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BACKGROUNDER

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Commercial Fishing in the High Seas Arctic: The U.S. Needs a Treaty, Not an Executive Agreement

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Abstract

On October 3, 2018, the U.S. signed the Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean, which applies precautionary conservation and management measures to ensure the sustainable use of fish stocks. While the agreement has a laudable purpose, it is susceptible to being undermined by non-parties, and should have taken the form of a treaty, not an executive agreement. The U.S. should seek to negotiate such a treaty.

On October 3, 2018, the United States signed the multi-country Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean. The object of the agreement is to apply precautionary conservation and management measures to ensure the sustainable use of fish stocks in waters outside the jurisdictions of the signatory nations. While the agreement has a laudable purpose, it is susceptible to being undermined by non-parties, and should have taken the form of a treaty, not an executive agreement.

The Development of the Agreement

The agreement is precautionary in the sense that, unlike some previous high seas conservation agreements, it has been concluded before fish stocks have been damaged by commercial fishing, or even before commercial fishing fleets have begun to operate in the region. The agreement covers the high seas beyond the exclusive economic zones (EEZs) of Canada, Denmark (for Greenland and the Faroe Islands), Norway, Russia, and the United States, an area of approximately 1.1 million square miles sometimes known as the "Arctic donut hole."[1]

This paper, in its entirety, can be found at **http://report.heritage.org/bg3375**

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Key Points

- It is sensible for the U.S. to seek to prevent overfishing in the high seas of the Central Arctic Ocean.
- The agreement the U.S. signed on this subject in October 2018 has a reasonable objective and is based on sound science and diplomatic consensus.
- Unfortunately, it is susceptible to being undermined by non-parties, and should have taken the form of a treaty.
- A problem for any agreement that limits use of a shared resource is that nations not party to the agreement may free-ride on it. If the U.S. and nine other parties pledge not to fish in the high seas Arctic Ocean, this only leaves more fish for the other nations of the world to catch.
- If the U.S. wants to prevent overfishing in the high seas Arctic Ocean, the proper course of action is to negotiate a treaty. Such a treaty should include all nations with significant commercial fishing fleets.

These five nations, joined by Iceland, China, South Korea, Japan, and the EU, negotiated the legally binding agreement to expand on the non-legally binding Oslo Declaration of July 16, 2015.[2] That declaration, in turn, reflected a 2008 joint resolution of Congress, which called on the U.S. to start international discussions "and take necessary steps with other Arctic nations" to protect fish stocks that move between maritime borders. In 2009, the U.S. effectively closed U.S. federal Arctic waters to commercial fishing and Canada followed suit.[3]

In the background of the agreement was a 1994 treaty among the U.S., Russia, Japan, Poland, South Korea, and China that closed the "Bering Sea donut hole," an area of about 50,000 square miles on the high seas between the U.S. and Russia that was heavily fished in the 1970s and 1980s in ways that did long-term damage to its fish stocks. The agreement seeks to prevent this from happening in the much larger area of the high seas Arctic Ocean.[4]

The Terms of the Agreement

The agreement requires parties to allow vessels flying their national flag to conduct commercial fishing in the high seas Arctic Ocean only for conservation and management measures, and requires them to ensure compliance with these measures. It also requires them to facilitate cooperation in scientific study of the marine resources of the high seas Arctic Ocean, and to establish a Joint Program of Scientific Research and Monitoring for the region.

On the basis of scientific information derived from this program, and from other sources, the parties agree to establish conservation and management measures for exploratory fishing in the region within three years and to determine whether to establish one or more fisheries management organizations in the region to regulate commercial fishing.

Decisions under the agreement are to be taken by consensus, and, in Article 8, the parties agree to "take measures consistent with international law to deter the activities" of non-party vessels that undermine the effective implementation of the agreement. The agreement has standard withdrawal provisions and will remain in force for an initial period of 16 years, and in five-year periods after that initial period unless a party objects or withdraws.[5]

The Sensible and Problematic Aspects of the Agreement

Several aspects of the agreement are sensible:

- There is a risk, as shown by the history of the "Bering Sea donut hole," that without agreed-upon restrictions the maritime resources of the high seas Arctic Ocean would be damaged by overfishing. The agreement holds out hope of avoiding this outcome.
- The agreement requires that decisions be made on the basis of sound science.
- The agreement is about conservation: It seeks to make fishing sustainable, not to ban it.
- The agreement is based on consensus, giving the U.S. and all other parties veto power.

Other aspects of the Agreement are problematic:

- In its preamble, the agreement asserts that provisions in the U.N. Convention on the Law of the Sea apply to the high seas Arctic Ocean, and in Article 14(1), it states that parties "recognize that they are and will continue to be bound by their obligations under relevant provisions of international law, including those reflected in the Convention." The agreement also cites the Convention in Article 1(b), Article 3(7), and Article 14(3).

1. Yereth Rosen, "Negotiators Reach Deal to Ban Commercial Fishing in International Arctic Waters," *Arctic Today*, November 30, 2017, https://www.arctictoday.com/negotiators-reach-deal-to-ban-commercial-fishing-in-international-arctic-waters/ (accessed December 11, 2018).
2. U.S. Department of State, "U.S. Signs Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean," Media Note, October 1, 2018, https://www.state.gov/r/pa/prs/ps/2018/10/286348.htm (accessed December 11, 2018).
3. Rosen, "Negotiators Reach Deal to Ban Commercial Fishing in International Arctic Waters."
4. Ibid.
5. European Commission, "Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean," June 12, 2018, https://eur-lex.europa.eu/resource.html?uri=cellar:2554f475-6e25-11e8-9483-01aa75ed71a1.0001.02/DOC_2&format=PDF (accessed December 11, 2018).

The U.S. has not ratified the Convention and should not do so.[6]

It is certainly arguable that, as the U.S. is not party to the Convention, it is not "bound by" any obligations under it. But it is not desirable for the U.S. to be a party to agreements that could be read as implying that the U.S. *does* have obligations under the Convention. Nor is it desirable for the U.S. to lend its diplomatic support to instruments like the agreement, which rely on the Convention for part of their authority, and which thereby further entrench the Convention's status as a part of today's world order.

- In its preamble, the agreement recalls the 2007 U.N. Declaration on the Rights of Indigenous Peoples, a laundry list of purported rights and national obligations that ranges from the unobjectionable to the dangerous. The latter category includes, for example, the declaration's Article 35, which by asserting that "indigenous peoples have the right to determine the responsibilities of individuals to their communities" gives an undefined collective group the right to impose undefined responsibilities on individuals.[7] It is not desirable for the U.S. to be a party to agreements that endorse wide-ranging U.N. declarations, particularly when, as in this case, the U.S. opposed the declaration in question at the United Nations.

- The agreement's invocation of "indigenous and local knowledge" in its preamble and in its legally binding portions (Articles 4(4) and 5(1)(b)), fit poorly with its reliance on scientific knowledge. The agreement assumes that indigenous knowledge will complement scientific knowledge, not contradict it, but there is no reason to believe this will necessarily be the case. If local prejudice differs from sound science, the agreement offers no guidance on which will prevail. The impact of this invocation may be limited by the fact that local and indigenous knowledge will be hard to come by in the high seas Arctic Ocean, which is a minimum of 200 nautical miles from the nearest land.

- The agreement is based, in its preamble and in its legally binding portions (Articles 2 and 5(1)(c)), on the "precautionary" approach. In the sense that the agreement seeks to prevent damage that it is reasonable to expect could occur without limits on fishing, this is sensible. But this "approach" could be read as echoing the EU's "precautionary principle," which requires the banning of activities (or products) that pose no known or obvious risk of damage. Since any fishing could be said to have Article 5(1)(c) "potential adverse impacts," the agreement's standard of acceptable risk is unclear, and could, if dominated by the EU's approach, result in a ban on fishing.

- Although the agreement requires that parties to it enforce it domestically, it contains no enforcement provisions that can operate against a national signatory that cheats on its obligations. It is unlikely that any party to the agreement would have accepted such provisions. The agreement is therefore a self-denying ordinance. If any party to the agreement cheats, the U.S. therefore has no good option but to withdraw from the agreement. But should this eventuality arise, it is unlikely that the agreement's backers will support a U.S. withdrawal. Other nations will recognize this, which, in turn, can only embolden them to cheat on the agreement.

The Problem of Non-Parties

An obvious problem for any agreement that seeks to limit the use of a shared resource is the threat that nations not party to the agreement may free-ride on it. In other words, the U.S. and nine other parties may pledge not to fish in the high seas Arctic, but that only leaves more fish for the other nations of the world to catch. This is an aspect of the "tragedy of the commons" associated with limited and shared resources: Without property rights, there is no reason to not consume as much of a resource as possible. Property rights are conducive to conservation.

6. Steven Groves, "The Law of the Sea: Costs of U.S. Access to UNCLOS," testimony before the Committee on Foreign Relations, United States Senate, June 14, 2012, https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos.
7. United Nations, "United Nations Declaration on the Rights of Indigenous Peoples," September 13, 2017, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed December 11, 2018).

The agreement, as shown by its Article 8, is alive to this problem. In its press release on the agreement, the State Department notes that "U.S. stakeholders... have been concerned foreign fishing vessels could begin fishing [in the high seas Arctic].... [T]his new fisheries agreement...reduces the chance that foreign vessels will fish just beyond the U.S. EEZ."[8]

But as the State Department admits, the agreement only "reduces" those chances: It does not eliminate them. The agreement requires Article 8(2) parties to "take measures consistent with international law" to deter the non-parties from undermining it. The U.S. can prevent foreign fishing vessels from transiting through its territorial waters and its contiguous zone (together comprising a 24-nautical-mile limit), but it cannot prevent them from passing through the remainder of its 200-nautical-mile-limit EEZ in order to reach, and fish in, the high seas Arctic.

By including 10 parties with significant commercial fishing fleets, including China and the EU, the agreement does offer some protection against free-riders. But it does not include many countries that harvest significant quantities of fish, including Peru, Indonesia, Chile, and the Philippines. Moreover, it is possible that the agreement will incentivize commercial fishing fleets to shift their registration to nations that operate open registries of fishing vessels in order to exploit the high seas Arctic Ocean resources from which the U.S. has barred itself.

In short, a 10-party agreement that imposes a fishing moratorium in the high seas Arctic Ocean on its signatories makes less sense than a multilateral treaty that imposes a similar moratorium on all nations with significant commercial fishing fleets. The agreement could be seen as a step in this direction, but it could equally be seen as a moratorium that will be respected by the U.S. while being exploited by other nations, either inside or outside the agreement.

The Agreement Should Have Been a Treaty

In its Circular-175 Process, the State Department has set out eight factors that affect what international commitments the U.S. can undertake through an executive agreement and what commitments must be made through the treaty process.[9] These factors are to be considered as a whole, not in any particular order or with any special emphasis on one or the other:

1. "The extent to which the agreement involves commitments or risks affecting the nation as a whole." The agreement directly affects the U.S. as a whole by preventing all U.S. commercial fishing in the high seas Arctic Ocean.

2. "Whether the agreement is intended to affect state laws." The agreement concerns the high seas, and therefore does not affect state laws.

3. "Whether the agreement can be given effect without the enactment of subsequent legislation." The agreement requires parties to enforce it domestically. This can only be done by fining or imprisoning U.S. individuals who violate it, and the U.S. cannot do this without enacting legislation to create these civil or criminal penalties.

4. "Past U.S. practice as to similar agreements." The U.S. treated the 1994 agreement that closed the Bering Sea donut hole as a treaty, and that treaty is avowed by the agreement's supporters to be a precedent for this agreement.

5. "The preference of the Congress as to a particular type of agreement." The 2008 joint resolution offers no guidance, as it simply called on the U.S. to "negotiate an agreement."

6. "The degree of formality desired for an agreement." The agreement is clearly a "formal" one. It has all the hallmarks of a treaty, it establishes a formal program, and it contemplates the establishment of additional organizations under it. The State Department describes it as "legally binding" and contrasts it with the Oslo Declaration, which it describes as "non-legally binding."

7. "The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement." The agreement has a 16-year duration and can be extended indefinitely by mutual consent.

8. U.S. Department of State, "U.S. Signs Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean."
9. Steven Groves, "The Paris Agreement Is a Treaty and Should Be Submitted to the Senate," Heritage Foundation *Backgrounder* No. 3103, March 15, 2016, https://www.heritage.org/environment/report/the-paris-agreement-treaty-and-should-be-submitted-the-senate.

As a precautionary agreement, it is avowedly based on the need for action to prevent future dangers, not current ones. It is neither routine nor short-term.

8. "The general international practice as to similar agreements." The 1994 Bering Sea agreement was a treaty, as is the U.N. Convention and the U.N. Agreement on Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, both of which are cited in the agreement's preamble. The 1995 Code of Conduct for Responsible Fisheries, which the agreement also cites, is voluntary. But the general practice appears to be that agreements that relate directly to the control of the high seas are to be treated as treaties. As the high seas are by definition not under the control of any one nation, this is a reasonable practice.

In short, of the eight factors, six indicate that the agreement should have been treated as a treaty requiring the advice and consent of the Senate. The agreement does not affect state laws, and Congress has expressed no clear preference for any particular type of agreement. But if the 1994 Bering Sea agreement was a treaty, it seems clear that—taking this factor with the remaining five—the current agreement should also have been a treaty.

What the U.S. Should Do

The agreement has a laudable and reasonable purpose at its core: It seeks measures against the preventable evil of over-fishing in the high seas Arctic Ocean. This evil is clear, it has past precedents, and the remedy the agreement proposes is reasonable. The agreement trenches on no current U.S. interests or practices. In the main, it is well-designed, and its emphasis on the need for sound science to inform conservation is welcome.

The agreement's citations of the U.N. Convention on the Law of the Sea and the U.N. Declaration on the Rights of Indigenous Peoples are particularly *unwelcome*, and its invocation of "indigenous and local knowledge" and the "precautionary approach" are potentially unsound, but the risks posed by these elements of the agreement could have been guarded against if the agreement had been a treaty and subject to the advice and consent of the Senate. This would have allowed the Senate to make clear its reservations, understandings, and declarations on these undesirable elements of the agreement.

Unfortunately, in spite of the fact that the agreement is a treaty by the standards of the State Department, it has not been treated as a treaty. It has instead been adopted by an exertion of executive authority as a sole executive agreement. This is wrong. Moreover, the fact that the agreement is not a treaty points to its other deficiency: Because it is limited to the 10 parties that have adopted it, it is particularly vulnerable to free-riding by the non-parties that are outside it. It seems likely that the reason why the agreement was not concluded as a treaty and why it includes only 10 parties is that it was negotiated in less than two years. If that is the case, a desire for a speedy outcome has regrettably resulted in an agreement that supporters of the U.S. treaty process cannot whole-heartedly endorse.

If the U.S. wishes—as is sensible—to prevent over-fishing in the high seas Arctic Ocean, the proper course of action is for it to negotiate a treaty to achieve this end. Such a treaty should include all nations with significant commercial fishing fleets. If such a treaty were negotiated, the Senate should consider it on its merits, and—if the treaty was in the main similar to the agreement—might well consider it favorably, with appropriate reservations, understandings, and declarations.

Drawing on the precedent of the 2008 joint resolution, Congress should:

- **Endorse the negotiation of such a treaty** as an objective for the United States;
- **State that the treaty to be negotiated should concern itself strictly with preventing over-fishing in the high seas Arctic**, and not imply U.S. acceptance or endorsement of any other international instrument;
- **State that the current agreement should have been a treaty** and as such is acceptable only as an interim measure;
- **Refuse to adopt any legislation implementing** the agreement through criminal or civil penalties; and;
- **Refuse to appropriate any funding relevant to the agreement after fiscal year 2022**, during which the initial three-year implementation period of the agreement will come to an end provided that the current parties adopt it in a timely manner.

The agreement is a potentially important piece of conservation diplomacy. But that is no excuse for failing to bring it before the Senate. Like any major international U.S. commitment, and like similar preceding commitments, this agreement should have been a treaty subject to the advice and consent process. A treaty that embodies the aims of the agreement remains a worthy subject for U.S. diplomacy, and a better and more effective path for achieving the agreement's aims.

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