

Round Two for Arctic Fishing?

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Abstract

In 2017, the Arctic Five—the United States, Canada, Russia, Norway, and Denmark—along with China, Japan, Iceland, and the European Union agreed to a moratorium on commercial fishing in the central Arctic Ocean (CAO). The resulting Central Arctic Ocean Fishing Agreement (CAOFA) is intended to restrict unregulated fishing on the high seas of the Arctic Ocean and provide scientists time to study whether any fish populations present would support a commercial fishery. Over thirty years ago, overfishing in another area of the Arctic, a spot in the Bering Sea known as the “Donut Hole,” led to the collapse of its valuable pollack fishery. By 1994, six nations (the United States, Russia, Japan, China, South Korea, and Poland) had signed the Central Bering Sea Pollack Agreement, which banned further fishing until the science of the region’s fisheries was better understood. Unfortunately, that agreement came too late and the Donut Hole’s pollack fishery never recovered. Taking action to protect any fisheries resources present in the CAO before fishing begins is an admirable first step. This paper examines some of the issues that will help determine whether the CAOFA is ultimately successful in its goal of protecting fisheries resources.

Keywords

Arctic – fisheries – Arctic Ocean – Central Arctic Ocean Fishing Agreement – United Nations Fish Stocks Agreement – regional fisheries management organizations – illegal fishing – overfishing

1 Introduction

The sea ice is melting in the central Arctic Ocean (CAO), which brings not only the possibility of fishing to this area, but also the complex issues regarding the conservation and management of fisheries resources. Fish populations in the rest of the world’s oceans have been declining for decades due to overfishing and illegal, unregulated and unreported (IUU) fishing, problems the Arctic

Ocean avoided when it was frozen. Today, with significant sections of the Arctic Ocean navigable during the summer months, along with ice-free summers predicted for the near future, government leaders, scientists and scholars have become increasingly concerned about the impacts that more people and vessel traffic in the Arctic will have on the environment. One major concern is that the improved access and navigability resulting from the declining sea ice will lead to a race by distant-water fishing fleets to plunder Arctic fisheries resources. In response, the United States led an international effort to protect fish populations from unregulated fishing on the high seas portion of the Arctic Ocean, efforts that culminated in the Central Arctic Ocean Fishing Agreement (CAOFA) in 2018. On 1 October 2018, the Arctic Five, the group of five Arctic littoral States (the United States, Canada, Denmark, Norway, and Russia), along with five other states: China, Japan, South Korea, Iceland, and the EU, which control large, distant-water fishing fleets, agreed to a 16-year moratorium on commercial fishing on the high seas portion of the CAO. The CAOFA's ban on commercial fishing is intended to provide scientists time to study the CAO's ecosystems and evaluate whether this area supports any exploitable fisheries before any commercial fishing begins.

Whether the CAOFA will ultimately be deemed a success remains to be seen, as any results will most likely not be known for years, if not decades. First, the agreement requires the ratification of all of the ten parties before it enters into force, and although not complete, the ratification process is well underway and provides hope that the agreement will soon go into effect.¹ Even after the CAOFA enters into force, scientists may ultimately determine that no commercially viable fish populations exist in the CAO. However, there are reasons to be optimistic, as early signs point in the direction of fish moving farther north into the Arctic Ocean as its waters grow warmer. Finally, the CAOFA requires development of conservation and management measures and the creation of a regional fisheries management organization (RFMO) before commercial fishing begins.

2 Background

The CAOFA was, in part, motivated by the collapse of the pollack fishery in the high seas portion of the Bering Sea, a spot referred to as the "Donut

1 As of October 30, 2019, South Korea was the sixth country to have completed ratification after Canada, the EU, the U.S., Japan, and Russia.

Hole.” Overfishing during the 1980s and 1990s led to a cataclysmic collapse of this once vibrant pollack fishery and other valuable fisheries in that area. By 1994, the United States, Russia, Japan, China, South Korea, and Poland agreed to ban fishing in the area. The Central Bering Sea Pollack Agreement was intended to prevent fishing until the science of the fisheries in this region was better understood. Tragically, the pollack fishery in the central Bering Sea never recovered.² It is important to note however that although the collapse of the central Bering Sea incident may have been in the minds of the proponents of the CAOFA, the two situations are very dissimilar. The Central Bering Sea Pollack Agreement was motivated by an imminent fishery collapse, whereas the CAOFA sets out to protect fisheries that have not yet even been identified.

The Arctic Ocean, a semi-enclosed sea and the world's smallest ocean, covers approximately five million square miles on top of the world. It is bounded by the five Arctic littoral States of the United States Russia, Canada, the Republic of Denmark (through Greenland), and Norway. The central Arctic Ocean extends beyond the EEZs of the Arctic Five and covers 2.8 million square miles. The Arctic region is warming at twice the rate as the rest of our planet. As a result, portions of the Arctic Ocean that once were ice-covered are now ice-free during the summer months. Approximately 40% of the CAO is now navigable for at least part of the year.

The United States' efforts to protect the CAO began over a decade ago, when Congress in 2008 directed that the United States “initiate international discussions and take necessary steps with other Nations to negotiate an agreement for managing migratory and transboundary fish stocks in the Arctic Ocean.”³ The declaration provided that “the United States should support international efforts to halt expansion of commercial fishing activities in the high seas of the Arctic Ocean.”⁴ Starting in 2009, the United States closed its EEZ north of the Bering Strait to commercial fishing until sufficient information is available to enable a sustainable commercial fishery to proceed.⁵

2 For an eye opening description of the facts of the case, see Bailey, K. M. 2011. An empty donut hole: the great collapse of a North American fishery. *Ecology and Society* 16(2): 28. URL: <http://www.ecologyandsociety.org/vol16/iss2/art28/>.

3 Public Law 110–243, 122 STAT. 1569–1571 (June 3, 2008).

4 *Id.*, sec 4.

5 74 FR 56734.

In 2015, the Arctic Five issued a joint declaration stating the group's intention to prevent unregulated fishing in the CAO.⁶ In the declaration, the five Arctic littoral States resolved only to authorize commercial fishing by their vessels in the CAO after an international regulatory regime was in place. The declaration included an intention to form a joint scientific undertaking to study the region's ecosystems and a call for other interested states to participate in broadening the efforts to protect the CAO beyond the efforts of the Arctic Five. Discussion between the signatories to the CAOFA took place in 2017 and 2018. The CAOFA was finalized towards the end of 2018 and the agreement was signed on October 1, 2018.

The intent of the CAOFA is to prevent unregulated fishing on the high seas portion of the CAO. Unregulated fishing generally refers to fishing in waters not covered by a conservation and management regime or vessels fishing in waters covered by an RFMO but not complying with RFMO requirements because they are not members. Unregulated fishing on the high seas results in the exploitation of many fish species when states harvest fish without any limitation and is part of the larger problem of IUU fishing. Illegal fishing, i.e., fishing in another state's EEZ or fishing in an RFMO management area in violation of the RFMO's regulations defeats a coastal State's or RFMO's legitimate management and conservation interests, depleting valuable fish stocks. Unreported fishing occurs when catches are not reported accurately to authorities in contravention of either state or national requirements. Unreported fishing interferes with the proper functioning of fishery management. Along with overfishing that occurs under existing regulatory regimes, IUU fishing significantly depletes fish populations, some of which are already below sustainable levels and may even be in danger of collapse. IUU fishing, much like international piracy, has gone from a regional concern to a global security threat. IUU fishing is supported by transnational criminal organizations and has been linked to a whole host of other maritime crimes, including drug trafficking, human slavery, piracy,⁷ and terrorism.

The three main "hard law" legal instruments that govern international fishing are the 1982 United Nations Convention on the Law of the Sea (UNCLOS,

6 U.S. Department of State, "Arctic Nations Sign Declaration to Prevent Unregulated Fishing in the Central Arctic Ocean," Media Note, July 15, 2015 <<https://2009-2017.state.gov/r/pa/prs/ps/2015/07/244969.htm>> (Last accessed November 22, 2019.)

7 A study of piracy incidents found states that experienced declining fish production were more likely to have an increase in incidents of piracy. *Id.* at 11.

Law of the Sea, or LOS),⁸ the 1993 FAO Compliance Agreement,⁹ and the 1995 UN Fish Stocks Agreement.¹⁰

UNCLOS was crafted as the codification of the international law for regulating the use of the world's oceans. One of its key provisions was to allow states to declare an Exclusive Economic Zone or EEZ up to 200 nautical miles from its baseline. An EEZ is a zone where a state has the jurisdiction and authority to explore and exploit the natural resources present from the top of the water column all the way to the seabed. One of these natural resources is fish. Beyond a nation's EEZ, all states have the freedom to fish subject to the other international obligations and agreements.¹¹

UNCLOS has specific provisions to protect shared stocks, both straddling stocks (fish that occur along the dividing line between two states' EEZs and fish that occur along the border of a state's EEZ and the high seas) and highly migratory stocks (fish that migrate long distances crossing international boundaries). For highly migratory species, "[t]he coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex 1 shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone."¹² For straddling stocks, coastal States and states that fish for such stocks in an adjacent zone are required to, either directly or through appropriate sub-regional or regional organizations, agree on conservation measures for the stocks in adjacent areas. Without this provision, states would be free to undermine a coastal State's conservation measures by fishing just on the other side of the boundary line.¹³

8 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] Despite the fact that the United States was a key proponent and leader of the Law of the Sea Conference, the U.S. has not yet ratified the treaty despite calls from nearly every corner of the world and within the United States to do so. Nonetheless, the United States treats almost all the treaty's provisions, including the articles governing fisheries, as reflecting customary international law.

9 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

10 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks [hereinafter FSA].

11 There are a handful of other important international agreements, including the 1989 UN Driftnet Moratorium, the 1993 UN FAO Compliance Agreement, and the 2009 Port State Measures Agreement that are beyond the scope of this paper.

12 UNCLOS, *ibid.*, Art. 64(1).

13 *Id.* at Art. 63.

The UN Fish Stocks Agreement (FSA) expands on UNCLOS's protections for straddling and highly migratory stocks. The FSA requires states to cooperate either through regional or subregional fisheries organizations or directly, to conserve straddling and highly migratory fish stocks.¹⁴ Where there is no RFMO, states are directed to cooperate to establish an organization or reach other agreement for the management of a straddling and highly migratory fish stock.¹⁵ Further, the FSA mandates that States meet their duty to cooperate by becoming members of such an organization or participate in such an arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement.¹⁶ Only states that are members of the relevant regional or sub-regional fisheries organization or agree to apply the measures established by the organization shall be entitled to fish for those resources.¹⁷

Beyond straddling stocks and highly migratory species, UNCLOS provides that states have an overarching obligation to cooperate in the management and conservation of marine living resources.¹⁸ Actions taken are required to be based on the best scientific evidence available with the aim of maintaining fish populations and dependent species or restoring stocks above the level where reproduction becomes seriously threatened.¹⁹

The third major international fisheries agreement, the UN FAO Compliance Agreement, was designed to ensure that vessels are authorized by flag States before they can fish on the high seas and to prevent the reflagging of violators, a common problem in international fisheries.

3 Issues

The CAOFA raises a number of issues that may present challenges for the parties to the agreement if commercially viable fish populations are found in the Arctic or if a non-party starts fishing in the CAO during the term of the agreement. The most important issue is that the agreement could create instability in the region if a non-party starts fishing in the CAO. A second issue is the interaction of the agreement with the UN Fish Stocks Agreement, a treaty

14 FSA, *ibid.* Art. 8(1).

15 *Id.* at Art. 8(5).

16 *Id.* at, Art. 8(3).

17 *Id.* at Art. 8(4).

18 UNCLOS, *id.*, Art. 117.

19 UNCLOS, *id.*, Art. 119.

which also deals with new and evolving fishers as well as RFMO requirements. Further, if an RFMO is eventually negotiated for the CAO, how will the parties to the agreement solve some of the recurrent organization and management issues that have negatively affected the performance of other RFMOs? Lastly, the future of fishing in the CAO will be greatly affected by ecosystem changes and human fishing activity in the world's other oceans.

Might we see a showdown over Arctic fishing over a state that is not a party to the CAOFA conducting unregulated fishing in the CAO during the moratorium? Whether non-parties to the Central Arctic Ocean Fishing Agreement would be compelled to act in accordance with the moratorium²⁰ is unclear. At the outset, an international agreement cannot bind a party state that has not consented. Further, the right to fish is one of the high seas' freedoms and UNCLOS does not expressly obligate a flag State to comply with conservation and management measures established by an RFMO. Practically speaking, demanding that a non-party comply with a total ban on fishing where there are harvestable quantities of fish appears unreasonable. A non-party to the CAOFA that is a signatory to the FSA would be obligated to take actions consistent with the agreement with regards to straddling and highly migratory fish stocks, if the CAOFA is interpreted as an RFMO. A non-signatory to the FSA would at least have a duty to cooperate in the conservation and management of living marine sources, a duty under UNCLOS that is also considered customary international law. In the Bering Sea Donut Hole case, a failure of the parties to agree led to the spectacular collapse of the area's pollack fishery. The same situation could still occur in the central Arctic Ocean. A state could continue to fish while arguing that its actions are in line with applicable conservation and management measures. A coastal State might argue that such fishing is illegal while the fishing state could argue that its activities are simply unregulated, but not illegal. However, both illegal fishing and unregulated fishing deplete fisheries resources and a party to the CAOFA may strongly object to a non-party fishing in the COA. A conflict over fishing would go against the CAOFA's proponents' aims to resolve resource issues peaceably.

At the outset, the question should be asked whether any provisions of the UNFSA conflict with those of the CAOFA.²¹ The CAOFA does not supersede the

20 The agreement does not prohibit exploratory fishing on the basis of sound scientific research.

21 The CAOFA is not strictly illusory due to its broader subject matter, i.e., the UNFSA deals with the subject of shared stocks, specifically, straddling and migratory fish stocks, while the CAOFA applies more broadly to fish, defined as "species of fish, mollusks and crustaceans except those belonging to sedentary species as defined in Article 77 of the Convention [UNCLOS]."

UNFSA as it expressly states that “[t]he parties recognize that they are and will continue to be bound by their obligations under the relevant provisions of international law, including those reflected in the Convention and the 1995 Agreement [i.e., UNFSA].”²² In fact, many of the UNFSA’s provisions appear to directly override those of the CAOFA. In order to step around these conflicts, the CAOFA could be viewed as a provisional agreement under the UNFSA or a new or exploratory fishery in order to fulfill the objectives and the spirit of both agreements despite the CAOFA’s broader subject matter of all fish, as opposed to the UNFSA’s limit to straddling stocks and migratory species, as discussed more fully below.

It is interesting to note that nine of the ten parties to the CAOFA have ratified UNCLOS, with the United States having signed the Convention but not yet ratified it. In addition, nine of the ten parties have ratified the UN Fish Stocks Agreement. China, the lone holdout, has signed the UN Fish Stocks Agreement but not ratified it. Further, six of the ten parties (The United States, Canada, Norway, Japan, South Korea and the European Union) have ratified the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

Under the UNFSA, the mandate for coastal States and flag States of fishing vessels is clear: to be entitled to access high seas straddling or migratory fishery resources, states must either join the competent RFMO or agree to apply the conservation and management measures established by the RFMO.²³ The UNFSA applies broadly to the conduct of fishing and does not distinguish between exploratory fishing and fishing conducted for scientific research.²⁴ If an RFMO with competence over the relevant straddling or migratory fish stocks does not exist, states under the UNFSA have an obligation to cooperate in the establishment of an RFMO.²⁵ The flag State for fishing vessels has an obligation to apply the conservation measures of the RFMO and ensure that such vessels do not engage in any activity that undermines the effectiveness of such measures.²⁶ The nine CAOFA parties that are parties to the UNFSA are bound under international law to follow these provisions. China, although it has not ratified the UNFSA, has signed the agreement and thus is obligated not to engage in

22 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, October 1, 2018 [CAOFA].

23 FSA, *ibid.*, Art. 8(3).

24 The UNFSA includes provisions for new and exploratory fisheries but does not distinguish between different purposes for fishing, e.g., exploratory fishing or scientific research.

25 FSA, *id.*, Art. 8(5).

26 *Id.* at Art.17(4).

any activity that would undermine the UNFSA's objectives. In the absence of the CAOFA, the relevant coastal States and flag States for fishing vessels would be required to establish an RFMO before fishing in the COA.²⁷

The CAOFA places a moratorium on commercial fishing but includes specific provisions for exploratory fishing and scientific research, which will be necessary to determine the existence of any commercially viable fish stocks in the CAO. For new or exploratory fisheries, the UNFSA provides that

[s]tates shall adopt as soon as possible cautious conservation and management measures, including, *inter alia*, catch limits and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment shall be implemented. The latter measures shall, if appropriate, allow for the gradual development of the fisheries.²⁸

The CAOFA requires the establishment of conservation and management measures for exploratory fishing within three years.²⁹ Parties are authorized to carry out scientific research involving the catching of fish provided the activities do not undermine preventions of unregulated commercial and exploratory fishing and the protection of healthy marine ecosystems.³⁰

At least one commentator has opined that the CAOFA could be viewed as an RFMO under Article 1 (1)(d) of the UNFSA.³¹ Under Article 1 (1)(d), "arrangement" means a cooperative mechanism established in accordance with the Convention [UNCLOS] and this Agreement [UNFSA] by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.³² However, the CAOFA expressly states that "it is premature at this point to establish any additional regional or subregional fisheries management organizations or arrangements for the high seas portion of

27 *Id.* at Art 8(5).

28 *Id.* at Art. 6(6).

29 CAOFA at Art. 5(1.d.).

30 *Id.* at Art. 4.

31 V. Schatz *et al.*, "The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Primer," EJIL: Talk!, October 26, 2018, <https://www.ejiltalk.org/the-2018-agreement-to-prevent-unregulated-high-seas-fisheries-in-the-central-arctic-ocean-a-primer/>.

32 An "arrangement" is more commonly referred to as a regional fish management organization or RFMO.

the Arctic Ocean,” which makes the argument that the CAOFA constitutes an RFMO tenuous. Although the CAOFA was not executed under the authority of the UNFSA, i.e., the CAOFA only recites that the parties recall the provision of the UNFSA. Thus, the CAOFA could be viewed as a “provisional arrangement” under Article 7(5) in accordance with the requirements for new and exploratory fishing, IAW Art. 6(6), discussed above. Per Article 7(5), pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. If the CAOFA is not a provisional arrangement under the UN Fish Stocks Agreement, then the discovery of fish in the COA by a non-party might trigger negotiations for an agreement to create an RFMO outside the CAOFA, perhaps undercutting the CAOFA’s relevance and/or effectiveness.

The downside, if and when commercial fishing starts, is that the effectiveness of any resulting regional fisheries management organization (RFMO) will face the same challenges as other RFMO’s face regarding compliance and enforcement that make overfishing and IUU fishing difficult to stop in the rest of the world’s oceans. Although the signatories to the CAOFA include many of the countries with large, distant water fishing fleets, many other such countries are not signatories. Under international law, the agreement is not binding on non-parties. Even so, international law obligates states to cooperate in the conservation and management of living marine resources and many states are parties to international instruments that protect fish. In spite of this, many states fail to carry out their obligations. How to get coastal States, flag States, and port States to comply with their international legal obligations for the protection and conservation of living marine resources, including fisheries, is one of the enduring problems of international fisheries law.

The interconnectedness of the world’s oceans and their ecosystems means that activities and events in other parts of the world’s oceans will have an effect on the Arctic. The Arctic Ocean as a result of the melting sea ice now provides a shortcut from Asia to North America and Europe for a portion of the summer months. But change has come slow to the Arctic so far. Shipping companies will begin to pursue greater use of the Arctic Ocean when they determine it’s advantageous from a bottom-line business perspective or navigating via the Arctic presents some other improvement such as increased safety or improved logistics. They may make the move to the Arctic if there are availability issues or other impediments to using existing shipping routes. Increased ship traffic is already beginning to impact the Arctic environment and the effects of more traffic are only going to increase in the future. Declining fish production in other parts of the world has resulted in fishing fleets moving to more productive

fishing grounds—sometimes thousands of miles away—and a doubling of fishing effort. If there are fish in the Arctic, fishing vessel will eventually seek them out. The existing international fisheries regime has done a poor job of protecting the world's fish stocks. As events affect states' use of the world's shipping lanes and fishing grounds, it is just human nature that people will look for alternatives, and the warming Arctic will gradually be a more attractive option over time. Protecting the Arctic and its fish means ensuring that free access and safety for the other shipping lanes and straits of the world remain protected. Fisheries resources around the globe also need better protection or distant water fleets will have greater incentives to follow the fish to the Arctic. If they do, the Arctic's pristine environment could be in jeopardy from increased use and resource exploitation.³³

4 Conclusion

The Arctic Ocean's sea ice is melting and opening access to this previously frozen body of water. Arctic States are concerned about exerting their sovereignty as well as taking advantage of the potential shipping, energy and fishing opportunities that this developing situation in the north presents. For protecting any fisheries in the CAO, the CAOFA is an admirable step, but there are other perhaps even more pressing issues. More ships will bring more environmental impacts and raise the risk of an oil spill. Energy development projects will bring their own risks to fisheries as the Deepwater Horizon and *Exxon Valdez* incidents have tragically shown us. Efforts to develop the Arctic in a sustainable, safe and environmentally sound manner, one that protects fish, are only half the puzzle. Decisions outside the Arctic (not cooperation and governance within) will shape the types and amounts of activity in the Arctic, including those regarding fishing and the protection of living marine resources.

33 See, United States Coast Guard, *Arctic Strategic Outlook* (April 2009). Fish are already migrating farther north into the Arctic as water temperatures change.

