A Note on the Potential Conflicting Treaty Rights and Obligations between the IMO’s Polar Code and Article 234 of the Law of the Sea Convention

Ted L. McDorman*

Introduction

Vessels in polar waters have increasingly attracted public attention in recent years as a consequence of global climate change and diminishing ice in both the Arctic and Antarctic. The International Maritime Organization (IMO) first turned its attention to guidelines for polar shipping in the 1990s with the adoption in 2002 of the Guidelines for Ships Operating in Arctic Ice-covered Waters1 and the 2009 Guidelines for Ships Operating in Polar Waters.2 Work within the IMO has since continued on the development of a mandatory International Code for Ships Operating in Polar Waters (the Polar Code).3 The goal is to produce a combination of internationally legally binding measures and non-binding recommendations respecting, amongst other things, vessel standards, operating procedures and environmental standards applicable to vessels engaging in activities both in Arctic and Antarctic waters.

In November 2012, it was decided within the Maritime Safety Committee (MSC) of the IMO that the Polar Code would not go forward as a single,
comprehensive treaty but rather would be adopted through amendments being made to the annexes of the International Convention on the Safety of Life at Sea (SOLAS);\(^4\) the International Convention for the Prevention of Pollution from Ships (MARPOL);\(^5\) and other IMO conventions as necessary.\(^6\) In particular, the Code is to be structured with general provisions; safety measures, which will be a new chapter of the SOLAS Convention; and pollution prevention measures, which will be included in the relevant annexes of the MARPOL Convention.\(^7\) The benefit of this is that as amendments to the annexes of the SOLAS and MARPOL Conventions, the new provisions will be subject to the tacit amendment procedures of each Convention,\(^8\) which, in short form, means that the amendments will come into effect for all State parties to these Conventions unless a State indicates that the amendment will not be binding upon it.

Pre-dating the above work by States within the IMO was the inclusion in the 1982 U.N. Convention on the Law of the Sea\(^9\) of article 234 that specifically deals with shipping in ‘ice-covered areas’.\(^10\) The history of article 234 is


\(^6\) For more detail, see J. Ashley Roach, “A Note on Making the Polar Code Mandatory” in this collection.


\(^8\) SOLAS Convention, supra note 4, article VIII and MARPOL Convention, supra note 5, article 16.


\(^10\) Id., article 234:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.