

*Non-Flag State Enforcement in High Seas Fisheries*, by Rosemary G. Rayfuse (Martinus Nijhoff Publishers, Leiden, Boston, 2004) xviii + 439 pp., incl. index and tables; ISBN 90-04-13889-7; US\$149, €110, £73.

The global context during which Dr Rayfuse conducted her research on *Non-Flag State Enforcement in High Seas Fisheries* has been one of a gradually worsening status in terms of marine capture fisheries. Although there are many reasons for this increasingly alarming development, the ineffective exercise of jurisdiction and control by states over ships flying their flag (flag states) is unmistakably one of the more important ones. This is among other things reflected by the many efforts at national, regional and global levels to address the problem of illegal, unreported and unregulated (IUU) fishing. Inadequate flag state control is the primary cause for IUU fishing.

Tackling inadequate flag state control is constrained by the freedom of the high seas, the principle of exclusive jurisdiction (primacy) of flag states over their vessels on the high seas and the wide margin of discretion afforded to flag states in their ship registration process. A more general constraint is the consensual nature of international law which, for treaty law, is reflected in the principle of *pacta tertiis*. The central objective of this study is whether, in the context of enforcement of high seas fisheries conservation and management measures, the principle of exclusive flag state jurisdiction on the high seas has been modified. Whether or not such a modification has already materialized is determined by analyzing state practice within the context of regional fisheries organizations (RFOs) with high seas management mandates. The state practice covered is therefore limited to the constitutive instruments of several RFOs and their regulatory efforts towards non-flag (state) enforcement. Limiting the analysis of state practice in this way is most appropriate as it proceeds from the key role that the 1995 UN Straddling Fish Stocks and Highly Migratory Fish Stocks Agreement (Fish Stocks Agreement) accords to RFOs with high seas management mandates. Article 21(1) of the Fish Stocks Agreement gives a member of an RFO the right to take certain forms of high seas enforcement action against another member or a non-member of that RFO, provided both states are parties to the Fish Stocks Agreement. As Rayfuse notes on p. 349, apart from the Canadian enforcement action with respect to the *Estai* in 1995, there have not been examples of unilateral high seas enforcement action that appear to go further than what is offered under the Fish Stocks Agreement. No account is taken of examples of high seas enforcement action taken as a consequence of hot pursuit from within the maritime zones of coastal states as their legal basis is entirely different.

The book begins by defining research objectives and methodology. It is then divided into three Parts: (I) The Legal Basis for Non-Flag Enforcement in High Seas Fisheries; (II) Practice within RFOs; and (III) Analysis and Conclusions. Part I discusses the rationale and legal bases for high seas non-flag enforcement in general and in relation to high seas fisheries in particular. Apart from

the type of at-sea enforcement action envisaged by Articles 21-22 of the Fish Stocks Agreement, in-port enforcement is also selected as a "mode of exercising high seas non-flag enforcement". The choice to do so probably stemmed from the growing attention to the use of port state jurisdiction (both prescription and enforcement) in addressing problems in marine capture fisheries. Its inclusion is therefore topical and will attract interested readers. As Rayfuse acknowledges, however, "the legal bases for adoption of at-sea and port state measures differ" (p. 10). Reliance on territorial sovereignty gives a port state very extensive or, as some states insist, unlimited prescriptive powers. The extent of a port state's enforcement powers over acts that have taken place on the high seas is much less extensive. As Rayfuse notes on p. 77, while these powers certainly include boarding, inspection and, where warranted, prohibiting the landing of catch and denial of access to port facilities, the saving-clause in Article 23(4) of the Fish Stocks Agreement reveals a lack of agreement on the precise extent of enforcement powers. In view of the extra-territorial nature of port state jurisdiction and the fact that errant vessels can avoid using certain or all foreign ports, its impact on the principle of exclusive flag state jurisdiction on the high seas is quite different from at-sea enforcement. This difference means that general conclusions on non-flag enforcement are sometimes difficult to draw.

Chapter 3 focuses on the various legal bases for non-flag enforcement in high seas fisheries in general. It covers bilateral, regional and global treaties on management and conservation of (high seas) fisheries that contain mechanisms on the two selected modes of non-flag enforcement. In addition, it examines whether the Fish Stocks Agreement should be regarded as an objective regime or whether its non-flag enforcement provisions have acquired the status of customary international law. While the first possibility is rejected, the second is accepted as feasible and thereby becomes the rationale for the analysis of state practice in the context of RFOs in Part II. This encompasses RFOs dealing with anadromous species (Chapter 4), highly migratory (fish) species (Chapter 5), straddling fish stocks (Chapter 6) and RFOs with high seas mandates that are currently being established (Chapter 7). A total of 14 RFOs are covered, three of which had, when the book was completed, either not yet been established or yet to become fully operational. The discussion of each RFO is extremely comprehensive and is in all likelihood unparalleled by any other publication so far. This is particularly true for the sections on the International Commission for the Conservation of Atlantic Tunas (ICCAT), the North-East Atlantic Fisheries Commission (NEAFC) and the Northwest Atlantic Fisheries Commission (NAFO). In addition to its main emphasis on non-flag enforcement, each section covers both the factual and legal aspects of the RFO concerned, its constituent instrument and other background information, including on the fishery. Some readers may feel that the background information is occasionally somewhat too extensive. The analysis of non-flag enforcement distin-

guishes between at-sea and in-port enforcement and, where relevant, between enforcement by members against other members of RFOs and enforcement by members against non-members. This excellent analysis is without doubt the most comprehensive and thorough that has been carried out so far in the academic literature on these issues.

The overall assessment of state practice within RFOs takes place in Chapter 8 "The Status of Non-Flag Enforcement in High Seas Fisheries", which is the first chapter in Part III. The second, Chapter 9, is entitled "Conclusion: The Future of Non-Flag Enforcement in High Seas Fisheries". Chapter 8 starts out by distinguishing between the two elements of non-flag enforcement: control and sanction. Whereas control encompasses surveillance, boarding, inspection and occasionally even detention, the more intrusive phase of sanction refers to prosecution and punishment. One of main conclusions of Chapter 8 is that, apart from stateless vessels, rights of non-flag sanction are not (yet) incorporated in relevant treaty law, including the Fish Stocks Agreement and the constituent instruments of RFOs, nor are they firmly rooted in state practice within the context of RFOs. This includes both in-port as well as at-sea enforcement. Rayfuse nevertheless argues that non-flag control "is becoming mainstream in a wide range of RFOs both in respect of members and non-members". Consequently, the principle of exclusive flag state jurisdiction has been modified to the extent that it has been supplemented by a secondary right to non-flag control. Rayfuse nevertheless admits that "the requirement of flag state consent to control is not wholly negated" (p. 355). This qualification is certainly called for in relation to at-sea enforcement as Chapter 8 reveals that only a few RFOs have non-flag at-sea enforcement procedures and none of these procedures are applicable to ships of non-members of which the captain or the flag state do not give their consent.

The discussion of the future prospects for non-flag enforcement in high seas fisheries in Chapter 9 appropriately places it in the wider context of the management and conservation of marine living resources. Rayfuse examines several practical impediments to non-flag enforcement, such as geography, costs and the nature of the fishery, as well as broader legal and political impediments. The latter include the need for the RFO's establishment as such and its measures to be consistent with international law. This also relates to the thorny issues of participation in the RFO and the allocation of fishing opportunities. Rayfuse finally takes an innovatory approach by advocating the application of the basic rules of state responsibility in cases where a flag state has failed to take remedial action itself or authorized another state to do so. This, she argues, would entitle an injured state, which would include at any rate any member of a relevant RFO, to take certain countermeasures against the flag state. Although no concrete examples are given, this would appear to include at-sea enforcement action. Insufficient progress in combating IUU fishing globally may make resort to the basic rules of state responsibility a potentially interesting option. Many states are nevertheless expected to be hesitant about

using this tool of general international law within a sphere of more specific international law that lacks a similar tool. Aware of the pitfalls of unilateralism, Rayfuse therefore calls for such countermeasures to be subject to multi-lateral verification and dispute settlement mechanisms agreed on within RFOs (p. 372). In view of her subsequent controversial, but nevertheless convincing, argument that the obligation to cooperate with RFOs has now become part of customary international law, such countermeasures would also be available for members of RFOs against non-members.

Rayfuse's advocacy of *de lege ferenda* already foreshadows her balanced conclusion on the customary status of a secondary right of non-flag sanction (including prosecution and punishment) for members of RFOs in situations where other members or non-members fail or refuse to exercise effective jurisdiction and control over their vessels; this right "is not far off" (p. 375). This approach appropriately rejects unilateralism and builds on the generally accepted role of RFOs as vehicles for international fisheries management and conservation. Eventually, however, the extended role of RFOs and the powers conferred on them may need to be confirmed and consolidated at the global level, perhaps in the framework of the 1982 UN Law of the Sea Convention or, as Rayfuse notes, as part of the ongoing review of the implementation of the Fish Stocks Agreement (p. 13). The more general orientation of Chapter 9 nicely complements the analysis in Part II that is more focused on international fisheries law, thus ensuring the book's attraction and value for an even wider audience.

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