’s Report, the IMO itself described its mandate as follows:  

92 Since 1959, the International Maritime Organization (“IMO”), as the sole United Nation’s specialized agency exclusively devoted to maritime affairs, has been providing a forum for co-operation among Governments in the field of governmental regulations and practices relating to all kinds of shipping engaged in international trade, facilitating the adoption of comprehensive multilateral treaties for a wide range of technical measures and, in particular, the adoption of the highest practicable standards, designed to enhance safety, security and efficiency in shipping engaged in international trade. (Italic’s added).

93 The wording of this jurisdictional statement might seem to preclude the IMO’s regulation of fishing vessels or yachts. The 1948 Convention on the International Maritime Organization (IMO Convention), however, states its jurisdictional mandate in arguably broader language:

94 To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and the prevention and control of marine pollution from ships; and to deal with legal matters related to the purposes set out in this article.

95 Although the IMO Convention in Section I, Article 1 speaks mostly to regulation of shipping, the UN mandate does not limit the separate maritime safety mandate clause to shipping or use other qualifying language. The IMO’s history of ensuring safety at sea via SOLAS in its many versions, and SOLAS’s Chapter V coverage of navigational rules for all vessels on all voyages would militate for the IMO’s ability to regulate the safety of fishing vessels and yachts in the hazardous polar waters, just as the IMO’s MARPOL regulates pollution from all vessels, including fishing vessels and yachts.

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91 See Wolfrum supra note 1 at 23.
94 MARPOL 1973, Article II (4). This jurisdictional grant to regulate maritime safety is not one shared by the FAO. The FAO’s Constitution makes clear that its jurisdiction covers nutrition, food and agriculture, including fisheries. FAO Constitution Preamble and Article I, available at http://www.fao.org/docrep/meeting/022/k8024e.pdf, last accessed on 30 November 2015. It can recommend international action for the conservation of natural resources and the adoption of improved
In addition to the UN’s grant of authority to the IMO for international shipping, if an international treaty grants the IMO a mandate to implement some or all of the treaty, then the IMO has that power granted to it by the treaty’s signatories or adopting States. The 1982 United Nations Convention on the Law of the Sea (UNCLOS), considered to be customary international law of the sea, provides in its article 94 that every State must exercise its jurisdiction over its flagged vessels to conform to generally accepted international regulations for the construction, equipment and seaworthiness of ships, and the manning and training of crews. The IMO regulations and guidelines are widely held to be the “generally accepted international regulations” and “international rules and standards” mentioned in the LOSC.

Part VI: Conclusion

The best method to make some or all of the Polar Code’s chapters on vessel structure, safety, certification applicable to fishing vessels and yachts would be to amend the Polar Code and make those amendments applicable via a separate subchapter and annex or chapter and annex in SOLAS. Likely the most successful route to do this is to create voluntary guidelines that the IMO’s MSC can later draft as mandatory SOLAS requirements, which is how it approached drafting early versions of polar waters safety guidelines.

The next best route would be to attempt to expand the Cape Town Agreement version of the SFV to add vessel safety requirements for vessels entering polar waters via a new protocol to the Cape Town Agreement. Given the history of non-ratification of any attempt to regulate fishing vessels on the international level, this would be problematic and, in any event, not address yachts. The IMO could amend the STCW-F, but only to address the Polar Code’s chapter 12 on manning and training, and perhaps the use of a Polar Waters Operational Manual, but not vessel construction, inspection or certification. Alternatively, the IMO could sponsor a completely new convention to make mandatory polar water safety regulations for fishing vessels and yachts, though this would be perhaps the slowest and least likely of solutions.

The IMO appears to have the authority to regulate safety of fishing vessels and yachts, though its attempts to do so have not been well accepted by the international community.

In a more piecemeal approach, the Antarctic Treaty Consultative Parties might be willing to amend CCAMLR to address safety requirements for fishing vessels (but not yachts) entering the Antarctic waters, but are unlikely to reach any consensus to do so. The Antarctic Treaty Consultative Parties could call for a meeting to attempt to draft a separate convention for the Antarctic area to make mandatory a polar class of fishing vessel and/or yacht. The Arctic Council could do the same for the Arctic region.

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95 See Yubing Shi, Gigantic Shipbuilders Under the IMO Mandate of GHG Emissions: With Special References to China, Japan and Korea, 7 J. E. ASIA & INT’ L 493, 500 (2014).
96 See Churchill supra note 7 at 264-265.
97 See Wolfrum supra note 1 at 2055.
## APPENDIX C

### Arctic Council and CCAMLR Members' Status by Convention (at Dec 2015)

<table>
<thead>
<tr>
<th>Country</th>
<th>SOLAS</th>
<th>SFV-T. Protocol</th>
<th>SFV Cape Town Agreement</th>
<th>STCW-F</th>
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* Observer status only