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Legitimization of the Arctic Coastal States (A5) through the Central Arctic Ocean (CAO) Fisheries Agreement

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On June 25, 2021, the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (henceforth referred to as the CAO Fisheries Agreement) entered into force. This primer explains the CAO Fisheries Agreement and how it can be understood as a legitimizing tool for the Arctic Five (A5 - the Arctic littoral states of Canada, the United States, Denmark, Norway, and Russia), in addition to providing a brief background of the tensions that exist between A5 and A8 governance.

Despite the Agreement itself being signed by the “A5+5” (the Arctic littoral states plus Iceland, China, Japan, Republic of Korea, and the European Union)

through the understanding that the CAO Fisheries Agreement was based off of the 2015 Declaration that was produced solely by the A5, the agreement can still be understood as a legitimization tool for the work of the A5. In a manner similar to how non-Arctic states can take on the role as Observers in the Arctic Council, the “plus 5” of the A5+5 were brought into the CAO fisheries conversation after the Arctic coastal states established the parameters. Thus, the reception of the CAO Fisheries Agreement demonstrates a marked shift and the acceptance and legitimization of Arctic Ocean governance by the A5 instead of the A8.

CAO Fisheries Agreement

In 2011 the United States initiated a series of discussions between the five Arctic coastal states on the idea of creating some sort of protective arrangement that would cover potential fisheries in the central Arctic Ocean. In recognition of the importance of this issue and the fact that climate change is making the region more accessible than ever before, these discussions would eventually form the basis of the 2015 Declaration

Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean (henceforth referred to as the CAO Declaration).

While not binding beyond its signatories, the 2015 A5 CAO Declaration is important because it allowed the A5 to publicly announce that while establishment of a commercial fishery in the central Arctic Ocean was not currently feasible, the A5 was committed to continuing discussions on how to protect the potential stocks.¹ After the Declaration five more members (Iceland, China, Japan, Republic of Korea, and the European Union) were brought into the discussion on how to best manage the potential stocks. The expanded CAO Fisheries Agreement was signed in 2018, and after domestic ratification from all ten signatories it entered into force on June 25, 2021.

The area the CAO Fisheries Agreement covers is the area of the Arctic Ocean classified as the high seas (indicated by the red line in the map). The fact that area the CAO Fisheries Agreement covers is the high seas that means that no single state has jurisdiction over the area and its resources, instead it is to be used freely by all members of the international community. The only way for the high seas and/or its natural resources to be managed is through the creation of a collective international agreement, which is what the A5+5 aimed to do by creating the CAO Fisheries Agreement.

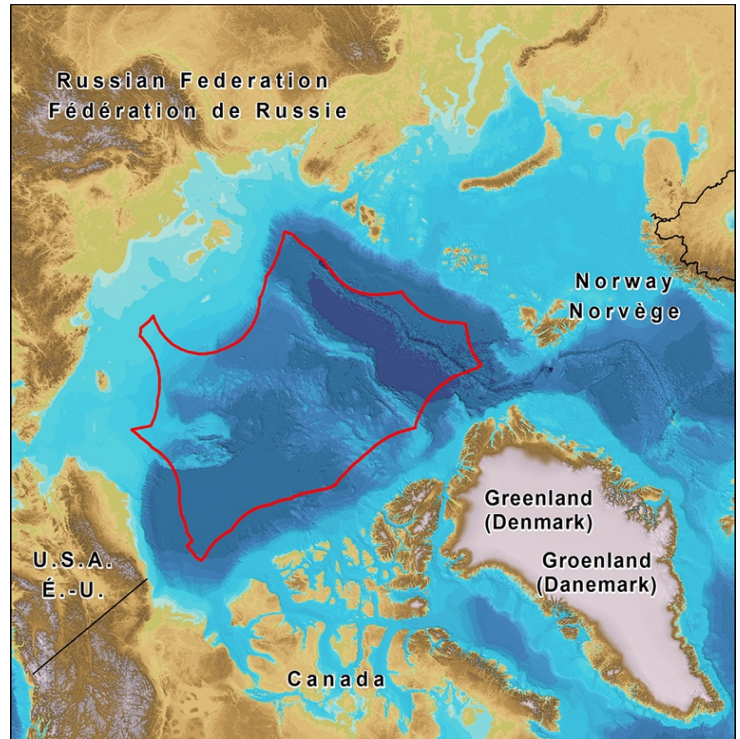


Figure 1: Fisheries and Oceans Canada, “Map showing area covered by the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean,” Digital Image, International Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, 2021, <https://www.dfo-mpo.gc.ca/international/arctic-arctique-eng.htm>.

Now that the CAO Fisheries Agreement has been ratified by all signatories and the agreement has entered into force, all of its signatories are bound to a fifteen-year commercial fisheries moratorium. The ratification of the CAO Fisheries Agreement also triggers the creation and implementation of a Joint Program of Scientific Research and Monitoring that will allow the signatories the ability to collectively gather data about the status of the potential stocks and to develop a sustainable method for possible future fisheries to occur in the region.²

When attempting to understand the reasons why the A5+5 would have wanted to create the CAO Fisheries Agreement, it is important to acknowledge the status and problems of the world's fisheries/fish stocks. Simply put, fish stocks around the world are not in the best shape, with approximately two-thirds of stocks located in the high seas (that are also under the jurisdiction of regional fisheries management organizations or RFMOs) where they are overexploited or classified as depleted stocks.³ Even the fisheries under the management of

RFMOs are struggling with enforcing practices in line with sustainable fisheries management terms, which means that new and emerging stocks are at an even greater risk of falling victim to unsustainable practices. Experts claim that “the state of world marine fisheries is worsening”⁴ and because of the fragile nature of the Arctic ecosystem, fisheries are at a greater risk of marine damage caused by unsustainable fishing practices.

In the Arctic and sub-Arctic there are nine species of commercially desirable fish and the number of total fish species in the regions accounts for over 150 different species. The potential for establishing commercial fisheries in the high seas of the Arctic Ocean has historically been hampered by the level of year-round ice that blanketed the waters, but as climate change continues to increase the rate of Arctic ice melt combined with technological advantages make these previously inaccessible fisheries more accessible.⁵ Furthermore, warming waters may force fish stocks to migrate north.

The Arctic coastal states had and continue to have a vested interest in making sure any potential stocks in the high seas of the Central Arctic Ocean remain protected. The A5 have previously pledged to protect the unique and fragile Arctic ecosystem, and they recognize that a fishery collapse in the high seas has a high chance of impacting the adjacent domestic fish stocks that are located within the respective coastal state’s Exclusive Economic Zone. In particular, the cases of straddling or migratory fish stocks hold particular relevance in this scenario because the same stock can migrate between different jurisdictions creating sustainable management problems.

The CAO Fisheries Agreement recognizes that while there is no currently established commercial fisheries located in the area covered by the agreement, that does not remove the possibility of commercial fisheries being established in the future. Due to the fragile nature of the Arctic environment, the status of global fish stocks, the rising global demand for fish, and the fact that the Arctic has not been immune to fishery collapse, a sustainable management program is required to protect the potential and emerging central Arctic fish stocks. In order to establish a sustainable management program, scientific research and data must be gathered to create a science-based sustainable arrangement that would allow for a level of sustainable harvest. Owing to a lack of information, the CAO Fisheries Agreement and the CAO Declaration are based around the idea of the pre-emptive application of the precautionary principle.

The importance of the precautionary principle can be clearly seen in the objective of the CAO Fisheries Agreement when it states that:

The objective of this Agreement is to prevent unregulated fishing in the high seas portion of the central Arctic Ocean through the application of precautionary conservation and management measures as part of a long-term strategy to safeguard healthy marine ecosystems and to ensure the conservation and sustainable use of fish stocks.⁶

The precautionary approach means that, in order to prevent harm from occurring in regard to the fish stocks and the level of available data or lack thereof surrounding the status of the potential and emerging stocks, the signatories have decided to take preventative measures and not act in a way that could possibly damage the system. In other words, the states are going to act in a way that avoids irreparable damage from commercial fisheries operating in the Arctic until scientific data shows that fish stocks in the CAO can support a fishery.⁷

The overt use and reliance upon the pre-emptive use of the precautionary principle, both in the CAO Declaration and the CAO Fisheries Agreement, are key reasons why the CAO Fisheries Agreement has been heralded as “historic” and “revolutionary.” The international community has historically been willing to create innovative solutions to international problems, but only after a problem/disaster has occurred. The fact that the Arctic Five decided to protect a potential fishery before commercial interests were established is one of the more innovative aspects of the agreement and may be why the A5+5 were able to reach a consensus.

In a 2011 article, Vylegzhanin, Young, and Berkman point to the use of an Arctic cautionary precedent when Russia and the United States dealt with the fisheries in the Bering Sea. The case of the Bering Sea Pollock fisheries does not follow the same story as with the CAO Agreement with the pre-emptive element, as the 1994 *Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea* only was created after the pollock stock had been severely overfished.⁸ The Aleutian Basin pollock fishery (located in the central Bering Sea) underwent one of the most drastic collapses in modern history during the 1980s. In 1983 it was estimated that the pollock stock was around 13 million tons in 1983, but by 1992 the stock had declined down to 6% and the overfished stock continued to decline further until it reached 2% in 2007. Despite efforts to revive the pollock stock as of 2011 the once rich stock has still not recovered.⁹ In order to prevent the further collapse of the stock the 1994 Convention was created and signed by the United States, Russia, Poland, the Republic of Korea, Japan, and China. While the pollock collapse and subsequent Convention may have helped provide the background for the United States to push for the creation of a pre-emptive moratorium that does not discredit the unique nature of the CAO Fisheries Agreement, as it is still the first large scale pre-emptive fisheries moratorium in a global commons.

A5 versus A8

The Arctic Eight (A8) refers to all the states that have territory located within the circumpolar Arctic (the A5 plus Iceland, Sweden, and Finland). There has been tension between the A5 coastal states and the A8 regarding who has the most legitimacy to set the rules that will govern the Arctic. An example of this tension can be seen in the reception that the 2008 Ilulissat declaration received.

The 2008 Ilulissat Declaration was put out by the A5 as a way to acknowledge the change that the Arctic is going through and to affirm the special position that the coastal states have in jurisdictional control over the Arctic Ocean. The Ilulissat Declaration goes on to highlight the unique nature of the Arctic ecosystem and how the region is under an increasing level of risk to higher levels of Arctic traffic and use, and it concludes with the A5 pledging to work together both inside and outside the Arctic Council on issues pertaining to the Arctic.¹⁰

After the A5 released the Ilulissat Declaration, they faced backlash from both the non-littoral Arctic states (Sweden, Finland, and Iceland) and Arctic Indigenous peoples. This backlash originated from the idea that the A5 thought that they were in a privileged position to create and control Arctic governance structures because they were coastal states – an idea that the Arctic Indigenous peoples and the non-littoral Arctic states were quick to dispute.

Out of the three non-littoral Arctic states, Iceland has been the most vocal against the use of and “special status” of the A5, explaining that Iceland disagrees with the idea that having an Exclusive Economic Zone in the high Arctic can be the decisive factor that creates a level of stratification between the Arctic states instead of acknowledging the commonality of the fact that all eight are Arctic states.¹¹

In 2009, the Inuit Circumpolar Council (ICC) produced “A Circumpolar Inuit Declaration on Sovereignty in the Arctic” as a response to the Ilulissat Declaration, which reaffirmed the idea that Indigenous peoples (particularly the Inuit) need to be considered partners in all matters concerning the region. In section 4.1, the Declaration directly addressed the Ilulissat Declaration, stating:

We also noted that the 2008 Ilulissat Declaration on Arctic sovereignty by ministers representing the five coastal Arctic states did not go far enough in affirming the rights Inuit have gained through international law, land claims and self-government processes.¹²

Through the use of the 2009 Sovereignty Declaration, the Inuit reminded not only the A5 and the A8 but also the international community that they expect to be included in all matters related to Arctic governance.

Nevertheless, the 2015 CAO Declaration demonstrated that the Arctic Five still view themselves as the most legitimate actors to deal with matters of Arctic governance. The CAO Declaration (and the subsequent CAO Fisheries Agreement) served as a successful legitimization tool for the A5 because the declaration elicited surprising little backlash. Although the Arctic non-littoral states are concerned about the stratification of power within Arctic regional governance, it is telling that not all of the Arctic states signed onto the expanded A5+5 CAO Fisheries Agreement. Although both Sweden and Finland are held to the terms of the Agreement because the European Union ratified it, neither of these Arctic states independently signed it, thereby further legitimizing the work and use of the A5 as leaders in the governance of the Arctic Ocean.

The A5 CAO Declaration, which provided the basis for the CAO Fisheries Agreement, demonstrated that the Arctic littoral states will continue to be guided by the 2008 Ilulissat Declaration in which they declared themselves as coastal states uniquely positioned to protect the fragile Arctic ecosystem.¹³ The CAO Fisheries Agreement affirmed and promoted the use of the A5 as a decision-making coalition, and legitimized its central role in relation to governance practices in relation to the Arctic Ocean.¹⁴

Implications of the CAO Fisheries Agreement

Now that the CAO Fisheries Agreement has entered into force, there are some interesting implications in regard to the lack of outcry regarding the A5-centric nature of the Agreement and the fact that Sweden and Finland have not signed onto it. Thus, although the Agreement is considered historic due to its pre-emptive precautionary approach, it is also historic due to its overt legitimization of the A5 in matters related to the governance and management of the Arctic Ocean.

Some may argue that, because Sweden and Finland are represented under the auspices of the European Union, the CAO Fisheries Agreement does not delegitimize the work and value of the A8 in terms of the management of the Arctic Ocean. This is a fundamentally flawed argument because the two states — Finland and Sweden—

did not sign under their own names. If they had signed on individually, that act would have signalled how all of the Arctic states understand the value of the protection of the potential and emerging fish stocks in the high seas of the CAO. This is especially important point because all the signatories had to ratify the agreement before it went into force. Because Finland and Sweden did not individually sign the CAO Fisheries Agreement, they did not have to domestically ratify it. Another example on how the EU’s signature does not replace the individual signatures of Sweden and Finland relates to the Arctic Council – the preeminent Arctic forum—in which the two states are members, while non-Arctic states and organizations can only serve as observers. This difference highlights the hierarchy that the Arctic states have tried to maintain on Arctic-related issues, and that a non- or partly Arctic entities (like the EU) cannot serve in the same roles or replicate the status of the Arctic states.

The coastal states have a clear and vested interest in ensuring that the fishery stock in the high seas of the central Arctic Ocean does not undergo a preventable collapse for a few reasons. First, there is the potential for migratory and/or straddling stocks to be present in the high seas, if there was a breakdown in the Agreement and a commercial fishery was set up right outside the Exclusive Economic Zone of one or more of the littoral states that would impact the quality and level of stocks within the coastal state’s area of control.¹⁵ It is also

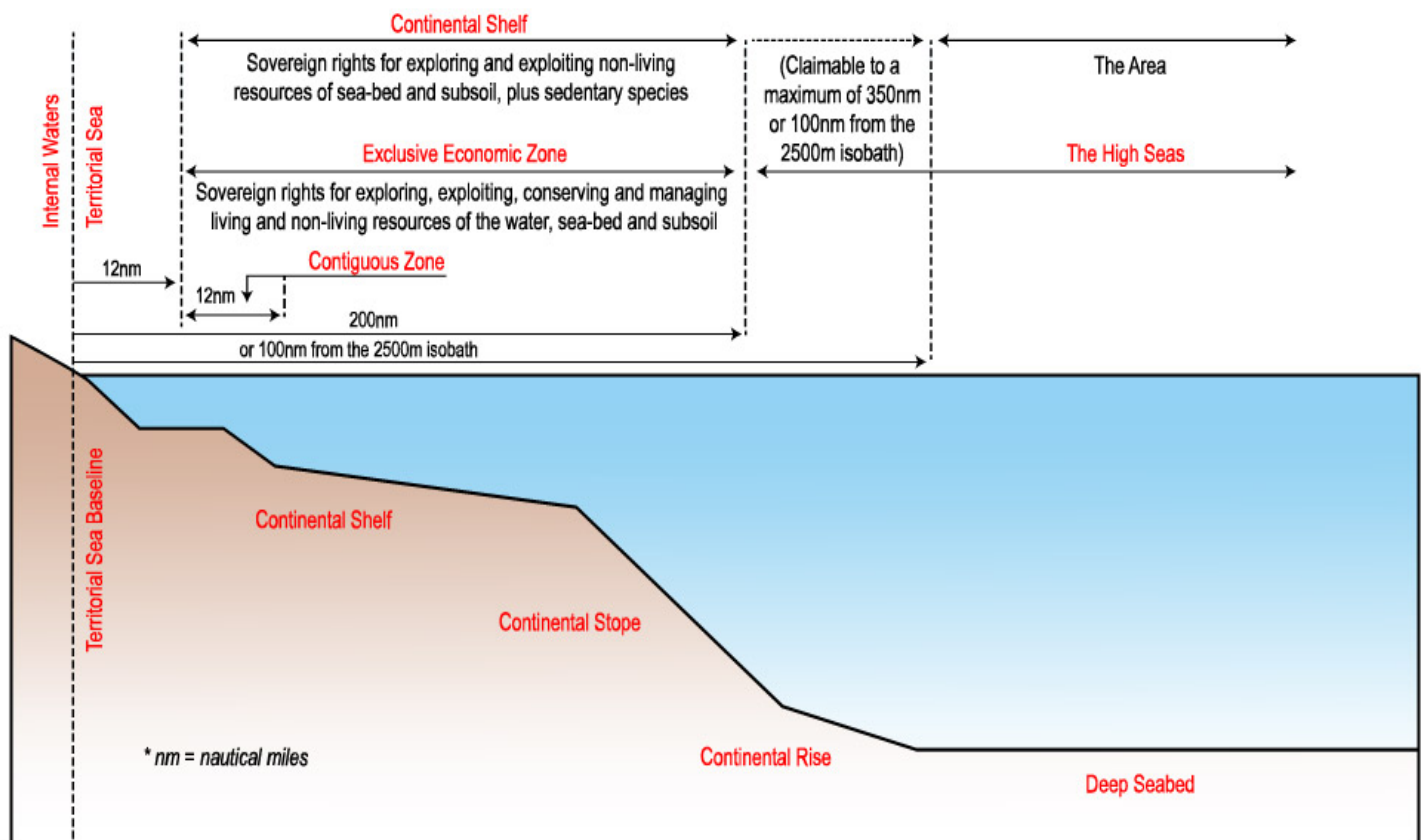


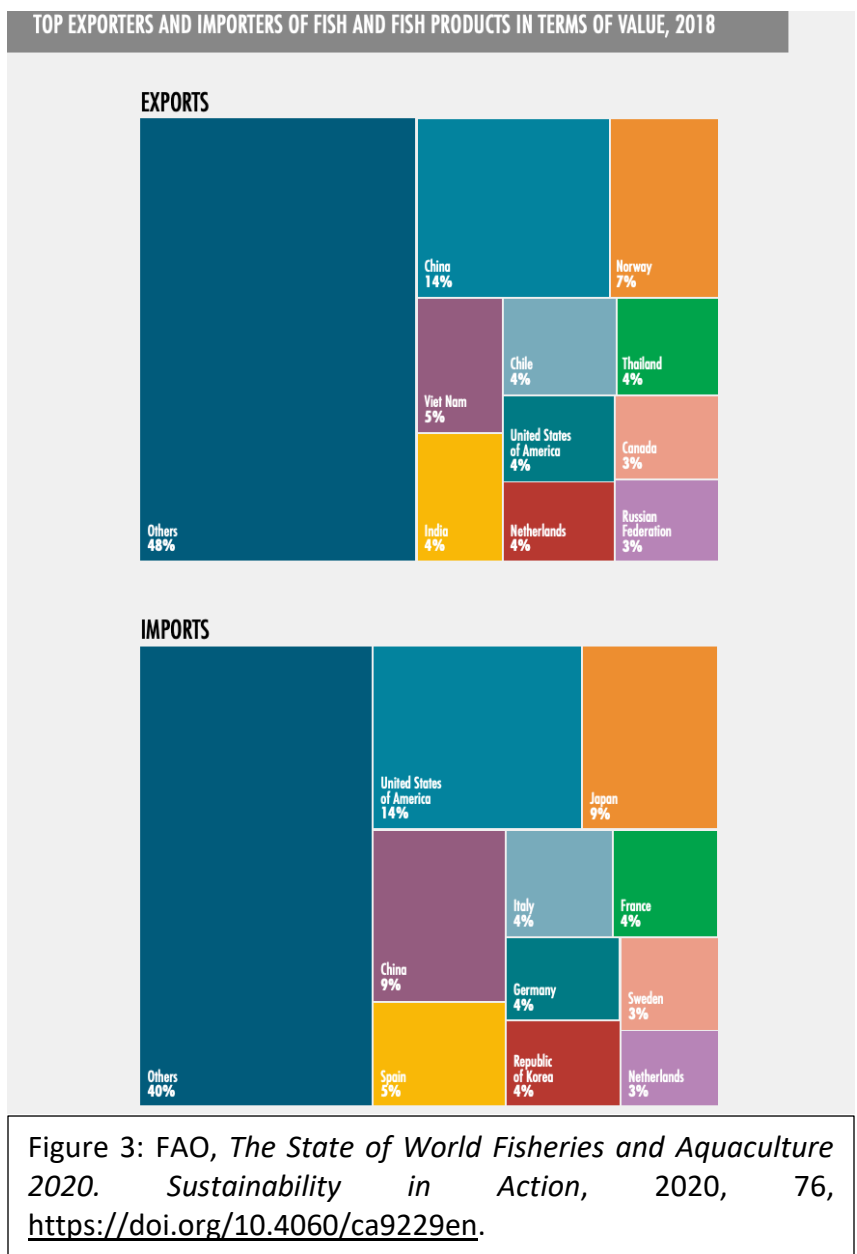
Figure 2: Fisheries and Oceans Canada, “Maritime sovereign rights, by zones, under the Law of the Sea Treaty,” Digital image, Sovereignty and UNCLOS Defining Canada’s Extended Continental Shelf, 2019, <https://www.dfo-mpo.gc.ca/science/hydrographyhydrographie/UNCLOS/index-eng.html>.

important to note that it is not just the fished stock that is impacted in a fishery collapse, as the entire maritime ecosystem is likely to be impacted from a sudden large-scale collapse.

Second, if the CAO Fisheries Agreement is to be viewed as a legitimization tool, as this policy primer suggests, then the A5 will be even more dedicated to ensuring the agreement remains in force. If the Agreement were to fail or even if there was significant “cheating” by one of the signatories, it could call into question the authority that the A5 have in relation to the creation and maintenance of Arctic Ocean policy and/or governance. In other words, the collapse of the CAO Fisheries Agreement (and, by extension, fish stocks in those waters) could delegitimize the position of the coastal states as the regional primary stakeholders.

It is important to remember that only the signatories are beholden to the terms set forth in international agreements in accordance with the Vienna Convention on the Law of Treaties. This means that all states that are not part of the A5+5 would be well within their rights to establish commercial fisheries in the high seas of the CAO. The signatories themselves could also get around the terms ratified under the CAO Fisheries Agreement by reflagging their fishing vessels to states who are not party to the agreement, which would allow them to establish commercial fisheries in the high seas without violating the CAO Fisheries Agreement.¹⁶

If the missing two Arctic states (Finland and Sweden) were to sign onto the Agreement now, it would not diminish the legitimizing influence that the CAO Fisheries Agreement would have on A5 governance. After all, the A5 were the driving force behind the creation of both the Agreement and the Declaration. Getting the rest of the A8 to openly ratify the Agreement would do would be is send a public message that the Arctic states are all on the same page regarding the protection of the potential and emerging stocks.



Furthermore, to ensure the greatest reach and level of stability for the CAO Fisheries Agreement, the signatories could try to include all states that either export or import the greatest percentage of fish. The 2020 State of World Fisheries and Aquaculture report by the FAO (Food and Agriculture Organization of the United States) list the top ten importers as the United States, Japan, China, Spain, Italy, Germany, the Republic of Korea, France, Sweden, and the Netherlands. All of these states are already beholden to the CAO Fisheries Agreement either as direct signatories or through the ratification by the European Union. The top 10 exporting states are China, Norway, Viet Nam, Chile, Thailand, India, the United States, the Netherlands, Canada, and Russia.¹⁷ Therefore, recruiting Viet Nam, Chile, Thailand, and India to join the CAO Fisheries Agreement may be advisable.

In conclusion, now that the CAO Fisheries Agreement has entered into force, it achieves several key objectives for the Arctic littoral states. First, it protects domestic fish stocks. Second, it legitimizes the A5 in terms of the management and governance over issues related to the Arctic Ocean, recognizing that the coastal states are in a unique position amongst all the eight Arctic states. Third, as long as the agreement stays in force and fish stocks do not collapse, the CAO Fisheries Agreement affirms the special relationship that the A5 have with the Arctic Ocean.

Notes

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³ Manfred Niekisch, Markus Salomon, and Stefanie Jung. “The Current State of International Fisheries and the Protection of Extensively Overfished Fish Stocks.” In *Legal Regimes for Environmental Protection: Governance for Climate Change and Ocean Resources*, edited by Hans-Joachim Koch, Doris König, Joachim Sanden, and Roda Verheyen, (Leiden, The Netherlands: Brill | Nijhoff, 2015): 140, <https://doi.org/10.1163/9789004302839>.

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⁵ Andrew J. Norris, and Patrick Mckinley, “The Central Arctic Ocean-Preventing Another Tragedy of the Commons.” *Polar Record* 53, no. 1 (2016): 43-44.

⁶ Agreement to prevent unregulated high seas fisheries in the central Arctic Ocean, 2019.

⁷ Alexander N. Vylegzhanin, Oran R. Young, and Paul Arthur Berkman, “The Central Arctic Ocean Fisheries Agreement as an Element in the Evolving Arctic Ocean Governance Complex,” *Marine Policy* 118 (2020): 6.

⁸ Vylegzhanin, Young, and Berkman, “Central Arctic Ocean Fisheries Agreement,” 7.

⁹ Kevin Bailey, “An Empty Donut Hole: The Great Collapse of a North American Fishery,” *Ecology and Society* 16, no. 2 (2011): 1-2.

¹⁰ The Ilulissat Declaration, 2008, <https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf>.

¹¹ Danita Catherine Burke, *Diplomacy and the Arctic Council* (Montreal & Kingston: McGill-Queen's University Press, 2019), 159.

¹² Inuit Circumpolar Council, "A Circumpolar Inuit Declaration on Sovereignty in the Arctic", 2009, https://www.itk.ca/wp-content/uploads/2016/07/Declaration_12x18_Vice-Chairs_Signed.pdf.

¹³ Erik J. Molenaar, "Participation in the Central Arctic Ocean Fisheries Agreement." In *Emerging Legal Orders in the Arctic : The Role of Non-Arctic Actors*, edited by Akiho Morishita, Leilei Zou, Nikolas Morishita, and Marzia Scopelliti, (New York: Routledge, 2019), 140.

¹⁴ Burke, *Diplomacy and the Arctic Council*, 171.

¹⁵ Molenaar, "Participation in the Central Arctic Ocean Fisheries Agreement," 141.

¹⁶ Rosemary Rayfuse, "Regional Fisheries Management Organisations and Their Efforts and Measures to Regulate Fishing Activities," In *Legal Regimes for Environmental Protection: Governance for Climate Change and Ocean Resources*, edited by Hans-Joachim Koch, Doris König, Joachim Sanden, and Roda Verheyen (Leiden: Brill | Nijhoff, 2015), 157-58, 161.

¹⁷ Food and Agricultural Organization (FAO), *The State of World Fisheries and Aquaculture 2020. Sustainability in Action*, (2020), 76.