

The Central Arctic Ocean Fishing Agreement: A Challenge for U.S. Diplomacy

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KEY TAKEAWAYS

The Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean, ratified by the U.S. in August 2019, has a laudable goal.

However, the agreement suffers from defects of both substance and process. It is vulnerable to free-riding, and it should have been a multilateral treaty.

The U.S. should seek to replace this interim agreement with a multilateral treaty that protects U.S. interests and binds all major fishing nations.

On August 27, 2019, the U.S. announced that it had ratified the Agreement to Prevent Unregulated Commercial Fishing on the High Seas of the Central Arctic Ocean.¹ 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. Although the agreement has a laudable purpose, it should have taken the form of a treaty, not an executive agreement. The U.S. should remedy the agreement's defects of substance and process by seeking to replace it with a multilateral treaty covering all major fishing nations.

Development of the Agreement

The agreement is precautionary because, unlike some previous high seas conservation agreements, it

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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.”²

These five nations, joined by Iceland, China, South Korea, Japan, and the European Union (EU), negotiated the legally binding agreement to expand on the non-legally binding Oslo Declaration of July 16, 2015.³ 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.⁴ The U.S. and the other parties that negotiated the agreement signed it in October 2018.⁵

Terms of the Agreement

The agreement requires parties to allow vessels flying their national flags to conduct commercial fishing in the high seas Arctic Ocean only for conservation and management measures. It further requires them to ensure compliance with these measures, 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 the parties agree in Article 8 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.⁶

Advantages of the Agreement

Without agreed restrictions, the maritime resources of the high seas Arctic Ocean could be damaged by overfishing. The agreement holds out

hope of avoiding this outcome. It requires that decisions be made on the basis of sound science and is based on consensus, giving the U.S. and all other parties veto power. In purported intent, and in much though not all of its execution, the agreement seeks reasonable methods to attain sensible ends.

Finally, given the role that China's "fishing militia" has played in asserting Beijing's spurious territorial claims in the South China Sea, the fact that the agreement will supposedly prevent Chinese commercial fishing in the high seas Arctic Ocean may help to deter future Chinese territorial claims.⁷

Defects of the Agreement

Unfortunately, the agreement has defects of both substance and process. Specifically, with respect to substance:

- 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. It cites the convention, directly or by implication, in Article 14(1), Article 1(b), Article 3(7), and Article 14(3). The U.S. has not ratified the convention and should not do so.⁸ It is not desirable for the U.S. to be a party to agreements that could be read as implying that the U.S. has obligations under the convention. Nor is it desirable for the U.S. to lend its diplomatic support to instruments like the agreement that assert the authority of the convention.
- 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" purports to give an undefined collective group the right to impose undefined responsibilities on individuals.⁹ 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," both in its preamble and in its legally binding Articles 4(4) and 5(1) (b), fits 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. It is disconcerting that the agreement's advocates assert both that "the treaty [*sic*] puts a lot of emphasis on Indigenous people and Indigenous knowledge" and that "scientists will be at the center of this process."¹⁰

- The agreement is supposed to lead to the development of regulated and sustainable fishing, not to a ban on it, but there already are hints that the agreement's advocates are actually seeking a ban. As one such advocate put it, "It may well end up that the science will tell us that there are not sustainable stocks [of fish]." If that is a conclusion reached after serious scientific study, then banning fishing would be reasonable, but if that conclusion is determined in advance, then any fishing ban enforced under the agreement would be driven by ideology, not science.
- 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 most unlikely that the agreement's backers will support a U.S. withdrawal. Other nations will recognize this, and this recognition can only embolden them to cheat on the agreement.
- Seven of the agreement's signatories control territory that borders on the Arctic, but three of its signatories (South Korea, Japan, and China) do not. (South Korea, Japan, and China are also not members of the Arctic Council, although China was granted observer status on the council in 2013.) The agreement gives China (as it gives Japan and South Korea) a clearer *de facto* status as an Arctic nation—or at least as a nation with a legitimate claim to a voice in the governance of that region—but the Trump Administration vigorously and correctly opposed China's nonsensical 2018 claim to be a "near-Arctic" nation.¹¹ Moreover, because the agreement gives China the right to conduct commercial fishing in the high seas Arctic Ocean for conservation purposes, it may actually offer cover for increased Chinese involvement in the area. Unfortunately, although the agreement cannot work unless it

covers China's fishing fleet, including China in the agreement implicitly concedes China a status that the U.S. and the rest of the genuinely Arctic nations in the agreement will regret acknowledging.

In addition, with respect to process:

- 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. 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 other nations that harvest significant quantities of fish, including Peru, Indonesia, Chile, and the Philippines. A 10-party agreement that imposes a fishing moratorium in the high seas Arctic on its signatories is less likely to be effective 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.
- Unfortunately, in spite of the fact that the agreement is a treaty by the standards of the State Department,¹² it has been adopted by an exertion of executive authority as a sole executive agreement. It seems likely that a desire to conclude an agreement quickly has resulted in an outcome that supporters of the U.S. treaty process cannot wholeheartedly endorse. If the U.S. wishes—as is sensible—to prevent overfishing in the high seas Arctic, the proper course of action was and 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 to be negotiated, the Senate should consider it on its merits and might well consider it favorably with appropriate reservations, understandings, and declarations.

What the U.S. Should Do

At its core, the agreement has a laudable and reasonable purpose: It seeks measures against the preventable evil of overfishing in the high seas Arctic. 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.

However, the agreement's citations of the U.N. Convention on the Law of the Sea and, in particular, of the U.N. Declaration on the Rights of Indigenous Peoples are unwise and unwelcome, and its invocation of "indigenous and local knowledge" is unsound. The agreement also gives China a clearer and unwelcome *de facto* status as an Arctic nation. The risks posed by these elements of the agreement could have been mitigated if the agreement had been a treaty and had been 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, the agreement was not treated as a treaty.

The agreement was ratified by the Trump Administration. It is extremely unlikely that the Biden Administration will respond to its deficiencies of substance and process by exiting from it. The only realistic alternative for the U.S. is to seek to supplement—and in essence to replace—the agreement with a multilateral treaty that replicates the good aspects of the agreement while remedying its defects. A multilateral treaty would be particularly useful because, by including China as only one among its many signers, it would not concede China any substantial *de facto* recognition as having a special status as an Arctic nation.

Another option would be to seek to expand the membership of the current agreement. After the agreement enters into force, it does allow (in Article 10, paragraph 2) the parties to it to "invite other States with a real interest to accede to this Agreement."¹³ The problem with this approach is, first, that it does not remedy any of the agreement's flaws and, second, that the major fishing nations that are not party to the agreement have no incentive to constrain their own fishing fleets when the U.S. and other parties to the agreement have already accepted constraints. The approach of pursuing a new multilateral treaty is therefore superior.

Negotiating a new multilateral treaty will be a major challenge for U.S. diplomacy: Not all of the parties to the agreement have ratified it yet, the majority that has done so may be unwilling to replace it, and the other major fishing nations will again have no incentive to constrain their fleets. Nor is a treaty a cure-all: Treaties are also vulnerable to free-riding, though a treaty that includes all major fishing nations is better than an agreement that includes only some of them. But a treaty is nevertheless the best path for the U.S. to follow: Any other plausible course of action will effectively leave the U.S. committed to an agreement that is flawed in both substance and process and that will likely fail because of those flaws.

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

- **Endorse the negotiation of a multilateral treaty regulating fishing in the high seas Arctic** as an objective for the United States;
- **State that the treaty to be negotiated should concern itself strictly with preventing overfishing in the high seas Arctic** and not imply U.S. acceptance or endorsement of any other international instrument;
- **State that the U.S. does not recognize China as an Arctic nation**, and that China's status as a non-Arctic nation has not been changed by its inclusion in the agreement, or in any future multilateral treaty regulating fishing in the high seas Arctic;
- **State that the current agreement should have been a treaty** and therefore 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 2021**, during which the agreement will likely enter into force.

The executive branch should:

- **Recognize the deficiencies of the agreement and set a public goal of negotiating a multilateral treaty to replace it.** Unless and until such a treaty is satisfactorily negotiated, the U.S. should state that it regards the current agreement as only an interim and fundamentally unsatisfactory measure.
- **Respect the will of Congress with regard to both the current agreement and the treaty that should replace it.** This treaty will have to receive the advice and consent of the Senate, and it is therefore both necessary and prudent for the executive branch to seek and respect the advice of the Senate, in particular, with regard to it.

Conclusion

The goal of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean is laudable, and in the main, the agreement is sensible. While the wider and more grandiose hopes entertained for fisheries agreements as instruments of peace are exaggerated—resource disputes do not cause wars without an underlying source of political tension—there is nothing wrong with limited agreements that achieve sensible ends.¹⁴

Unfortunately, the agreement is marred by failures of both substance and process. These failures are connected: The U.S. treaty process is designed to scrutinize potential U.S. treaty commitments to ensure that the treaty in question has been carefully drafted, respects the Constitution, and will achieve the ends it sets out to achieve.

The agreement faces a problem of free-riding and is therefore unlikely to achieve its ends. If it had been negotiated as a multilateral treaty, its failures of substance might have been eliminated by Senate scrutiny, and it could have addressed the free-riding problem more effectively.

The U.S. treaty process is not an end in itself. It is a vital part of negotiating good agreements. Regrettably, in the case of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, the U.S.'s failure to respect this treaty process runs a serious risk of causing the agreement to fail to achieve its desirable goal. The U.S. should seek to repair this fault by negotiating a treaty that can both pass the scrutiny of the Senate and make the best possible effort to fulfill that goal.

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Endnotes

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