

SOME IMPLICATIONS IN INTERNATIONAL LAW  
OF THE SOVIET PROPOSAL TO OPEN THE NORTHERN SEA ROUTE  
TO TRANSNATIONAL COMMERCIAL TRAFFIC  

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TRANSIT PASSAGE IN THE SOVIET ARCTIC STRAITS

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## DECLARATION

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## ABSTRACT

The Soviet Union, with the cooperation of the Scott Polar Research Institute, the Fridtjof Nansen Institute, and the Woods Hole Oceanographic Institution, has recently undertaken the Northern Sea Route Project, an effort to ascertain the feasibility of opening the shipping route along the Arctic coast of the Soviet Union, from the Norwegian frontier to the Bering Strait. The goal is to operate the route on a year-round basis, offering it to commercial shippers as a substantially shorter alternative route from northern Europe to the Pacific Ocean in the hope of raising hard currency in exchange for pilotage, icebreaking, refueling, and other services.

Meanwhile, the international law of the sea has been developing at a rapid pace, creating, among other things, a right of transit passage that allows, subject to specified conditions, the relatively unrestricted passage of all foreign vessels -- commercial and military -- through straits used for international navigation. In addition, transit passage permits submerged transit by submarines and overflight by aircraft, practices with implications for the national security of states bordering straits.

This thesis summarizes the law of the sea as it relates to straits used for international navigation, and then describes 43 significant straits of the Northeast Arctic Passage, identifying the characteristics of each that are relevant to a determination of whether the strait will be subject to transit passage.

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## PREFACE

Geographical names (except for the seas) are in Russian, as are most of the useful maps and charts of the area. When an English name differs significantly from the Russian in spelling or is quite well known, it is included parenthetically on the first entry, and occasionally on subsequent ones. The style of transcription is that adopted by the Scott Polar Research Institute, but quotations follow the original transcription. A brief glossary of geographical terms appears in the appendixes.

Most of the physical description of straits is taken from the Hydrographer of the Navy's Pilot series (Arctic Pilot 1985, Bering Sea Pilot 1980, White Sea Pilot 1973). The measurements indicate the width of the strait at its narrowest and either the least known depth or the range of known depths. Distances are indicated in nautical miles ( $1/60$  of a degree of latitude) and cables ( $1/10$  of a nautical mile), depths in meters. Coordinates, which are included parenthetically in the descriptions of straits in Chapter IV, are meant only to facilitate location on a map or chart, most of which do not identify all the straits and islands mentioned here, and the choice of coordinates is not methodical: Sometimes the coordinates locate the center of a strait, sometimes one side of an entrance passage, sometimes the center of an adjacent island. The citation at the end of each description identifies the strait's principal entry in the Pilot series and is not meant to attribute all data in the description, particularly those regarding baselines, to the Pilot series.

This paper contains little in the way of geographic, economic, political, or historical information on the Northeast

Passage or the Northern Sea Route, and what there is is not new. It is borrowed from other sources, primarily Butler's Northeast Arctic Passage, Armstrong's The Northern Sea Route, and Armstrong's many years of reportage of the development and operations of the Northern Sea Route. Much of the commentary on the international law of the sea is based on treatises by the late D.P. O'Connell (1982) and by R.R. Churchill and A.V. Lowe (1988). Because of my own language limitations, I have relied on English translations by Butler, Armstrong, and Franckx. For information on the geography, history, economics, politics, and administration, the following sources, all in English, are recommended: Armstrong 1952, Butler 1978, Krypton 1953, Krypton 1956, and Armstrong's annual reports in Polar Record on the previous year's developments in the Northern Sea Route.

If there is anything original in this paper, it is in the application of the developing rules of the law of the sea to the specific straits along the Northern Sea Route in an effort to determine what effect the internationalization of those straits would have on their legal status. Inasmuch as the transit passage regime is quite recent (in fact, the convention that created it has not yet come into effect) and not yet the subject of any international litigation or incident, many of its implications are unclear, and this paper does not provide any definitive answers. It aims, instead, at raising and investigating pertinent questions before they become contentious.

## Introduction

The 1982 United Nations Convention on the Law of the Sea introduced to international law a new concept -- the right of transit passage through straits used for international navigation -- which under certain conditions permits relatively free passage by ships, overflight by aircraft, and submerged transit by submarine through the territorial sea and even the internal waters of a coastal state, activities that have significant implications for national security of states bordering straits.

This new right of transit passage is the principal component of a new legal regime governing straits used for international navigation. In many cases the new regime is not likely to have a major impact on international navigation or on coastal state security because much of the area to which the new rules are being applied were, until recently, regarded as high seas and thus subject to even more liberal rules of passage. Nevertheless, in a three-mile-wide belt along each coast of most straits and in the entirety of some smaller straits, the 1982 convention applies the new regime to waters that for many years have been regarded as territorial sea and thus, but for the new regime, subject to the more restrictive rules of innocent passage, which do not include a right of overflight or submerged transit. In these cases, the new regime of transit passage substantially decreases the jurisdiction of coastal states over the straits waters in question.

Quite independently of developments in the law of the sea, the Soviet Union has been proceeding with a plan to develop the



Northern Sea Route into a year-round operation and to open it to international commercial shipping, with the intention of earning hard currency by charging for pilotage, icebreaking, and weather forecasting services. If this plan should be realized, many of the major straits of the Northeast Passage, along the northern coast of the Soviet Union from the Norwegian border to the Bering Strait, arguably would become straits "used for international navigation" within the meaning of the 1982 convention and thus subject to the new regime. It would, for example, arguably prohibit the Soviet Union from denying access to Proiliv Vil'kitskogo (Vil'kitskiy Strait) to United States Coast Guard icebreakers, as was done in 1967. (Franckx 1988)

This paper will attempt to ascertain the effect that opening the Northern Sea Route to foreign traffic would have on the legal status of the Northeast Passage straits along the route. It will do so by examining the new regime of international straits as it applies to the waters of the Soviet Arctic and by attempting to identify the specific straits that will be affected if the plan to open the Northern Sea Route succeeds.

There are two major qualifications to any claims for significance of this paper: First, the project may well not succeed, leaving the Northern Sea Route a purely domestic transport route largely unaffected by international shipping and international law; that in itself is not a reason to abandon or postpone this study, for the issues raised here have a direct bearing on the willingness of the Soviet Union to promote the venture. Second, the specific body of law with which the paper is concerned has not yet come into effect and may never do so;



nevertheless, there is reason to believe that it may come into effect within a few years (Larson 1989), and the Soviet Union has already ratified it. Furthermore, strong arguments can be made (though not here) that the twelve-mile territorial sea and the regime of straits used for international navigation have been so generally accepted that they have become norms of customary law independent of the effectiveness of the convention from which they sprang (Langdon 1990; Burke and DeLeo 1983:407-408), but this argument is said, despite some historical validity, to deny the proceedings and results of the Third United Nations Conference on the Law of the Sea (UNCLOS III), at which the 1982 convention was negotiated and adopted. (Larson 1987:427)

The terms "Northeast Passage" and "Northern Sea Route" are frequently used interchangeably. As Professor William Butler observes, however, the terms do not describe the same entity. The Northeast Passage is the geographical area from the Soviet-Norwegian frontier to the Bering Strait, comprising the waters and islands of the Barents, White, Kara, Laptev, East Siberian, and Chukchi Seas. The Northern Sea Route is a "domestic transport concept," a cabotage route from European Russia to Vladivostok and serving northern Siberia and the Far East. (Butler 1988:9; Franckx 1991b:33) This paper is concerned with the Arctic straits of the Northeast Passage to the extent that they form a part of the Northern Sea Route, for it is these straits whose legal status may change if the Soviet government succeeds in attracting foreign shipping to its Arctic shores.

## I. Opening the Northern Sea Route

Opening the Northern Sea Route could result in "a substantial reorientation of the sea freighting patterns of the northern hemisphere [and] would seem to offer benefits all round." (Armstrong 1991a) The project, in one form or another, has been on the Soviet agenda for a quarter century.

### A. Early Efforts

The first attempt by the Soviet government to earn hard currency by opening the Northern Sea Route to foreign shipping occurred at the close of the 1966 shipping season with the publication of a brochure offering access to the route on payment of fees for the services of Soviet icebreakers, pilots, and refueling and other facilities at the remote ports along the route. The charges listed in the brochure were based on the size of the ship, its iceworthiness, and its proposed date of passage. A ship of good ice classification would be charged at the same rate year round; ships of lower classification would enjoy the same low rate for about six weeks of the summer season but a significantly higher rate at other times. (Armstrong 1968a:202-203; 1968b:332) Viktor G. Bakayev, the minister of the merchant marine, confirmed the offer at the start of the 1967 season (Anderson 1967), and the Soviet freighter Novovoronezh made a demonstration run through the Northern Sea Route, loading at Havre, Antwerp, Rotterdam, and Hamburg, and arriving at Yokohama on 25 August, 27 days after leaving Hamburg, escorted by four icebreakers at different times. Nevertheless, despite an advertized saving of 4,332 nautical miles on a voyage from Yokohama to London (compared to the usual route through the Suez

Canal), it attracted no foreign shippers. This may have been due, at least in part, to a tacit withdrawal of the offer by the Soviet government to avoid the appearance that it was offering the Northern Sea Route as an alternative to the Suez Canal, which had been closed to shipping during the 1967 Middle East war. (Franckx 1991:37-38; Armstrong 1972a:119, 1972b:377, 1970:52)

In August 1977, the Soviet icebreaker Arktika sailed to the North Pole, demonstrating that much of the ice, in summer at least, is navigable and raising the possibility of a trans-Arctic shipping route (Armstrong 1978:186). The following summer, the icebreaker Sibir' accompanied the freighter Kapitan Myshevskiy on a high-latitude demonstration voyage from Murmansk to Mys Serdtse-Kamen in the Chukchi Sea; on its return voyage west, the Sibir' was completely stopped by an ice floe in the East Siberian Sea and there are indications that she was unable to follow the planned route. (Armstrong 1979:500) (map, p. A-1) Since then, there appears to have been little discussion of such a trans-Arctic route.

In 1984, the "polar experiment" began, using the Northern Sea Route, instead of the Panama Canal, to ship goods from the west coast of North America to European Russia. (Shabad 1984:259) The experiment was apparently successful, or at least promising, as two years later Mikhail Gorbachev, in his Vladivostok speech, stressed the need to "speed up measures to increase the economic benefit of through traffic on the Northern Sea Route," which Armstrong interpreted as an order to put more emphasis on developing the through route. (Armstrong 1987:589; Franckx 1991:35) It is not only for international traffic that

the route is important, however. It is viewed by many Soviet economists as crucial to the economic well being of the Soviet Arctic and Far East. (Berezovokov 1986)

The next indication that the Soviet government was still interested in opening the coastal route to foreign shipping came in Gorbachev's Murmansk speech of 1 October 1987:

Through the Arctic runs the shortest sea route from Europe to the Far East, the Pacific Ocean. I believe, depending on the evolution of the normalization of international relations, that we could open the Northern Sea Route for foreign shipping subject to the use of our icebreaker pilotage. (Franckx 1991:38)

The Murmansk speech has been described as "represent[ing] the first wave in a Soviet diplomatic offensive directed towards the Arctic and the Nordic states." (Scrivener 1989:5)

In a limited sense, the opening may have already begun. Japanese vessels have been using part of the route since before 1967. (Anderson 1967) In 1989, foreign shippers chartered the Soviet vessel Tiksi for hard currency and took it through the Northern Sea Route from Hamburg to Osaka. (Franckx 1991:38) The ship traversed the Northern Sea Route both ways between August and November, calling at Chinese and Japanese ports. Two other freighters traversed the Northern Sea Route from western Europe to Japan in 23 days that year, 10 days less than the Suez route. (Armstrong 1989:128) Afterward, Izvestiya was able to announce that, "for the first time in its history, the Northern Sea Route provided the country with foreign currency ...." (Franckx 1991:38) The article also declared that the Soviet government could guarantee foreign vessels safe passage in less than two weeks through the Northern Sea Route during August and September. The relatively short target period, compared with the government's object of year-round navigation, has been attributed

to the disaster of August 1983, when 50 ships were trapped in ice in Proliv Longa (Long Strait), between Ostrov Vrangelya (Wrangel Island) and the continent, with the loss of one and damage to as many as 30 others. (Franckx 1991:39)

#### B. The Northern Sea Route Project

The present plan to open the Northern Sea Route to international shipping began to take form in June 1990 at a meeting in Oslo, held under the auspices of Dr. Willy Østreng, the director of the Fridtjof Nansen Institute. The meeting was attended by Norwegian and Soviet academics, representatives of the Norwegian and Soviet shipping industries, and scientists from the Scott Polar Research Institute and the Woods Hole Oceanographic Institution. It was decided that a pilot study should be undertaken to help determine the advantages, difficulties, and costs of opening the Northern Sea Route by considering the availability of sources for a detailed assessment of the physical attributes and environmental factors, the potential for commercial shipping, and the legal and political implications. (Armstrong 1991)

At a second meeting, in Leningrad in October 1990, under the auspices of the Research Institute of the Ministry of the Merchant Fleet, the pilot study began with the establishment of working groups, each with Soviet and other members. (Armstrong 1991) A memorandum of understanding was signed, and the Soviet Union agreed to make all relevant data available to the other institutes. (SPRI 1991) At the time, it was thought that the pilot study would take six months to complete, and a third meeting is planned for Oslo in June 1991. If the pilot study

reaches a favorable conclusion, it could lead to an in-depth study of several years' duration. (Armstrong 1991)

Terence Armstrong of the Scott Polar Research Institute, who participated in both meetings and who has chronicled the development of the Northern Sea Route for the past three decades, has written: "If the natural obstacles, hitherto regarded as prohibitively difficult, can be shown to be surmountable at economic cost and without unacceptable damage to the environment, then traffic in both directions might gain from using this new link." (1991a)



## II. The Maritime Zones

To understand the potential effect on the Arctic straits of the internationalization of the Northern Sea Route requires a basic familiarity with the structure that the law of the sea has imposed on the world's oceans.

### A. An Introduction to the Law of the Sea

Until relatively recently, perhaps until the early 1960s, access to the use of the seas was governed by four long-standing principles: (1) a complex of rights commonly called the freedom of navigation on the high seas; (2) a three-mile-wide territorial sea; (3) a resultant belt of high seas in most of the important straits of the world; and (4) a right of innocent passage in the territorial sea. (Reisman 1980:54) This system was largely preserved by the conventions that emerged from the 1958 Law of the Sea Conference -- principally the Convention on the Territorial Sea and the Contiguous Zone (TSC 1958) and the Convention of the High Seas (HSC 1958) -- but since that time they have been fairly persistently eroded in favor of what has come to be known as "creeping jurisdiction," the gradual but continual broadening of the authority of states to regulate the use of the waters off their coast. This section will briefly describe the recent development and current status of the law of the sea as it relates to international straits.

The international law of the sea is generally regarded as being derived from two sources: customary international law and international conventions. Customary international law, like conventional law, is based on the principle of consent by states.

To show the existence of a rule of customary law, two elements must be established: (1) a general and consistent practice by states, and (2) opinio juris, a belief by the states that the practice is either required or permitted by customary international law. To maintain the element of consent, states that persistently object to an emerging rule of customary law will not be bound by it.

Conventions, sometimes called treaties or agreements, are the clearest possible evidence of a state's consent to be bound by a legal undertaking, and they may be used to modify legal rights and obligations arising under customary international law or under earlier conventions. The principal conventional sources of the law of the sea are the 1958 Geneva Conventions on the High Seas (HSC 1958), the Territorial Sea and the Contiguous Zone (TSC 1958), the Continental Shelf (CSC 1958), and Fishing and Conservation of the Living Resources of the High Seas (FC 1958). The 1982 United Nations Convention on the Law of the Sea (LOSC 1982) alters many of the rights and duties of states established by the 1958 conventions and by customary law. When, if ever, it comes into effect, its provisions will be binding as among the states that are parties to it, but their relations with non-parties and the relations among non-parties will continue to be governed by the 1958 conventions, where applicable, and otherwise by customary international law. Analysis is further complicated by arguments that some provisions of the 1982 convention have passed into customary law. (Langdon 1990; O'Connell 1982:570)



## B. The Maritime Zones

The seas of the world are divided into zones, and applied to each zone is a set of rules, derived from customary and conventional international law, governing the nature and the subject matter of the jurisdiction a coastal state may exercise in the waters off its coast. Briefly, the zones are, in increasing order of coastal state jurisdiction, the high seas, the exclusive economic zone (EEZ), the contiguous zone, the territorial sea, and the internal waters, which are divided from the territorial sea by baselines. Following is a brief definition of "baselines" and of each of the zones and a description of the legal regime that attaches to each of them.

### 1. Baselines

It is from the baselines that the coastal zones are measured. As a general rule, "the normal baseline ... is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." (LOSC 1982: article 5; TSC 1958: article 3) When, however, this is impossible or impracticable because of a deeply indented coastline or the presence of reefs, bays, river mouths, off-shore islands, low-tide elevations, or harbor works, a coastal state is permitted to draw straight baselines, with the effect of enclosing a greater area as internal waters and pushing the other zones of coastal state jurisdiction farther into the high seas. (LOSC 1982: article 7; TSC 1958: articles 4) (Generally on baselines, O'Connell 1982:171-230; Churchill and Lowe 1988, chapter 2).

## 2. Internal Waters

Internal waters are the waters on the landward side of the baselines (LOSC 1982: article 8; TSC 1958: article 5(1)). For the most part, this means bays, estuaries, ports, and any coastal waters enclosed by straight baselines. Internal waters are regarded as an integral part of the coastal state, which possesses full territorial sovereignty over them. Consequently, ships of foreign states have no rights of passage through internal waters and must rely upon the permission of the coastal state.

The only exception to this rule is highly relevant to the straits issue: Where straight baselines drawn along an indented coast or fringe of coastal islands have enclosed waters not previously regarded as internal, then a right of innocent passage applies to those waters as if they were part of the territorial sea (LOSC 1982: article 8(2); TSC 1958: article 5(2)); if the internal waters happen to be in a strait used for international navigation, then under the 1982 convention transit passage may apply (LOSC 1982: article 35). Also relevant to the straits problem is the possible exception to the exception: when applying innocent passage or transit passage to newly enclosed internal waters, the conventions specifically refer to "the establishment of a straight baseline in accordance with the method set forth in article 7 [in LOSC 1982 or article 4 in TSC 1958]," permitting the argument that if the straight baselines are drawn under rules of customary international law, rather than pursuant to the conventions, innocent passage may not apply. The issue was not discussed by the International Court of Justice in

Anglo-Norwegian Fisheries (1951), a case that helped to clarify the customary international law pertaining to straight baselines.

In the internal waters of another state, foreign ships enjoy very few rights other than those granted by treaty. Other than ships in distress, foreign vessels have no right of access in customary international law to ports of another state. International ports are presumed to be open to foreign merchant ships, but a state may designate which of its ports are open, and there is no obligation to maintain any open ports at all. In practice, of course, ships enjoy broad rights to enter ports of other states under the hundreds of bilateral friendship, commerce, and navigation treaties and some international and regional conventions. If a state has granted a right of access to its ports, a right of exit is presumed, subject to the normal legal powers of the coastal state, which permit a state to seize a ship for the violation of customs, navigation, or pilotage laws or to arrest a vessel as security in a civil action or in an in rem action against the ship. A state may require vessels to obtain clearing papers, certifying that they have complied with customs and health requirements, and may detain unseaworthy vessels. Under the 1982 Law of the Sea Convention, a port state may institute legal proceedings against ships that have discharged pollutants into or even beyond the port state's internal waters, territorial sea, and exclusive economic zone (articles 218, 220).

There is also a right of access through internal waters to international rivers (those that form international boundaries or flow through more than one state) and canals, but, except for

ships of riparian states, it is generally thought that the rights derive solely from treaties, not from customary international law (Churchill and Lowe 1988:53-54).

Despite a theoretical dispute on the extent of a port state's jurisdiction to enforce its laws aboard ships sailing under the flag of another state, state practice is quite consistent: Port states enforce their laws aboard ships of another state only when the port state's interests have been affected; matters affecting only the internal operations of the ship are left to enforcement by the flag state, through the master or the consul. A port state's interests have been found to have been affected, thus justifying intervention by the port state authorities, when its intervention is requested by the master or by the flag state's consul; when a non-member of the ship's complement is involved; when a national of the port state is involved; when a fugitive wanted by the police of the port state is aboard; and when the gravity of the offense is particularly great, as in the case of murder. (Generally on internal waters, O'Connell 1982, chapter 9; Churchill and Lowe 1988, chapter 3).

### 3. Territorial Sea

As its name suggests, the territorial sea is a part of the territory of the coastal state, under both customary and conventional international law. (LOSC 1982: article 2; TSC 1958: article 1) Nevertheless, the sovereignty that a state exercises over its territorial sea is subject to the very important right of innocent passage over those seas by ships of foreign states (LOSC 1982: articles 2(3), 17; TSC 1958: articles

1(2), 14). A coastal state's sovereignty extends to the air space above the territorial sea; this has long been recognized in customary and conventional international law, (LOSC 1982: article 2(2); TSC 1958: article 2; CICA article 2), but there is no right of innocent passage of aircraft through the airspace above the territorial sea (Hailbronner 1983:491; Moore 1980:85). A coastal state's sovereignty also extends to the seabed and subsoil under the territorial sea (LOSC 1982: article 2(2); TSC 1958: article 2), but that is of little significance to this paper.

There has never been universal agreement on the allowable breadth of the territorial sea, although it was fairly clear by the 1930s that states could claim up to three miles without challenge. In 1960, at the time of the Second United Nations Conference on the Law of the Sea (UNCLOS II), nearly every state claimed a territorial sea of less than twelve miles, three miles being the most common claim. A few states claimed six miles, and the Scandinavian states continued to put forward their historic four-mile claims. By the end of UNCLOS III in 1982, the majority of states claimed at least 12 miles, and the 1982 convention recognizes this as the maximum allowable breadth (LOSC 1982: article 3). Several states, principally in Latin America, claim more, up to 200 miles, but these are not generally recognized other than between the states making such wider claims.

Foreign ships have a right of innocent passage through the territorial sea that has been recognized in customary international law since the concept of the territorial sea itself developed and in conventional law. (LOSC 1982: article 17; TSC

1958: article 14) The definition of "passage" has broadened somewhat over the past sixty years but remains relatively uncontroversial. Under the 1958 convention, "passage" means navigation through the territorial sea for purposes of traversing it or proceeding to or from internal waters (article 14); the 1982 convention extended the definition to include navigation to or from a roadstead or port facility outside internal waters (article 18(b)). Passage must be continuous and expeditious, but may include stopping and anchoring incidental to ordinary navigation or rendered necessary by force majeure or distress (LOSC 1982: article 18(2); TSC 1958: article 14(2),(2)). The 1982 convention also allows stopping and anchoring for the purpose of rendering assistance to others in distress (article 18(2)).

The history of the meaning of "innocent" has not been so straightforward. From the start, there was disagreement over whether innocence was to be determined by the manner of passage or by the ship's adherence to the laws of the coastal state. The 1958 convention provided: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State" (article 14(4)) and made no reference to adhering to the laws of the coastal state, with a single exception: "Passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea." (article 14(5)) The 1982 convention adopted the same general definition of innocent but substituted for the fishing vessels provision a list



of 12 activities to be considered prejudicial to the peace, good order, or security of the coastal state and thus rendering the passage not innocent. These include the threat or use of force against the coastal state; weapons exercises; collecting information prejudicial to the defense or security of the coastal state; propaganda; launching or taking on aircraft or military devices; violating the coastal state's customs, fiscal, immigration, or sanitary laws; fishing; research or surveying; interfering with the coastal state's communications; and finally and most broad, "any other activity not having a direct bearing on passage." (article 19(2)) This appears to have narrowed the right of innocent passage by allowing any activity "not having a direct bearing on passage" to render the passage not innocent, while under the 1958 convention only acts prejudicing the peace, good order, or security of the coastal state would do so. If a ship violates the rules relating to innocent passage, it becomes fully subject to all the laws of the coastal state and may be arrested for their violation or expelled from the territorial sea.

A submarine in the territorial sea must navigate on the surface and show its flag (LOSC 1982: article 20; TSC 1958: article 14(6)), but beyond that, the innocent passage of warships has been a matter of contention. The United States has recently, but not always, argued that the right of innocent passage extends to all ships, including warships. A number of states have contended that innocent passage does not extend to warships, and that they require authorization before entering the territorial sea. (Froman 1984:655) The Soviet Union filed a reservation to

that effect upon its ratification of the Territorial Sea Convention:

The Government of the U.S.S.R. considers that a coastal State has the right to establish procedures for the authorization of the passage of foreign warships through its territorial waters. (TSC 1958)

During UNCLOS III, however, the Soviet Union, which had developed into a major maritime power, began to recognize a right of innocent passage for warships (Franckx 1989a). By 1989, the dispute appeared to have been settled, as the United States and the Soviet Union exchanged notes confirming that both states recognized the right of innocent passage of warships, without prior authorization or notification. Although both states had held both positions at various times over a period of years, this agreement apparently marked the first time in history that they had been on the same side of the question at the same time. (Franckx 1990:485) The exchange of notes also confirmed that coastal states might not establish laws or regulations impairing innocent passage through the territorial sea, but that a coastal state might designate sea lanes and enforce traffic separation schemes when necessary to protect the safety of navigation. At the same time, the United States confirmed that it would refrain from exercising the right of innocent passage in the Soviet territorial sea in the Black Sea (Lowe 1991), as it had been doing as part of its freedom of navigation program. (Juda 1990)

There continues a theoretical dispute over the extent of a coastal state's legislative competence in the territorial sea, but most of the practical difficulties resulting from the dispute are avoided either by judicious restraint on the part of coastal states or by the relatively clear restrictions on enforcement



jurisdiction in the 1958 and 1982 conventions. As to legislative competence, the 1982 convention has taken a restrictive view of the coastal state's prescriptive authority over ships passing through the territorial sea, listing specific categories of laws and regulations that the coastal state may adopt: navigational safety; protection of navigational aids, cables, and pipelines; conservation of living resources; environmental protection; scientific research; and preventing infringement of fisheries, customs, fiscal, immigration, and sanitary laws (article 21).

As to the coastal state's enforcement jurisdiction over crimes committed aboard a ship passing through the territorial sea, the 1982 convention takes a position reflecting the practice of port states in the enforcement of laws on foreign ships in internal waters: Enforcement should be exercised only when the consequences of the crime extend to the home state, it is the kind of crime that disturbs the peace of the country or the good order of the territorial sea, the coastal state's assistance has been requested by the ship's master or the flag state's consul, or drug trafficking is involved (article 27; TSC 1958: article 19). Civil jurisdiction is treated analogously, providing that a coastal state should not stop or divert a ship to exercise civil jurisdiction over a person on board, and that it may not arrest or levy execution against a ship except for liabilities incurred by the ship in connection with that voyage through the coastal state's waters, unless the ship is in the territorial sea having left the coastal state's internal waters (LOSC 1982: article 28; TSC 1958: article 20). These restrictions on the coastal states codify long-standing state practice based on

comity, and from them it may be inferred that the coastal state enjoys almost complete jurisdiction in the territorial sea subject to five exceptions: these codified rules of comity; a rule of nondiscrimination; jurisdiction over crimes committed before a ship entered the state's territorial sea; jurisdiction to arrest the ship in connection with liabilities unrelated to the present voyage through the territorial sea; and some limitations on enforcement jurisdiction over pollution (LOSC 1982: article 220).

A coastal state has duties as well as rights in the territorial sea. It must give notice of known navigational hazards (Corfu Channel Case 1949; LOSC 1982: 24(2); TSC 1958: article 15(2)), and must provide lighthouses, rescue facilities, and other basic navigational services.

Where the presence of shipping would hamper the security of the state, a coastal state may suspend innocent passage temporarily in specified areas of the territorial sea (LOSC 1982: article 25(3); TSC 1958: article 16(3)); this right of suspension is frequently exercised near naval dockyards, for example, and to allow for weapons exercises.

When the territorial sea encompasses a strait used for international navigation, the rules of innocent passage may no longer apply. In that situation, the Law of the Sea Convention has made a significant break from customary international law and the Territorial Sea Convention to impose the regime of transit passage, which is more favorable to maritime states and affords less jurisdiction to the coastal state. This is discussed in more detail in Chapter III. (Generally on the territorial sea,

O'Connell 1982, chapters 3-5; Churchill and Lowe 1988: chapter 4)

#### 4. Contiguous Zone

Beyond the outer limits of the territorial sea, a coastal state may establish a zone for the enforcement of laws applicable to the territorial sea, that is to prevent or punish infringement in the territorial sea of customs, fiscal, immigration, or sanitary laws. The Territorial Sea Convention permits this contiguous zone to extend as far as 12 miles from the baselines (article 24), and the Law of the Sea Convention, reflecting the permissible extension of the Territorial Sea out to 12 miles, allows a contiguous zone out to 24 miles.

Customary international law never settled on a permissible maximum breadth of the contiguous zone or on a limitation on the scope and type of jurisdiction exercisable within it. While the two conventions clearly contemplate enforcement jurisdiction only, so that the coastal state has no right to prosecute offenses that occur within the contiguous zone, a number of states, before and since the conventions, have claimed legislative jurisdiction in the contiguous zone, and some states have claimed jurisdiction to enforce interests not mentioned by the conventions, primarily security.

Under customary international law and the Territorial Sea Convention, the contiguous zone was a part of the high seas, giving rise to a presumption against a coastal state's jurisdiction over foreign ships. Under the Law of the Sea Convention, the contiguous zone is a part of the exclusive economic zone, in which no such presumption exists, a situation

that may facilitate the extension of coastal state legislative jurisdiction into the contiguous zone. (Generally on the contiguous zone, Churchill and Lowe 1988: chapter 7).

#### 5. Exclusive Economic Zone

The exclusive economic zone extends up to two hundred miles from the baseline and enjoys its own legal regime, separate from that of the territorial sea and the high seas. In the exclusive economic zone, the coastal state has sovereign rights over exploring, exploiting, conserving, and managing living and non-living natural resources (LOSC 1982: article 56(1)(a)), and legal jurisdiction over marine scientific research, the protection and preservation of the marine environment, and the establishment and use of artificial islands, installations and structures (LOSC 1982: article 56(1)(b)). Other states have freedom of navigation and overflight and of laying submarine cables and pipelines.

In its present form, the exclusive economic zone was created by the 1982 Law of the Sea Convention, and its roots go back only as far as 1945, the beginning of the current trend to extend coastal state jurisdiction over the sea and its resources. Its principal effect has been to give coastal states exclusive rights to the fish and hydrocarbons situated off their shores. Its primary relevance to this paper is the jurisdiction granted to coastal states over the protection and preservation of the marine environment. If the Northern Sea Route is opened to foreign commercial shipping, the additional traffic is likely to threaten the delicate environment of the Arctic Ocean. Jurisdiction over the marine environment of the exclusive economic zone will enable the Soviet Union to regulate shipping beyond its territorial sea

in a way that probably would have been impermissible prior to the Law of the Sea Convention. Of special importance is article 234 of the 1982 convention, which grants coastal states the right to enact and enforce special regulations for the control of marine pollution in ice-covered areas within the exclusive economic zone, where the ecological balance is recognized as particularly sensitive. (Generally on the exclusive economic zone, O'Connell 1982, chapter 15; Churchill and Lowe 1988, chapter 9)

#### 6. High Seas

The 1982 Law of the Sea Convention defines the high seas as "all parts of the seas that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic state." (article 86) On the high seas, every nation has the right to sail ships flying its flag (LOSC 1982: article 90; HSC 1958: article 2), and no state may claim sovereignty over any part of them (LOSC 1982: article 89; HSC 1958: article 2). Among the freedoms of the high seas, the conventions explicitly guarantee navigation, overflight, laying submarine cables and pipelines, and fishing (LOSC 1982: article 87; HSC 1958: article 2). The conventions make no effort to present an exhaustive list of freedoms; the presumption against state sovereignty on the high seas leaves states free to use the seas as they like, subject to a few restrictions and the general principle that the freedoms are to be exercised with due regard for the interests of other states exercising their freedom of use (LOSC 1982: article 87; HSC 1958: article 2).

The basic rule is that the state under whose flag a ship is sailing has exclusive jurisdiction over the ship while it is on the high seas, but there are several major exceptions under which states may exercise jurisdiction over ships of another state: ships suspected of piracy (LOSC 1982: articles 100-107; HSC 1958: articles 14-21), slave trading (LOSC 1982: article 99; HSC 1958: article 22(b)), drug trafficking (LOSC 1982: article 108), or unauthorized broadcasting (LOSC 1982: article 109). In fact, the conventions impose an obligation on states to cooperate in the suppression of these activities. A state may also exercise jurisdiction on the high seas over ships of other nationalities to avoid pollution damage after a collision or other accident (LOSC 1982: article 221), and may pursue onto the high seas ships that have violated its laws in its territorial sea (LOSC 1982: article 111; HSC 1958: article 23). (Generally on the high seas, Churchill and Lowe 1988: chapter 11)



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### III. The Legal Regime of International Straits

Whether as refuges or as sea paths for his ships, straits have ever attracted the profit-seeking eyes of man.

P.P. Graves (1931:13)

Since early in the nineteenth century, when the major maritime powers recognized the value of freedom of navigation on the high seas, the major straits of the world have been kept open to free navigation, first through a series of bilateral and multi-lateral agreements and, more recently, through customary international law developing out of the treaties. (Anand 1983:181-183) This regime remained reasonably stable until about the 1960s. By 1973, when UNCLOS III began, four major issues had emerged that threatened the continued viability of the customary straits regime as codified by the 1958 Convention on the Territorial Sea and the Contiguous Zone (TSC 1958): the growing number of states claiming 12-mile territorial seas instead of the traditional three miles; the question of whether warships enjoyed a right of innocent passage; the interest of states bordering straits in the safety of navigation and in protecting their waters from pollution; and uncertainty as to the precise content of the right of innocent passage, upon which depended the authority of a state to bar foreign ships from transiting a strait bordering its coast. (Koh 1982:3)

#### A. The Importance of Straits

As UNCLOS III opened, the line was fairly clearly drawn. On one side were the straits states, many of them developing countries, and their claims to jurisdiction to regulate and even



prohibit passage; on the other, the maritime powers and their insistence on keeping the straits open. Despite the military and economic edge held by the major powers generally, the geographic situation of straits, which are confined and often shallow, gives the states bordering a major advantage in the enforcement of rules (Morris 1987:460), and in the event of a dispute over access to a strait, it is often cheaper to take a longer route than to negotiate or force passage. (McGwire 1977) While there has been some suggestion in the legal and political literature of the maritime powers that straits are no longer of paramount importance to national security (Darman 1978; Osgood 1976:48), the more prevalent view is that they are still of fundamental importance and likely to remain so. (Moore 1980; Reisman 1980) Reisman encapsulated the latter view in his 1980 article on the negotiations over the straits regime:

An acceptable public order of the oceans as it pertains to security should provide for wide surface and aerial access and rights of submerged passage as unconditionally as possible." (Reisman 1980:53)

Indeed, as early as 1970, before UNCLOS III opened, the president of the United States had outlined a new oceans policy recognizing the inevitability of the 12-mile territorial sea and stressing the importance of straits to a variety of interests:

It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation, and as a source of food. For this reason the United States is currently engaged with other states in an effort to obtain a new law of the sea treaty. This treaty would establish a 12-mile limit for territorial seas and provide for free transit through international straits. (Nixon 1970:678)

As to the undeniable interest of the straits states in regulating the use of the waters off their coasts, McDougal and

Burke argue that "there appears no coastal interest of sufficient gravity to merit authorizing the coastal state to deny all passage through a strait, except in times of the highest expectations of violence." They say that limiting a coastal state's authority to precluding passage for a specified cause will tend to prevent a state from controlling a strait "as a means of projecting its influence for purposes of special national policy ... rather than as protection against prejudice from passage." (McDougal and Burke 1987:189)

#### B. The Development of the Law

Before the 1960s, when the three-mile territorial sea was more or less standard, ships of all nations enjoyed the freedom of the high seas through any strait more than six miles wide measured between the baselines. As it happened, this included nearly all of the important straits, so that Westlake was able to write in 1904 that straits needed to be considered in international law only to the extent that their widths were not more than twice that of a coastal state's territorial sea (or the aggregate widths of both territorial seas if the strait is bounded by opposing states). (Westlake 1904:193) Today, under Westlake's formula, straits are more important than ever in international law, for as territorial seas have grown wider, fewer and fewer straits reach the critical width, so it is upon international law that the maritime states' depend for access to them.

When coastal states in large numbers began declaring territorial seas of 12 miles, in some cases more, the principal resistance to these claims came from maritime states concerned

that straits of less than 24 miles' breadth would be removed from the legal regime of the high seas. One study found that 116 international straits would be enclosed by a world-wide adoption of the 12-mile territorial sea. (Office of the Geographer 1974) This would have relegated foreign ships in these straits to the right of innocent passage, which is not only restrictive of ships' movements and activities, but is also susceptible to suspension by the coastal state. (Koh 1982:3-6) It would also have eliminated the right of overflight, as there is no right of innocent passage for aircraft above the territorial sea (Hailbronner 1983:491; Moore 1980:85), and would have required transiting submarines to surface and to show the flag. (TSC 1958: article 14(6)) Perhaps just as serious, from the maritime states' perspective, was the concurrent increase in the employment of straight baselines, which had the effect of enclosing as internal waters some straits used for international navigation; under the customary regime for internal waters, these straits would have been altogether inaccessible to foreign vessels without the authorization of the coastal state.

Before UNCLOS III, the legal regime of international straits running through the territorial sea was ambiguous, as to both the content of the right of passage through them and the question of which straits it affected. O'Connell regarded the regime of straits as an autonomous institution, neither high seas nor territorial sea but somewhere in between. He found that the choice of route and the scope of permissible behavior were more restricted than on the high seas but greater than in the territorial sea (O'Connell 1982:327). Churchill and Lowe, on the

other hand, find that, despite some disagreement on the content of the right, "the balance of juristic opinion seems to favour the conclusion that customary law accords only a nonsuspendable right of innocent passage through them." (Churchill and Lowe 1988:89) Whatever the content of the right, there appears to be no doubt that the coastal state was prohibited from suspending it; this is a fundamental rule of customary international law (Corfu Channel 1949:29) that was embodied in the Territorial Sea Convention:

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State. (1958: article 16(4))

#### 1. The Corfu Channel Case

Corfu Channel is a central case in the history of the straits regime, and some familiarity with it is crucial to an understanding of the regime's development. The dispute leading to it began on 15 May 1946, when Albanian shore batteries opened fire on two British cruisers passing through the Corfu Channel between Albania and the Greek island of Corfu. The British government protested strongly what it regarded as a breach of the international right of passage of vessels, including warships, through straits used by international shipping. On 22 October, a British squadron, cleared for action but with the guns in the normal stowage position, proceeded through the north Corfu Channel. Two of the ships struck mines and were seriously damaged, with the loss of 44 lives. The British government announced that it intended to sweep the passage for mines and, despite Albanian protests, did so, detecting 22 mines and

destroying 20. An inspection of the two others revealed evidence strongly suggesting Albanian responsibility.

The United Kingdom, seeking compensation for the ships and the loss of life, referred the dispute to the International Court of Justice, which, after some procedural disagreement, accepted jurisdiction. The United Kingdom alleged that the Albanian government either had caused the mines to be laid in the channel or was aware of their existence in a channel known by the Albanian government to be used by shipping of other states. The United Kingdom argued that Corfu Channel, because it was a natural channel between two parts of the high seas, was an international highway subject to a right of innocent passage. Albania denied laying the mines and responded that Corfu Channel was not an international strait but a means of lateral traffic of secondary and limited importance. It justified its refusal of passage to the British ships on the grounds that the channel was the frontier between Albania and Greece, which regarded itself as being in a state of war with Albania, and that national security was a consideration in establishing rights of passage.

By special agreement of the parties, the International Court had two principal questions to answer: (1) Was Albania responsible for the explosions? and (2) Did the United Kingdom violate Albania's sovereignty on October 22 and during the minesweeping operations? The answer to the first question, which went against Albania, is of little significance to this paper, but the answer to the second forms the core of most discussion of international straits since 1949. The International Court held that under customary international law



States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in international convention there is no right for a coastal State to prohibit such passage through straits in time of peace. (Corfu Channel 1949:28)

The court noted the heightened tensions along the Albania-Greece frontier, and said that

Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorisation. (Corfu Channel 1958:29)

A determination of Britain's right to traverse the channel and to conduct minesweeping operations there thus required two factual determinations: whether Corfu Channel was a strait "used for international navigation" within the meaning of the court's statement of the law, and whether Britain's activities there -- the October 22 transit and the subsequent minesweeping operations -- were innocent.

Albania argued that Corfu Channel was not an international strait but merely an alternative route of secondary importance between the Aegean and Adriatic Seas, used almost exclusively by local traffic, and thus not subject to the passage regime articulated by the court. The court, however, found this to be sufficient to qualify the channel as an international strait, the decisive criteria being (1) its geographical situation as a strait connecting two parts of the high seas, and (2) the fact that it was actually used for international navigation. The actual volume of international traffic through the strait was not relevant to its legal status.



As to the innocence of the British activities in the channel, the court's formulation of the law had made clear that the vessels' being warships did not ipso facto disqualify them from innocent passage. A determination of innocence, then, depended upon the facts of each incident. As to the passage of 22 October, the evidence showed that the ships were not in combat formation; further, the fact that the purpose of the passage was to challenge the Albanian government's attempt to close the channel to British warships did not render it not innocent. What governed innocence was not the purpose of the voyage but the manner in which it was carried out.

The minesweeping operations, however, were found not to be within the ambit of innocent passage. Further, the court rejected the British defense of extreme urgency, noting that the sort of intervention in which the British had engaged would "in the nature of things ... be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (Corfu Channel 1949:33)

While Corfu Channel is interesting in a number of respects, its great significance is in the exposition of the law relating to innocent passage through international straits and in its application of the factors that qualify a strait as international: (1) its geographical situation and (2) its use in international navigation. Since 1949, those factors have been the focus of much discussion, and they have subsequently been modified by convention. They are discussed in more detail in Chapter VI.

## 2. Unresolved Issues

Even after Corfu Channel, a number of major questions were left unresolved. For example, there has never been a precise determination of the rules of innocent passage that would allow a neutral observer to render an objective judgment as to the innocence vel non of a particular passage. (Maduro 1980:73) Further, despite the clear judgment of the International Court that innocent passage applied to warships, this immediately became a point of contention. The International Law Commission concluded that passage of warships through any territorial sea, including international straits, would require either "authorization or notification." The question was not resolved explicitly by the 1958 convention. While both questions are of significance to the Arctic straits, neither bears directly on their legal status if they are used for international navigation.

### C. International Straits in the 1982 Convention

Two tasks, broadly speaking, faced UNCLOS III: attempting to clarify issues left outstanding by Corfu Channel, the 1958 conventions, and state practice, and attempting to resolve new conflicts raised by "creeping jurisdiction." By and large, they succeeded in striking a balance between the security needs of the straits states and the mobility requirements of the maritime powers. (Grunawalt 1987:452)

To help clarify the meaning of innocent passage, the 1982 convention retained the rule that passage is not innocent if "prejudicial to the peace, good order or security of the coastal State," but added a list of twelve categories of activities considered to be prejudicial. (article 19) As there is no

indication that the list is to be taken as exhaustive, it is unlikely that the list can resolve all ambiguity. As for the warships problem, the 1982 convention grants the right of transit passage to "all ships and aircraft," (article 38(1)) a phrase that Moore describes as "wholly inconsistent with any differentiation on the basis of the military or commercial nature of the vessel or aircraft." (1980:110) Nevertheless, the passage of warships continued to be an issue and, as between the United States and the Soviet Union, was not resolved until 1989. (Lowe 1991)

The drafters attempted to resolve the "creeping jurisdiction" dispute by creating a new right of transit passage. Unknown in customary international law and created by the 1982 convention, transit passage is the outstanding characteristic of the regime for international straits established by Part III of the convention. Negotiated as a part of a package including recognition of the 12-mile territorial sea, it represents a compromise between the interests of the maritime states in unfettered freedom of navigation through international straits and the interests of the coastal states in protecting their waters from collisions and pollution (Reisman 1980). The regime assures access to straits enclosed by expanded territorial seas and internal waters, and transit passage is far more favorable to maritime states than is the relatively restrictive innocent passage. (Robertson 1980:812)

#### 1. The Right of Transit Passage

Transit passage "means the exercise ... of the freedom of navigation and overflight solely for the purpose of continuous

and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas on an exclusive economic zone." (article 38(2)) It differs significantly from innocent passage in that: (1) it applies to overflights by aircraft as well as to navigation (id.); (2) it may not be hampered or suspended (article 44); and (3) there are no criteria of innocence to be met, although ships or aircraft must proceed through or over the strait without delay (article 39(1)(a)), refrain from the threat or use of force against the coastal state (article 39(1)(b)), and refrain from any activity other than those incident to their normal modes of continuous and expeditious transit (article 39(1)(c)); any other activity "remains subject to the other applicable provisions" of the convention (article 38(3)), which presumably means that the rules of innocent passage take effect when a vessel engages in any unauthorized activity, permitting the coastal state to bar the vessel or to assume jurisdiction over the offending behavior. In addition, by reference to "normal modes" of transit, article 39(1)(c) apparently permits submarines to transit submerged. Reisman (1980:71-75) and others have argued that this is not unambiguous, but Moore finds that the convention's text undeniably establishes the right of submerged transit through straits. (Moore 1980:95-102)

Transit passage affords to the coastal state significantly more jurisdiction over foreign vessels than do the rules governing freedom of the high seas or exclusive economic zones but significantly less than over vessels in innocent passage. (Moore 1980:105) Coastal states may designate sea lanes and

prescribe traffic separation schemes for safety reasons (article 41(1)) and may adopt laws and regulations regarding maritime safety and traffic (article 42(1)(a)); the prevention of fishing (article 42(1)(c)); loading or unloading in violation of customs, fiscal, immigration, or sanitary laws (article 42 (1)(d)); and the prevention, reduction and control of pollution but only by giving effect to existing international regulations.

## 2. Conditions for Applying Transit Passage

The 1982 convention applies the right of transit passage to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone." (Article 37). It, however, expressly exempts from the regime of international straits the following areas:

1. internal waters within a strait, except where waters not previously considered internal waters have been enclosed by straight baselines pursuant to article 7 (article 35(a));

2. waters of the high seas or an exclusive economic zone (article 35(b));

3. straits in which passage is regulated by long-standing international conventions (article 35(c)); and

4. straits through which there exists, in the high seas or an exclusive economic zone, a route of similar convenience with respect to navigational and hydrological characteristics (article 36).

The convention also exempts from the right of transit passage (but not from the overall regime of international straits)

5. a strait between the mainland and an island of a state if, seaward of the island, there exists through the high seas or an exclusive economic zone a route of similar convenience with respect to navigational and hydrological characteristics (article 38(1)). In this case, a regime of nonsuspendable innocent passage applies to the strait (article 45(1)(a),(2)).

### 3. Nonsuspendable Innocent Passage

In two instances, straits used for international navigation will be subject to a nonsuspendable right of innocent passage, rather than transit passage: when a strait between an island and the mainland is excluded from the transit passage regime under article 38(1) because of a high seas route of similar convenience seaward of the island (LOSC 1982: article 45(1)(a)(2)), and when the strait connects a part of the high seas or an exclusive economic zone not with another part of the high seas or an exclusive economic zone but with the territorial sea of a foreign state (LOSC 1982: article 45(1)(b)(2)). As to the first instance, there are a significant number of examples of Soviet Arctic straits lying between islands and the mainland, so the question of a seaward route of similar convenience is highly relevant. There are no examples of the second instance, however, as the entire Northern Sea Route, as it traverses the Northeast Passage, lies within Soviet internal waters, territorial sea, or exclusive economic zone, so that none of its straits leads to the territorial sea of another state.

A regime of archipelagic sea lanes passage, closely analogous to that of transit passage, has been established to govern the rights of archipelagic states to enclose their waters



with straight baselines while allowing foreign ships relatively unobstructed access to sea lanes through and air routes over the archipelagos (articles 46-54). This regime has no relevance to the Northern Sea Route, as there are no archipelagic states in its vicinity, and will not be discussed further. There are major archipelagos in the Soviet Arctic, and the status of their waters is an issue, but they are not subject to the archipelagic states regime of the 1982 convention, which is restricted to states "constituted wholly by one or more archipelagos ...." (article 46(a)) (emphasis added) (Scovazzi 1988:38 fn.3)

#### IV. The Straits of the Northern Sea Route

The legal regime applicable to a particular strait depends largely upon the classification of the waters in which the strait is situated, the classification of the waters that it joins, and whether or not the strait is "used for international navigation." A strait's being used for international navigation gives rise to the possibility that transit passage will apply.

This section identifies each of the straits that is or might become essential to navigation through the Northeast Arctic Passage and describes the characteristics relevant to its legal status: the maritime zone in which it lies; its width, which determines whether it is capable of including a high seas or exclusive economic zone route of similar convenience; if it separates an island from the mainland, whether there is a seaward route of similar convenience through the high seas or an exclusive economic zone; and other basic data of interest such as length, depth, and typical ice conditions.

The straits described are among those identified by Butler as possibly essential to transit the Northeast Arctic Passage or possibly becoming essential under certain conditions. (1978:38-41) (The word "essential" is not used here with a legal connotation, inasmuch as the importance of a strait to international navigation is no longer a factor in determining its legal status; in this context it is intended simply as a predictor of whether the strait will, in fact, be used for international navigation.)

Obviously the most important of the straits listed here are those linking the seas, as they constitute "choke points," where the choice of route is at its absolute minimum. Many of the others may appear to be too small or out of the way ever to prove useful to ships plying the Northern Sea Route, but the unpredictable nature of sea ice often forces vessels onto unanticipated routes.

#### Barents Sea

1. Proliv Kil'dinskiy (Kil'din Strait) ( $69^{\circ} 20' N$ ,  $33^{\circ} 59' E$ ),  $4\frac{1}{2}$  cables wide, 10 miles long, and deep in the fairway, is situated between the mainland and Ostrov Kil'din, the largest island off the Murmansk coast. It never freezes, but is sometimes completely blocked by ice carried in by tidal currents. The strait is enclosed by straight baselines that enclose the island and thus constitutes internal waters, but it appears to be subject to no claim of historic strait. Whether the seaward route is of similar convenience varies with the ice conditions, especially because the water in the strait never freezes. (White Sea Pilot, p. 58)

2. Proliv Nikol'skiy Shar ( $70^{\circ} 30' N$ ,  $57^{\circ} 13' E$ ),  $\frac{1}{2}$ -mile wide and 10 miles long. It lies between Ostrov Kusova Zemlya, a small island at the southwestern corner of the northwestern coast of Proliv Karskiye Vorota (Kara Gates Strait) and Poluostrov Piritovyy on Novaya Zemlya. It is within the straight baselines that enclose Novaya Zemlya. (Arctic Pilot 3.125)

3. Proliv Kostin Shar ( $70^{\circ} 52' N$ ,  $53^{\circ} 21' E$ ), 6 cables wide and 55 miles long, separates the east and north sides of Ostrov Mezhdusharskiy from Novaya Zemlya. It is within the straight

baselines that enclose Novaya Zemlya. The bay in which the island and the strait lie has too wide an entrance (about 45 miles) to be entirely closed under the conventional rules for closing bays, there is no evidence that the bay has been claimed as historic waters, and, in light of the straight baselines enclosing the entire archipelago, there is at present no reason for the Soviet Union to draw a bay closing line. (Arctic Pilot 4.10)

4. & 5. Proliv Krotova, 1-3/4 miles wide, and Proliv Kazakova, 2-3/4 miles wide, are deep, and clear of dangers in the fairway. They divide Ostrov Mityushev (73° 26' N, 54° 6' E) from Novaya Zemlya, and are within the straight baselines. (Arctic Pilot 6.12)

6. Proliv Shirokiy (71° 18' N, 53° 15' E), 3½ cables wide, lies between Ostrov Timofeyeva and Ostrov Sobachiy in Proliv Kostin Shar. It is within the straight baselines that enclose Proliv Kostin Shar. (Arctic Pilot 4.70)

7. Proliv Uzkiy (71° 19' N, 53° 21' E), 5½ cables wide, 25 to 50 meters deep in the fairway, separates Ostrov Sobachiy from Novaya Zemlya and from Ostrov Ter-Tyre in Proliv Kostin Shar and is within the straight baselines that enclose Proliv Kostin Shar. (Arctic Pilot 4.62)

#### White Sea

The White Sea is a large bay opening into the Barents Sea between Poluostrov Kol'skiy (Kola Peninsula) and Poluostrov Kanin. Its entrance is 84.4 miles wide measured along the closing line that runs between Mys Sviatoy Nos and Mys Kanin Nos. It contains a number of significant straits, in particular the

Gorlo, which varies in width between 25 and 50 miles and joins the northern and southern basins. It is the only passage between the White Sea and the Arctic Ocean and thus an indispensable route for vessels serving White Sea ports. In addition, Butler identifies six other straits in the White Sea as essential or conditionally essential to transit the Northeast Arctic Passage.

Nevertheless, this paper does not survey the straits of the White Sea, for two reasons. First, the Northern Sea Route Project appears to contemplate the foreign use of the Northern Sea Route as a transport route between northern Europe and northern Pacific ports. Ships plying this route will pass by the entrance to the White Sea but will not enter.

Second, the closing line renders all the waters of the White Sea internal waters. Because the line was drawn as the closing line to a historic bay (Decree of 1985), and not as a straight baseline under article 7 of the 1982 Law of the Sea Convention (or article 4 of the 1958 Territorial Sea Convention), the exceptions of articles 35(a) (transit passage) and 8(a) (innocent passage) in the 1982 convention and of article 5(a) (innocent passage) in the 1958 convention do not apply; all the straits of the White Sea are thus exempt from the innocent passage and transit passage regimes. Furthermore, as a result, the waters on each end of all the straits are internal waters, not high seas or exclusive economic zone, so the straits do not meet the section 37 condition for transit passage. While international objection has been made to the Soviet baselines, it seems unlikely that the White Sea closing line will not be eventually

accepted; the White Sea straits, therefore, will not be described further.

#### Linking Barents and Kara Seas

Three straits connect the Barents and Kara Seas. The only other route between the seas is around the north tip of Novaya Zemlya, which is occasionally necessary, when all three straits are obstructed by ice. Sometimes, but rarely, all four routes are closed. All three straits, along with the whole of Novaya Zemlya and Ostrov Vaygach, have been enclosed by straight baselines, so they constitute internal waters, but probably not to the exclusion of transit passage.

8. Proliv Yugorskiy Shar,  $5\frac{1}{2}$  miles wide, about 21 miles long and at least 12 meters deep in the fairway, lies between Ostrov Vaygach and Poluostrov Yugorskiy on the mainland. The southwest entrance is between Mys Belyy Nos ( $69^{\circ} 36' N$ ,  $60^{\circ} 11' E$ ) and Mys Greben',  $5\frac{1}{2}$  miles to the northwest. The northeast entrance is between Mys Yarossel' ( $60^{\circ} 51' N$ ,  $60^{\circ} 47' E$ ) and Mys Belyy,  $7\frac{1}{2}$  miles west by northwest. It is the most convenient of the three straits linking the Barents and Kara Seas. Though the strait lies between an island and the mainland, the Novaya Zemlya archipelago precludes a seaward route of similar convenience. It is fully enclosed by the straight baselines that enclose Novaya Zemlya, but at each end, beyond the 12-mile territorial sea extending from the baselines, is exclusive economic zone, of the Barents Sea to the Southwest and of the Kara Sea to the northeast. (Arctic Pilot 2.32)

9. Proliv Karskiye Vorota (Kara Gates Strait) ( $70^{\circ} 30' N$ ,  $58^{\circ} 00' E$ ), lies between Ostrov Vaygach and Novaya Zemlya. The



depths are very irregular, but in the fairway it is deep enough to make anchoring difficult. It is enclosed by straight baselines of 29 miles on the southwest and 32 miles on the northeast, suggesting that the exclusive economic zone would run through it if it were not enclosed; large numbers of islets along both sides of the strait reduce the fairway to a width of  $13\frac{1}{2}$  miles, however, and if each islet were assigned its own baselines, it is likely that the territorial seas would overlap, eliminating the exclusive economic zone. Like Proliv Yugorskiy Shar, it is in internal waters with exclusive economic zone at each end (beyond the 12-mile territorial sea). (Arctic Pilot 2.68)

10. Proliv Matochkin Shar ( $73^{\circ} 20' N$ ,  $54^{\circ} 00' E$ ),  $\frac{1}{2}$ -mile wide, 55 miles long, and at least 11.9 meters deep in the fairway, divides Novaya Zemlya in two, about 155 miles from Proliv Karskiye Vorota (Kara Gates Strait) at the south end. When ice conditions permit, vessels of any size can pass through. Like the other two inter-sea straits, it is in internal waters with exclusive economic zone at each end, beyond the territorial sea. (Arctic Pilot 5.1)

#### Kara Sea

There are thousands of islands in the Kara Sea, but only twenty of the straits have been identified as significant to navigation.

11. Proliv Petukhovskiy Shar, 2 to 3 cables wide and  $5\frac{1}{2}$  miles long, is between Ostrov Bol'shoy Olynyi and the southern side of Novaya Zemlya's Poluostrov Rusanov ( $70^{\circ} 34' N$ ,  $56^{\circ} 21' E$ ). It is deep enough only for small vessels drawing four to six

feet. It is enclosed by the straight baselines along Novaya Zemlya's indented coastline. (Arctic Pilot 3.96)

12. Proliv Morozova,  $\frac{1}{2}$  mile wide, separates the southeastern end of Ostrov Mestnyy ( $69^{\circ} 51' N$ ,  $61^{\circ} 14' E$ ) from Mys Tonkiy, on the mainland. It is enclosed by straight baselines that end on the island. The convenience of a seaward route depends upon ice conditions. (Arctic Pilot 9.19)

13. Proliv Sharapov Shar, a narrow passage, 0.6 to 0.9 meters deep, lies between the mainland and Sharapovy Koshki, a chain of sandy spits extending from Mys Porny-Salya ( $70^{\circ} 26' N$ ,  $66^{\circ} 59' E$ ) about 40 miles north to Mys Kharasovoy. It is a textbook case for the argument that there can be no seaward route of similar convenience: Depths range between  $2\frac{3}{4}$  and 9 fathoms about 15 miles to the seaward, but vessels use the channel despite its shallowness when forced by ice to navigate close to the shore. It lies partly within straight baselines and partly behind Sharapovy Koshki, which has natural baselines. (Arctic Pilot 9.97)

14. Proliv Malygina,  $4\frac{1}{2}$  miles wide and 32 miles long, lies between Ostrov Belyy (White Island) ( $73^{\circ} 15' N$ ,  $70^{\circ} 45' E$ ) and Poluostrov Yamal. Depths are subject to frequent change, but a light draft vessel can save 50 miles by not having to pass north of the island, a route frequently blocked by ice while the strait is clear, mitigating against a convenient seaward route. The strait is entirely enclosed by straight baselines enclosing Ostrov Belyy. (Arctic Pilot 10.17)

15. Proliv Ovtsyna ( $72^{\circ} 35' N$ ,  $78^{\circ} 40' E$ ), 22 miles wide and  $3\frac{1}{2}$  to  $6\frac{1}{2}$  fathoms in the middle, separates Ostrov Kuz'nin (also

called Ostrov Sibiryakova) and Ostrov Oleniy. It is a principal ship channel to the Reka Yenisey (Yenisey River) and is within the straight baselines that enclose the mouth of the river. (Arctic Pilot 11.167)

16. Proliv Krestovskiy, 1 mile wide and 10 meters deep in the fairway, separates Ostrov Krestovskiy Island ( $72^{\circ} 26' N$ ,  $80^{\circ} 46' E$ ) from the Reka Yenisey (Yenisey River) and is within the straight baselines that enclose the mouth of the river. Any seaward route will likewise be within the straight baselines and thus not in the high seas or exclusive economic zone. (Arctic Pilot 11.236)

17. Proliv Matisena lies between Ostrov Pilota Makhotkina ( $76^{\circ} 22' N$ ,  $96^{\circ} 55' E$ ) and Arkhipelag Nordenshel'da (Nordenskjöld Archipelago), a group of about seventy islands. The strait, which has not been surveyed, is 12 to 18 meters deep in the fairway. It is within the straight baselines that enclose the archipelago. (Arctic Pilot 14.76)

18. Proliv Fram (Fram Strait),  $1\frac{1}{4}$  miles wide and generally deep but less than 11 meters at points, separates the south side of Ostrov Nansena (Nansen Island) ( $76^{\circ} 12' N$ ,  $94^{\circ} 57' E$ ) from Poluostrov Yeremeyeva on the mainland. It is well within the straight baselines that enclose Arkhipelag Nordenshel'da to the north, so the seaward route is in internal waters. (Arctic Pilot 14.26)

19. Proliv Sverdrup, not surveyed but known to be deep and clear of known dangers in the fairway, lies between Ostrov Nansena and Ostrov Bonev ( $76^{\circ} 10' N$ ,  $95^{\circ} 00' E$ ). It lies

within the straight baselines of Arkhipelag Nordenshel'da.  
(Arctic Pilot 14.30)

20. Proliv Zarya ( $76^{\circ} 10' N$ ,  $95^{\circ} 00' E$ ),  $1\frac{1}{2}$  miles wide and 10 to 15 meters deep in the fairway, lies between Ostrov Bonevy and the mainland, but Ostrov Nansena and Ostrov Taymyr cut it off from any possible seaward route of similar convenience. It lies within the straight baselines of Arkhipelag Nordenshel'da.  
(Arctic Pilot 14.32)

21. Proliv Palander,  $2\frac{1}{4}$  miles wide and 38 to 49 meters deep in the fairway, separates Ostrov Bonevy and Ostrov Nansena on the west and Ostrov Taymyr ( $76^{\circ} 17' N$ ,  $95^{\circ} 22' E$ ) on the east. It lies within the straight baselines of the Arkhipelag Nordenshel'da. (Arctic Pilot 14.41)

22. Proliv Toros ( $76^{\circ} 19' N$ ,  $96^{\circ} 29' E$ ), unexamined but known to be about 16 miles long and 1 to 2 miles wide with depths of about 20 meters, separates Ostrov Taymyr and Ostrov Pilota Makhotkina from Ostrov Moiseyev and Ostrov Pilota Alekseyeva. It lies within the straight baselines of the Arkhipelag Nordenshel'da. (Arctic Pilot 14.64)

23. Proliv Vostochnyy, 1 mile wide, 6 miles long, and at least 8.8 meters in the fairway, lies between Ostrov Pilota Makhotkina and Mys Kamen' ( $76^{\circ} 17' N$ ,  $96^{\circ} 44' E$ ), the northeast extremity of Ostrov Taymyr. It is well within the straight baselines that enclose the Arkhipelag Nordenshel'da to the north, so the seaward route is in internal waters. (Arctic Pilot 14.68)

Dikson Island Straits (in the Kara Sea)

Ostrov Dikson (Dikson Island), the largest member of an archipelago lying southwest of Mys Severo-Vostochnyy (Cape

southeast), is a key port of call for ships plying the Northern Sea Route in either direction, for vessels bound from European Russian ports to Siberian seaports and rivers, and for river steamers from Krasnoyarsk and Igarka. It is separated from the mainland by three straits -- Proliv Lena, Proliv Preven, and Proliv Vega -- named for the vessels in which A.E. Nordenskjöld made the first successful transit of the Northeast Passage in 1878-79.

24. Proliv Lena (73° 31' N, 80° 28' E), 1 cable wide and 2.1 meters deep, lies between the north side of Dikson Island and the mainland. It is within the straight baselines that enclose the mouth of Reka Yenisey (Yenisey River) but as one of the points lies on Ostrov Dikson, there is a seaward route; its convenience depends on ice conditions. Its seaward end leads to the territorial sea, which abuts the exclusive economic zone, but its southern end leads to internal waters. (Arctic Pilot 11.147)

25. Proliv Preven (73° 31' N, 80° 30' E), 15.8 meters deep in the fairway, lies between Ostrova Nordenshel'da, a group of three islets, and the mainland and is the northern entrance to Gavan' Dikson, the harbor and anchorage area between Ostrov Dikson and the mainland to the east. As with Proliv Lena, it is within the straight baselines that enclose the mouth of Reka Yenisey, but as one of the points lies on Ostrov Dikson, there is a seaward route; its convenience depends on ice conditions. (Arctic Pilot 11.146)

26. Proliv Vega (73° 28' N, 80° 29' E), at least 10 meters deep in the deepest channel, is the southern entrance to Gavan' Dikson. As are Proliv Lena and Proliv Preven, it is within the

straight baselines that enclose the mouth of Reka Yenisey, but as one of the points lies on Ostrov Dikson, there is a seaward route; its convenience depends on ice conditions. The south end of the strait leads to internal waters. (Arctic Pilot 11.142)

Shkhery Minina (Minin Skerries) (in the Kara Sea)

Shkhery Minina consists of an archipelago comprising three main groups of islands: Ostrova Plavnikovyy (Plavnikov Islands), a central group, and a northeastern group. They are all enclosed by straight baselines. (Arctic Pilot 13.85)

27. Proliv Dubravina ( $74^{\circ} 24' N$ ,  $85^{\circ} 12' E$ ), 2 miles wide and 20 to 26 meters deep in the fairway, separates Ostrov Kosterina from Ostrov Severnyy Zarzar (Northern Karzar Island). (Arctic Pilot 13.121)

28. Proliv Glubokiy ( $74^{\circ} 26' N$ ,  $85^{\circ} 41' E$ ) is narrow and 10 to 13 meters deep in the fairway. It lies between Ostrov Kosterina, Ostrov Kruglyy, and Ostrov Granitnyy on the west and Ostrov Pestsovyi on the east. (Arctic Pilot 13.123)

29. Proliv Stalintsa (Stalinets Strait), 7 cables wide and at least 11 meters deep, separates the northeastern group, including Ostrov Kolosovykh ( $74^{\circ} 55' N$ ,  $86^{\circ} 40' E$ ) from the mainland. The strait is so far within the straight baselines that any convenient seaward route will be within internal waters. (Arctic Pilot 13.188)

30. Proliv Iney ( $74^{\circ} 50' N$ ,  $86^{\circ} 26' E$ ) is about 1 mile wide and 7 miles long, but about midway the fairway narrows to 2 cables. It passes between Ostrov Nerpichiy and Ostrov Kolosovykh and connects the eastern and western parts of Proliv Stalintsa. (Arctic Pilot 13.200)



### Linking Kara and Laptev Seas

Four straits join the Kara and Laptev Seas. They are all entirely within the straight baselines that enclose the waters of the Severnaya Zemlya archipelago as internal waters. Occasionally the route around the northern end of the archipelago is open.

31. Proliv Borisa Vil'kitskogo (Vil'kitskiy Strait) ( $77^{\circ} 23' N$ ,  $102^{\circ} 07' E$ ), at least 30 miles wide and 60 miles long, lies between Poluostrov Taymyr, the northernmost point of Asia, and Ostrov Bol'shevik, the southernmost major island of Severnaya Zemlya. It is the shortest, best marked, and best known of the four straits. It is enclosed on the northwest by the straight baselines that enclose Arkhipelag Nordenshel'da and on the east by the lines that enclose Severnaya Zemlya). If it were not enclosed by straight baselines, it would contain a belt of high seas at least 6 miles wide. (Arctic Pilot 2.132)

32. Proliv Shokal'skogo (Shokal'skiy Strait) ( $77^{\circ} 55' N$ ,  $99^{\circ} 33' E$ ),  $10\frac{1}{2}$  miles wide, 80 miles long, and deep enough for vessels of any draft, is between the northwestern side of Ostrov Bol'shevik and Ostrov Oktyabr'skoy Revolyutsii (October Revolution Island). It is within the baselines that enclose Severnaya Zemlya. (Arctic Pilot 2.156)

33. Proliv Krasnoy Armii (Red Army Strait) ( $79^{\circ} 40' N$ ,  $93^{\circ} 00' E$ ),  $1\frac{1}{2}$  miles least width and 80 miles long, separates Arkhipelag Sedova and Ostrov Oktyabr'skoy Revolyutsii (October Revolution Island) on the south and southeast from Ostrov Pioneer (Pioneer Island) and Ostrov Komsomolets to the north northwest.

It is enclosed by the straight baselines that enclose Severnaya Zemlya. (Arctic Pilot 14.272)

34. Proliv Yungsturm, unexamined but known to be 3 miles wide at its narrowest and 30 miles long, separates Ostrov Pioneer (Pioneer Island) and Ostrov Komsomolets (80° 14' N, 91° 24' E). It is enclosed on the northwest by the straight baselines that enclose Severnaya Zemlya; at the southeast end it joins Proliv Krasnoy Armii (Red Army Strait). (Arctic Pilot 14.278)

#### Laptev Sea Straits

35. Proliv Mod (Maud Strait), 1½ miles wide, separates Ostrov Severnyy (76° 38' N, 112° 20' E) from Ostrov Yuzhnyy, in the Ostrova Petra (Peter Islands or Pyotr Islands). It can be used by vessels drawing up to 5 meters. It is within straight baselines that enclose the coastal islands off the northeast coast of Poluostrov Taymyr. (Arctic Pilot 15.37)

36. Proliv Murmantsa (Murmanets Strait), 7½ miles wide, separates Ostrov Yuzhnyy from Mys Vos'mogo Marta on Poluostrov Taymyr. It can be used by vessels drawing up to 5 meters. It is enclosed by straight baselines; the convenience of the seaward route will depend upon ice conditions. (Arctic Pilot 15.37)

#### Linking the Laptev and East Siberian Seas

Ostrova Novo Sibirskiy (New Siberian Islands) separate the Laptev and East Siberian Seas. There are several straits among the islands, but two major straits -- Proliv Dmitriya Lapteva and Proliv Savnikova -- join the seas directly. They are within the straight baselines that enclose three of the major islands.

37. Proliv Dmitriya Lapteva (Dmitriy Laptev Strait), 30 miles wide and 63 miles long, lies between Mys Svyatoy Nos (72°

52' N, 150° 50' E) on the mainland and Ostrov Bol'shoy Lyakhovskiy. It will accommodate vessels drawing as much as 7 meters. Arctic ice does not penetrate the strait, so ordinarily there is only one-year ice, and it is usually ice free in August and September. It is within the straight baselines that enclose Ostrova Novo Sibirskiy, so there is no exclusive economic zone despite the 30-mile width. The only seaward route would involve going north of the entire archipelago, then through or near Ostrova DeLong and on through the East Siberian Sea to Proliv Longa (Long Strait). (Arctic Pilot 2.206)

38. Proliv Sannikova, 30 miles wide, lies between Ostrov Malyy Lyakhovskiy (74° 17' N, 140° 30' E) to the south and Ostrov Kotel'nyy to the north and offers an alternative route to Proliv Dmitriya Lapteva. It, too, is enclosed by the straight baselines that enclose Ostrova Novo Sibirskiy, so there is no exclusive economic zone despite the 30-mile width. (Arctic Pilot 2.221)

39. Proliv Blagoveshchenskiy (75° 24' N, 145° 50' E), unexamined but known to be 25 miles wide and of uneven depth, separates the west end of Ostrov Novaya Sibir' from the east side of Ostrov Faddeyevskiy. Ostrov Novaya Sibir' is outside the straight baselines that link Ostrov Kotel'nyy and Ostrov Faddeyevskiy with the mainland, and so is the strait, placing its margins in the territorial sea. As a result, there is a belt of exclusive economic zone at least a mile wide running through the center of the strait. If the route through that belt can be shown to be of similar convenience to the routes through the belts of territorial sea, the territorial seas will be exempt from transit passage. The depths in the strait have not yet been

fully examined, but it is known that flats extend a considerable distance from both sides and that in the middle there are depths of 6 to 7 meters. Relative ice conditions, of course, are unpredictable. (Arctic Pilot 16.59)

40. Proliv Zarya (75° 36' N, 136° 35' E) is 10 miles wide and 18 to 22 meters deep on the eastern side, 10 to 15 meters on the western side. It separates Ostrov Bel'kovskiy and Ostrov Kotel'nyy. As only the latter is enclosed by straight baselines, the strait is not enclosed and is situated entirely in the territorial sea. (Arctic Pilot 16.34)

#### East Siberian Sea

Ostrova Medvezhiy are six islands lying north of the mouth of Reka Kolyma (Kolyma River). Neither of its larger straits has been surveyed and the depths of the smaller straits are unknown. They are not enclosed by straight baselines.

41. Proliv Melyokhov, width unknown and 9 meters deep in the fairway lies between Ostrov Krestovskiy (70° 52' N, 160° 35' E) on the west and Ostrov Pushkareva and Ostrov Leont'yeva on the east. It is situated entirely in the territorial sea. (Arctic Pilot 16.94)

42. An unnamed strait, of unknown width and 7.3 meters deep in the fairway, lies between Ostrov Krestovskiy (70° 52' N, 160° 35' E) and the mainland. It is situated entirely in the territorial sea. Any seaward route in the exclusive economic zone would have to go around the north and east of all six islands. (Arctic Pilot 16.94)

### Linking East Siberian and Chukchi Seas

43. Proliv Longa (Long Strait), 75 miles wide, lies between Ostrov Vrangelya (Wrangel Island) ( $71^{\circ} 20' N$ ,  $179^{\circ} 00' W$ ) and poluostrov Chukchi on the mainland, connecting the East Siberian and Chukchi Seas. As the strait is not enclosed and is wider than 24 miles, a belt of exclusive economic zone runs through it. Nevertheless it cannot be regarded as a route of similar convenience as when the strait is frozen over the ice nearly always extends from the mainland to the island, so mariners are advised to seek and follow an inshore lead. The entire southern coast of Proliv Longa has baselines following the low-water mark, so any navigable waters are in the territorial sea. Likewise, the ice is too unpredictable to permit a seaward route to be designated as one of similar convenience. (Bering Sea Pilot 12.38)

## V. Soviet Jurisdiction over the Arctic Straits

By and large, the legal status of a Soviet Arctic strait can be determined rather straightforwardly by identifying the maritime zone in which it is located, through reference to Soviet legislation establishing baselines and zones (particularly the twelve-mile territorial sea), though some analysis may be required to ascertain whether the claims set forth by the legislation comport with the relevant conventions. The relevant legislation is described briefly in section A.

For those straits enclosed by straight baselines pursuant to section 7, however, the issue is somewhat more complex, in that their status depends upon the character of the waters before their enclosure as internal waters. If the waters were previously considered to be internal waters, then they are not subject to innocent passage (LOSC 1982: article 8; TSC 1958: article 5) or to transit passage (LOSC 1982: article 35(a)). If, on the other hand, they were previously considered to be part of the territorial sea or the high seas, then innocent passage applies (LOSC 1982: article 8(2), TSC 1958: article 5(2)), and if they are in a strait used for international navigation, then Part III of the 1982 Law of the Sea Convention applies, presenting the prospect of transit passage. (LOSC 1982: article 35(a)) The difficulty arises because the waters' previous status is not nearly so clear as that created by statute. The factors affecting this prior status is discussed in section B.



#### A. Soviet Legislation

The 1960 Statute on the Protection of the State Boundary established a 12-mile territorial sea. The 1971 amendments to that act offered the first official suggestion that the Soviet Union was considering the use of straight baselines:

Coastal sea waters, twelve nautical miles in breadth, computed from the line of lowest ebb-tide both on the mainland and also around islands, or from the seaward line of internal sea waters of the USSR, and in those localities where the coastline is deeply indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity -- from straight baselines joining appropriate points, shall constitute the territorial waters of the USSR. (article 3; translated in Butler 1971:751)

The reference to straight baselines was retained when the act was replaced in 1982, but the phrase "in those localities where the coastline is deeply indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity" was dropped. The qualifying phrase had tracked the language of the 1958 Territorial Sea Convention, and its elimination, in Pharand's phrase, gave the Soviet Union "considerable latitude as to where such lines may be used." (1988:152) Apparently some Soviet commentators agreed, as they asserted that "international law recognises the sovereign right of each state to fix the length of such base lines at its own discretion" (Butler 1971:752), despite the preponderant Soviet view that baselines should not be drawn arbitrarily or unreasonably and should not ordinarily exceed 24 miles. (Butler 1972:418)

It was not until 1984 and 1985 that the straight baselines were established (Decree of 1984; Decree of 1985), and their publication was both low-key and slow. (Franckx 1989:362-367) The list of 726 points was the longest ever published by a

coastal state. Of the 431 in the Arctic, 391 were for the continental coast and the rest for the coasts of single islands. The remainder were in the Baltic and Black Seas and the Pacific Ocean. (Scovazzi 1988:37) Less than a month after the publication of the baseline coordinates in Soviet Notices to Mariners in January 1986, the United States lodged an official protest to what it called excessive straight baselines in the 1984 decree, which did not concern the Arctic baselines, and there is still some question as to whether the baselines conform to the rules of article 7 of the 1982 Convention and are thus valid as a matter of international law. (Franckx 1989:366) Butler has reprinted the list of baselines in translation, stressing that Notices to Mariners does not have the status of an official gazette and that it often contains abridged or summarized notices. (Butler 1986)

#### B. Evidence of Pre-Enclosure Status

The status of waters enclosed by straight baselines drawn pursuant to article 7 depends upon their previous, as well as their present, status. It is necessary, therefore, to ascertain how those waters were regarded prior to the establishment of the straight baselines. For purposes of this paper, these include the straits of the three inter-sea archipelagos -- Novaya Zemlya, Severnaya Zemlya, and Ostrova Novo Sibirskiy -- and those straits lying landward of the coastal fringe islands enclosed by straight baselines, such as Proliv Kil'dinskiy. They do not include those of the White Sea, which are enclosed by the closing line to a bay rather than by a straight baseline drawn pursuant to article 7.

To determine whether the waters of these straits were regarded as internal waters prior to their enclosure requires an examination of Soviet claims to historic waters and of the history of Soviet practice in exercising jurisdiction over the area.

### 1. Historic Waters

The doctrine of historic waters has never been the subject of an international convention and is therefore subject to customary law, which on this particular point is vague, controversial, and, in most cases, indeterminative. According to O'Connell, it has three elements: effectiveness of control, effluxion of time, and the attitude of other states. (1982: chap. 11, esp. 427-435)

The Soviet Union has never claimed any of the Arctic seas as historic waters, though Soviet legal writers have consistently made such claims. There is, however, some evidence of claims to historic straits, but the claims tend to be vague as to their basis and content. (Alexander 1987:338) The 1960 statute on the state boundary made reference, in defining internal waters, to "straits, historically belonging to the USSR," but did not identify any. (Butler 1978:86) In 1965, during an exchange of correspondence regarding the proposed passage of the United States Coast Guard icebreaker Northwind through Proliv Vil'kitskogo, the Soviet Union reportedly relied on historic straits, among other grounds, for objecting to the passage. (Butler 1978:86) It was in that year that a Soviet naval international law manual suggested for the first time in Soviet legal literature that some Arctic straits were historic waters:

The Dmitrii Laptev and Savnikov straits are regarded as belonging to the Soviet Union historically. They have never been used for international navigation, and in view of specific natural conditions and frequent ice jams, the legal status of these straits is sharply distinguished from all other straits being used for international navigation. (Butler 1978:86)

Since that time, a fairly substantial body of literature advocating the inclusion of historic seas and historic straits in Soviet internal waters has emerged. The most extensive analysis of straits is that of P.D. Barabolia, who identified five categories: (1) straits leading to internal seas or bays and constituting internal water, (2) historic straits, (3) archipelagic straits, (4) straits leading to closed seas, and (5) international straits. (Butler 1978:87) Barabolia defined historic straits as

situated apart from basic routes of international navigation and for a long period of time used only by one coastal State or leading to historic bays and seas. A peculiarity of historic straits consists in the fact that usually a coastal State expends numerous resources to exploit such straits, which go primarily to study the strait, create navigational equipment and signal systems, remove dangers, establish deep channels, and so forth.

Such straits have important economic and defense significance for the coastal State.

The regime of navigation in such straits is completely regulated by coastal State legislation.

Merchant vessels in these straits proceed along previously stipulated routes and pilotage may be prescribed therein, since these straits in fact lead to shores and ports of that State to which they appertain. Warships of other States may traverse historic straits only after obtaining the authorization of the coastal State. (Barabolia 1972:17, translated by Butler (1978:87))

(For a review of the literature, Butler 1978:86-87; Franckx 1989:482-499)

In 1985, the Soviet Union claimed a number of inlets as historic bays, identifying them as "internal waters of the USSR,

as waters historically belonging to the USSR." (Decree of 1985) Three of them were in the Arctic -- the White Sea, Cheshskaya Bay in the Barents Sea, and Baidaratskaya Bay in the Kara Sea -- and were enclosed by closing lines of 84.4, 44, and 62.5 miles, respectively. (Pharand 1988: 108; maps: Scovazzi 1988:39, 40) These are far longer than the 24-mile lines that would be permitted under the method of closing bays approved by the 1958 and 1982 conventions (LOSC 1982: article 10; TSC 1958: article 7). When, in 1957, the Soviet Union claimed Peter the Great Bay, in the Pacific Ocean, as historic internal waters, at least four states -- the United States, the United Kingdom, France, and Japan -- protested, but it appears that the Soviet Union has successfully enforced the claim. (Pharand 1988:107) Apparently no protests have been lodged specifically against the 1985 claims of the White Sea, Cheshskaya Bay, and Baidaratskaya Bay, and it appears likely that the Soviet Union will be able to demonstrate the requisite degree of control, time and international acquiescence to validate its assertion of historic title.

None of the straits that are the subject of this paper is in Cheshskaya Bay or Baidoratskaya Bay, but seven, including the Gorlo, the major channel connecting the northern and southern basins, are in the White Sea. If the claim to the White Sea as an historic bay is established, as this paper assumes, these seven straits will unambiguously be situated in internal waters and exempted from the Part III regime for international straits.

The Soviet government has never formally claimed the Arctic seas themselves as historic waters, and Franckx argues that the claims to the three historic bays establishes conclusively that



the government does not regard the Kara, Laptev, East Siberian, and Chukchi Seas to be historic internal waters. A review of the government's efforts to exercise jurisdiction there will provide further evidence of the official Soviet view of the status of those waters.

## 2. Soviet Practice in the Arctic Seas

If the Soviet government has regarded the Arctic seas as historic internal waters of the Soviet Union, it can be expected to have enforced its sovereignty over those waters by requiring ships and aircraft to request permission to enter or fly over them. In fact, the Soviet government has not done so.

In each navigation season between 1962 and 1967, United States Coast Guard icebreakers cruised, singly or in pairs, to the Kara, Laptev, East Siberian, and Chukchi seas. Armstrong 1972b:377. In September 1965, the Northwind came under surveillance by Soviet aircraft and a warship while conducting two months of oceanographic experiments and research in the Kara Sea. The Soviet government did not object to the collection of water samples but is reported to have protested the removal of cores from the seabed, which could be regarded as a violation of the 1958 Continental Shelf Convention (CSC 1958). (Pharand 1988:107-110)

In 1967, the Edisto and the Eastwind, United States Coast Guard icebreakers, attempted to circumnavigate the Arctic Ocean through the Northeast and Northwest Passages. No official objection was raised by the Soviet Union until the vessels encountered difficult ice north of Severnaya Zemlya and announced that they planned to traverse the Vil'kitskiy Strait, which is



less than 24 miles wide. The Soviet government denied passage, demanding 30 days' notice, apparently on the ground that the vessels were armed (with machine guns). The United States disputed the validity of the refusal, but the vessels did not attempt to enter the strait. Armstrong 1968b:332; 1972b:379.

The text of the radio message received by the icebreakers from the U.S.S.R. Ministry of the Maritime Fleet included the following passage:

Vil'kitskii Straits are within USSR territorial waters. Therefore sailing of any foreign navy ships in the straits is subject to regulations of safety of USSR frontiers. For passing the straits according to the above regulations, military ships must obtain preliminary permission of USSR Government through diplomatic channels one month before expected date of passage. (Franckx 1988:271)

While it could be argued that the Soviet Union was treating Vil'kitskiy Strait as internal waters by denying passage to the American vessels, the evidence suggests that the refusal was based on a claim that the strait was in the territorial sea and subject to the right of innocent passage but that the proposed passage was not innocent. This is consistent with the Soviet Union's persistent objection to the application of innocent passage to foreign warships, and under the terms of the 1958 High Seas Convention the armed Coast Guard vessels could reasonably have been construed as warships. (Pharand 1988:107-110; Butler 1978:125)

In 1980, the Soviet Union similarly refused to allow the Swedish state-owned icebreaker Ymer to transit the Northeast Passage in the centenary of Nordenskjöld's first passage but did not interfere with the vessel's scientific activities in the Barents Sea. (Theutenberg 1984:45-46)

### 3. National Transport Route

In 1985, when another United States Coast Guard icebreaker, the Polar Star, transited the Northwest Passage, Canada objected on the ground that the waters of the Northwest Passage were internal waters, subject to no right of passage. Soviet public comment supported Canada's position and contended that the Northern Sea Route, too, was an internal waterway. (Armstrong 1986:187; Dowd 1985) Since that time, little has been heard officially of this somewhat broader claim of sovereignty over the entire route.

Canada is not the first state to claim a coastal transport route as internal waters even though much of it is seaward of the customary baselines. In Anglo-Norwegian Fisheries, the International Court of Justice declared the Indreleia to be "not a strait at all, but rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway" (1951:132), thus sanctioning Norway's enclosure of the entire route by straight baselines. Canada has similarly enclosed its Arctic archipelago by straight baselines, even though its configuration bears no similarity to that of the fringe of coastal islands that makes up the Indreleia and is described in the 1958 and 1982 conventions. Pharand has made a strong case that the Canadian baselines are compatible with international law, relying on, among other things, the Arctic character of the islands and straits of the archipelago. (1988)

It is not surprising, then, that Soviet jurists have proposed that the entire length of the Northern Sea Route should be regarded as Soviet internal waters, nor would it be surprising

if a successful resolution of the Canadian claim encouraged the Soviet Union to make such a claim official.

What is the nature of the argument that the Northern Sea Route is an internal waterway? Should the fact that it occasionally passes beyond the Soviet maritime boundaries into the high seas or exclusive economic zone affect Soviet jurisdiction over the route? Kolodkin and Volosov say no:

The integral nature of the Northern Sea Route as a transport route is not affected by the fact that individual portions of it, at one time or another, may pass outside of the aforesaid boundaries where the USSR exercises its sovereign rights or sovereignty in full (ie it may pass into the high seas). This fact is supplemented by factors of an historical order. The contribution of the Russian and Soviet State to not merely the study, exploration, and outfitting of the Northern Sea Route as a transport route, but also the entire polar region where continental and island territories of the Arctic belonging to the USSR are situated, is well known and internationally recognized. There is thus an aggregate of legal and other material circumstances which enable the Northern Sea Route to be relegated to the category of national transport routes. Having regard to this, one must conclude that the regulation of navigation along the Northern Sea Route is the prerogative of the USSR as the coastal state of this route. (1990:164)

It is not entirely clear whether Kolodkin and Volosov are arguing for the enclosure of the entire Northern Sea Route as internal waters, which would constitute a rather expansive claim given the constantly shifting position of the route, (1990:164; Butler 1978:54-57), or merely for Soviet jurisdiction to regulate navigation along the entire route, even when it passes outside internal waters and the territorial sea:

[T]he Northern Sea Route as a whole, irrespective of whether it passes through territorial waters or not, should be relegated to the category of national transport routes. The Norwegian Inderleja, for example, is such a route, as was confirmed by the International Court of Justice (ICJ) in its judgment of 18 December 1951 in the Anglo-Norwegian fisheries

case, and by Norwegian legislation. The entire sea route from Varangersfjorden to the Porsangerfjord, irrespective of whether parts are within internal or territorial waters was laid, exploited and equipped exclusively by Norway and is therefore under its complete control and administration.

The ICJ drew attention to two conditions: first the knowledge of other States about such claims; and second the absence of negative reactions on the part of other States. Further, the ICJ gave a positive reply to the question of whether the water areas were sufficiently connected to the land so as to be under the sovereignty of the coastal State. It should be emphasized that the positive reply of the ICJ with respect to Norway is fully applicable to the USSR. (1990:166)

Kolodkin and Volosov go on to advance a separate argument, but with little legal foundation, that the Soviet Union should not be required to recognize the right of innocent passage through the many straits that were incorporated into Soviet internal waters through the drawing of straight baselines. Citing article 5(2) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and article 8(2) of the 1982 Convention, which retain the right of innocent passage through waters enclosed by straight baselines but previously considered to be high seas or territorial sea, they draw an analogy to Canadian claims in the Northwest Passage (Pharand 1988:A-1-A11) but fail to note that Canada, which has never ratified the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, based its claims on customary international law. The Soviet Union, which has ratified the convention, is bound by article 5(2).

One commentator has observed that, between the 12-mile territorial sea and the difficulty of negotiating ice passage without Soviet support, the Soviet Union has already effectively nationalized the route. (Shusterich 1984:257)

### C. Summary

The territorial sea is 12 miles wide measured from the baselines, which include an extensive set of straight baselines, the international validity of which is not settled. The straight baselines enclose, among other waters, the major straits connecting the Barents, Kara, Laptev, and East Siberian Seas, relegating the straits to internal waters. Unless the waters of the straits can be shown to have been regarded as internal waters before their enclosure, innocent passage and perhaps transit passage will apply.

Despite the virtual unanimity of Soviet commentators and a few official statements that the straits are internal waters, the Soviet government has never claimed them as historic waters, and Soviet practice in the region is not consistent with their having been internal waters before their enclosure. Commentators have suggested that the entire Northern Sea Route should be regarded as a national transport route under Soviet jurisdiction, but this is not governmental policy. There is, in short, no strong argument that the straits were regarded as internal waters before their enclosure by straight baselines in 1985.

## VI. Transit Passage in the Arctic Straits

To summarize the conditions of transit passage described in Chapter IV, transit passage applies to a strait used for international navigation

1. between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone, if the strait

2. is situated in the territorial sea or in internal waters newly enclosed pursuant to article 7, and

3. does not contain a route of similar convenience through the high seas or an exclusive economic zone, and,

4. if situated between an island and the mainland, does not have a seaward route of similar convenience through the high seas or an exclusive economic zone, and

5. is not governed by an international convention of long standing.

If by reason of a seaward passage of similar convenience a strait is exempted from transit passage, nonsuspendable innocent passage applies (article 45(1)(a)). Nonsuspendable innocent passage applies also to straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign state (article 45(1)(b),(2)). As all the straits of the Northern Sea Route under consideration here are entirely within the internal waters, territorial sea or the exclusive economic zone of the Soviet Union, article 45(1)(b),(2) does not affect the analysis of this paper.



#### A. Conditions of Applying Transit Passage

The following review discusses each of the five qualifications and identifies the Soviet Arctic straits to which it applies.

##### 1. Between Parts of the High Seas or EEZ

This section applies to straits ... between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. (article 37)

The Corfu Channel court restricted its holding on innocent passage to straits "connecting two parts of the high seas." In 1951, the International Law Commission, which had been created by the United Nations General Assembly to prepare codifications of various aspects of international law, including the law of the sea, began work on the law relating to the territorial sea. In both the geographical and use factors, the commission followed the Corfu Channel judgment:

There must be no suspension of the innocent passage of foreign ships through straits normally used for international navigation between two parts of the high seas.

The 1958 Territorial Sea Convention expanded the definition to cover straits within the territorial sea of one state but with the territorial sea of another state at one end: "between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." (TSC 1958: article 16(4)) This additional scope applies to straits such as the Strait of Tiran, leading from the Red Sea to the Gulf of Aqaba, and prevents, for example, states in the geographical situation of Egypt, Jordan, or Saudi Arabia from closing off the Israeli port of Eilat from the high seas.

The 1982 Law of the Sea Convention has altered the 1958 approach in two ways. The first is little more than a technical change, modifying the geographical definition of international straits to reflect the creation of the exclusive economic zone:

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. (article 37)

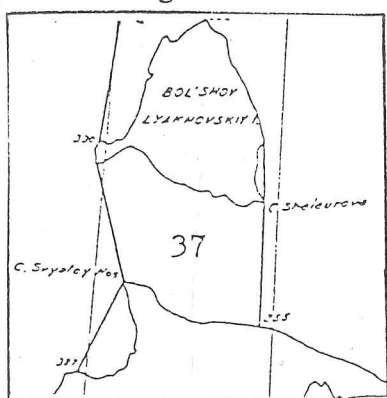
The second change is the introduction of a dual regime for international straits in the territorial sea: very roughly, a new regime of transit passage for most straits connecting two parts of the high seas or exclusive economic zones (1982: article 37), but nonsuspendable innocent passage for straits connecting high seas or an exclusive economic zone with the territorial sea of a foreign state (article 45). (This two-tier system has come under criticism. (Reisman 1980:65-67))

A number of questions arise regarding the effect of straight baselines on this particular requirement. If a strait is enclosed at each end by newly drawn straight baselines, then under article 37 transit passage may apply if the other condition are satisfied. At each end of the strait, however, will be a 12-mile belt of territorial sea through which ships must pass going to and from the exclusive economic zone. (figure A, p. 70) Is a strait in this situation being used for navigation between two parts of the high seas or exclusive economic zone? Without analyzing the matter in detail, it would appear that the transit passage regime is intended to apply to such situations. Nine of the straits considered here are in this situation: Yugorskiy Shar, Karskiye Vorota, and Matochkin Shar in Novaya Zemlya;

Borisa Kil'kitskogo, Shokal'skogo, and Krasnoy Armii, and arguably Yungshturm, in Severnaya Zemlya; and Dmitrya Lapteva and Sannikova, in Ostrova Novo Sibirskiye.

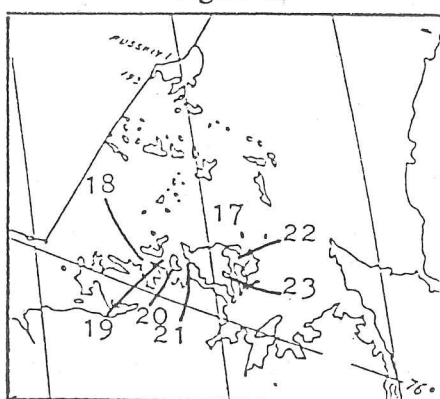
A more problematic situation arises when a strait lies well within straight baselines. (figure B, below) A ship transiting the strait must pass through internal waters at either end of the strait. Unlike the first situation described above, the waters at either end of the strait, however, are not territorial sea but

Figure A



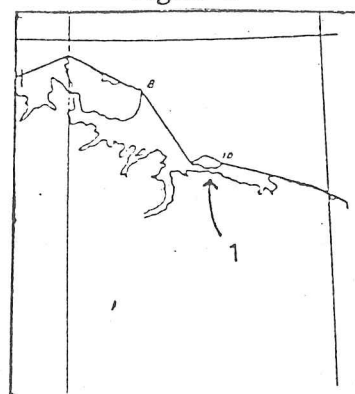
**Proliv Dmitriya Lapteva is enclosed at either end.**

Figure B



**Proliv Matisena (17) is well behind baselines.**

Figure C



**Proliv Kil'dinskiy is just behind straight baselines.**

internal waters. While the strait might well be used by a ship going from one part of the exclusive economic zone to another, it has to pass through internal waters at both ends of the strait. The question is whether, despite the language of the convention, a state should be permitted to insulate a strait otherwise available to international navigation from transit passage by enclosing it and the surrounding waters with straight baselines.

Most of the 43 straits fall into this category: Nikol'skiy Shar, Kostin Shar, Krotova, Kazakova, Shirokiy, Uzkiy,

Petukhovskiy Shar, Sharapov Shar, Malygina, Ovtsyna, Krestovskiy, Matisena, Frama, Sverdrup, Zarya, Palander, Toros, Vostochnyy, Lena (on one end), Previn (on one end), Vega, Dubravina, Glubokiy, Stalintsa, and Iney.

In the former case, any straight route will take the ship from the strait to exclusive economic zone, though passing through territorial sea. In the latter case, the route could remain in internal waters as long as the straight baselines continues to enclose navigable waters.

In a third possibility, a strait lies behind an island which is enclosed by straight baselines running more or less parallel to the strait, so that, unlike the first configuration, the strait does not intersect the baselines. (figure C, p. 70) A ship transiting the strait may, but need not, leave internal waters immediately by passing through the territorial sea on the way to the exclusive economic zone. This is the situation of Proliv Mod and Proliv Murmantsa and at one end of Proliv Lena and Proliv Preven.

## 2. Internal Waters

Nothing in this Part affects: (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such .... (article 35)

Taken together with article 35(b), which excludes the high seas and exclusive economic zones from the regime, this clause restricts the effect of the international straits regime to the territorial sea and to internal waters newly enclosed under the article 7 method for indented coasts and fringes of coastal islands.

What at first glance might appear to be one of the most significant factors in determining the status of a strait -- whether it has been enclosed by straight baselines, thus rendering it part of the internal waters of the state -- turns out to have little, if any, effect at all. If the enclosed waters had previously been considered as internal waters, then the straight baselines did not alter their status and thus had no effect regarding innocent passage (article 8(1)) or transit passage (article 35(a)). If, on the other hand, the enclosed waters had not previously been considered as internal, then innocent passage applies to the waters (article 8(2)) as if they were in the territorial sea, and without regard to whether they had previously been in the territorial sea, an exclusive economic zone, or the high seas; if the newly enclosed waters constitute a strait used for international navigation, then Part III of the 1982 convention applies (articles (35(a), 37)), including, in appropriate cases, transit passage, just as if the strait had not been enclosed.

Nevertheless, it is useful to catalogue those straits that have been enclosed by straight baselines, as this provides a starting point for identifying those that have previously been regarded as internal waters and thus subject to neither innocent passage nor the regime for international straits. This approach assumes that any waters claimed by the Soviet Union as historic internal waters will have been enclosed by straight baselines, a reasonable inference for the Northeast Passage given that the 1985 legislation covered, among other things, the entire Soviet coastline along the Northeast Passage. (Decree of 1985) Any

state would have difficulty justifying a claim to historic internal waters that had been overlooked by a comprehensive system of baselines.

A number of straits along the Northern Sea Route have been enclosed by straight baselines drawn in accordance with provisions other than article 7's methods for enclosing indented coastlines and fringes of coastal islands. The White Sea, for example, has been enclosed as a historic bay, rendering all of its waters, including its straits, internal waters not subject to innocent passage or transit passage.

At three of the four boundaries between the Soviet Arctic seas, the Northern Sea Route has been intersected by straight baselines incorporating major coastal archipelagos into internal waters. These are the only points along the Northern Sea Route that straight baselines, or for that matter any sovereignty or jurisdictional claims over coastal waters, create a conflict or potential conflict with a right of innocent passage that could cut through the Northern Sea Route and block through traffic. (One possible exception is the argument that the entire Northern Sea Route is an internal waterway analogous to the Norwegian Indreleia, but the Soviet Union has never formally claimed it as such.)

Twelve major straits are included in the waters enclosed by the baselines surrounding the three inter-sea archipelagos. Between the Barents and Kara Seas, Proliv Karskiye Vorota (Kara Gates Strait) and Proliv Matochkin Shar lie within the Novaya Zemlya archipelago, and Proliv Yugorskiy Shar separates the archipelago from the mainland. Between the Kara and Laptev Seas,



Proliv Borisa Vil'kitskogo (Vil'kitskiy Strait) separates Severnaya Zemlya from Poluostrov Taymyr on the mainland, and three other straits -- Yungshturm, Krasnoy Armii (Red Army), and Shokal'skiy -- lie within the archipelago. Between the Laptev and East Siberian Seas are four navigable straits running between or south of Ostrova Novo Sibirskiye: Dmitriya Lapteva (along the mainland), Sannikova, Blagoveshchenskiy, and Zarya. The passage connecting the East Siberian and Chukchi Seas, Proliv Longa (Long Strait) between Ostrov Vrangelya (Wrangel Island) and the mainland, has not been enclosed by straight baselines.

Of the straits within a single sea, nearly all are enclosed by straight baselines drawn along an indented coast or a fringe of coastal islands. Like the enclosed inter-sea archipelagic straits, this means that their waters are entirely internal waters. If claimed as historic waters, these straits would not be subject to innocent passage or transit passage, but closing them to foreign vessels traffic would not block through traffic in the way closing the inter-sea archipelagic straits would. Ice conditions permitting, these straits can be bypassed.

In short, this applies to every strait under consideration except Proliv Zarya, Proliv Melyokhov, the unnamed strait at Reka Kolyma, Proliv Blagoveshchenskiy, and Proliv Longa. All five of these are in the territorial sea, and the last two have belts of exclusive economic zone running through them.

Chapter V's survey of Soviet boundaries and jurisdictional claims makes reasonably clear that none of the straits under consideration is in historic waters; having thus been newly

enclosed, they cannot be excluded by article 35(a) from the 1982 international straits regime.

### 3. Through Route of Similar Convenience

This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or an exclusive economic zone of similar convenience with respect to navigational and hydrological characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply. (article 36)

Nothing in this Part affects: ... (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas .... (article 35(b))

A route in the high seas or an exclusive economic zone will exist through a strait when, through the entire length of the strait, the territorial seas generated by the land on each side of strait do not meet. This can occur in either or both of two ways in any given strait. Ordinarily it will occur when a strait is wider than 24 miles for its entire length, so that some belt of high seas or exclusive economic zone will lie between the two 12-mile-wide territorial seas. If the passage is of similar convenience to the routes through the territorial seas, its presence obviates the need for transit passage through the territorial seas.

A route through the high seas or exclusive economic zone might also occur in narrower straits where a state, to avoid the imposition of the transit passage regime to its entire territorial sea within a strait, up to the baselines, might claim less than the allowable 12 miles of territorial sea, thus retaining high seas or exclusive economic zone through the strait and leaving the territorial sea to its customary regime of

innocent passage. By thus waiving some regulatory authority over the waters not claimed as territorial sea, the coastal state retains significantly greater authority over the waters it does claim as territorial sea. As of 1987, there were at least 33 straits with a least width of 24 miles or less but nonetheless containing a route through high seas or exclusive economic zone, (Alexander 1987:482), but this appears to have been due to territorial sea claims made before the 1982 convention approved the 12-mile limit. The Soviet Union has not varied the width of its territorial sea in the Arctic straits since the 1960 legislation establishing the 12-mile territorial sea.

To exempt the territorial waters in such a strait from transit passage, the route through the high seas or exclusive economic zone must be "of similar convenience." Even in non-Arctic waters, where the depth is the critical, but reasonably stable, parameter of convenience, this issue is much more complex than it first appears. One critic has suggested that the rule may create a shifting regime, in which the existence of transit passage depends upon the nature of the ship. Consider a strait with a relatively shallow belt of high seas or exclusive economic zone at the center, and a much deeper fairway toward one side in the territorial sea. A tramp steamer drawing fifteen feet may find the high seas route to be of similar convenience and thus be entitled only to innocent passage in the territorial sea, while a supertanker drawing 55 feet may not be able to use the shallower high seas route and thus be entitled to transit passage in the deeper territorial sea. (Langdon 1990)

In the Arctic seas, it is far less likely than in other parts of the world that routes of similar convenience will exist in any effective way, as the condition of "convenience" hinges not only upon depth but upon hydrographical characteristics, the most conspicuous and variable of which in the Arctic is the thickness, extent, and strength of sea ice. (Arikajnen 1988:20-25) It is impossible to say with any certainty from one shipping season to another, sometimes from one day to another, which of two routes, seaward and landward of an island, is going to be the more convenient, or indeed possible. It seems fair to argue that, as a matter of law, in no case will a given route be reliably of similar convenience; thus article 36 should not, in and of itself, disqualify any Arctic strait from transit passage.

Only five straits, measured between baselines, are wider than 24 miles at the narrowest point: Borisa Vil'kitskogo (30 miles) between the Kara and Laptev Seas; Dmitriya Lapteva (30 miles), Savnikova (30 miles), and Blagoveshchenskiy (25 miles), between the Laptev and East Siberian Seas; and Proliv Longa (75 miles) between the East Siberian and Chukchi Seas. Of these, only Proliv Longa and Proliv Blagoveshchenskiy appear to contain any belt of exclusive economic zone, as the others are entirely enclosed in internal waters.

#### 4. Seaward Route of Similar Convenience

[I]f the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics. (article 38)

This qualification is designed to enhance, at relatively low cost to freedom of navigation, the jurisdiction and security interests of a coastal state in a strait bordering the mainland. It applies only when an alternative route of similar convenience exists seaward of an island that forms a strait with the mainland. Furthermore, the seaward route must be in the high seas or an exclusive economic zone, where the coastal state's jurisdiction to impede or regulate navigation is at a minimum and where the rights of overflight by aircraft and submerged transit by submarine already exist. The clause was designed to apply to such straits as Messina, between Sicily and the Italian mainland, and Pemba, between Pemba Island and the Tanzanian mainland.

As with high seas routes through a strait, it is far less likely in the Arctic than in other parts of the world that seaward routes of similar convenience will exist, as the thickness, extent, and strength of sea ice is unpredictable. Again it seems that, as a matter of law, there can be no seaward route of similar convenience. The Arctic problem aside, the convention offers little guidance as to standards, such as a minimum width, for determining similar convenience. (Alexander 1987:336).

Twenty significant Soviet Arctic straits lie between the mainland and an island:

In the Barents Sea, Proliy Kil'dinskiy, between the mainland and Ostrov Kil'din, is deep in the fairway and never freezes, which would mitigate against there being a seaward route of similar convenience should it be necessary to make a case-by-case

determination, through it is frequently blocked by ice carried in by tidal currents.

Linking the Barents and Kara Seas, Proliv Yugorskiy Shar lies between Ostrov Vaygach and the mainland, but its location at the landward end of Novaya Zemlya precludes any possibility of a seaward route exemption.

In the Kara Sea, Proliv Morozova between Ostrov Mestnyy and the mainland; Proliv Sharapov Shar between the mainland and a chain of sandy spits, seaward of which depths range between 2-3/4 fathoms and nine fathoms, but vessels use the channel despite its shallowness when forced by ice to navigate close to the shore; Proliv Malygina between Ostrov Belyy (White Island) and Poluostrov Yamal, in which depths constantly change, but a light draft vessel can save 50 miles by not having to pass around Ostrov Belyy, suggesting that the seaward route is not of similar convenience; and Proliv Krestovski between Ostrov Krestovski and the mouth of Reka Yenisey (Yenisey River).

The Dikson Island straits, also in the Kara Sea, separate Ostrov Dikson from the mainland: Proliv Lena and Proliv Preven, both narrow and lying north of the island, and Proliv Vega on the south side.

In the Shkhery Minina (Minin Skerries), also in the Kara Sea, Proliv Stalintsa (Stalinets Strait) between the northeastern group and the mainland; Proliv Frama (Fram Strait) between Ostrov Nansena and Poluostrov Yerermeyeva; Proliv Zarya between Ostrov Bonevyy and the mainland; and Proliv Vostochnyy between Ostrov Pilota Makhotkina and Poluostrov Trud.



Linking the Kara and Laptev Seas is Proliv Vil'kitskogo between Ostrov Bol'shevik and Poluoostrov Taymyr.

In the Laptev Sea are Proliv Mod (Maud Strait) and Proliv Murmantsa, both between the Ostrova Petra (Peter Islands) and the mainland.

Linking the Laptev and East Siberian Seas is Proliv Dmitrya Lapteva between Ostrov Bol'shoy Liakhovskiy and the mainland, and in the East Siberian Sea is an unnamed strait between Ostrov Krestovskiy Island and the mainland.

Finally, linking the East Siberian and Chukchi Seas is Proliv Longa (Long Strait), lying between Ostrov Vrangelya (Wrangel Island) and the mainland. If Ostrov Vrangelya is a part of the Soviet Union, then it is subject to the provisions of article 38, which applies only when the island and mainland bordering the strait belong to the same state. Although its status is unclear, because of arguable claims to sovereignty by the Soviet Union, Canada, the United Kingdom, and the United States, there is, at least, a de facto acceptance of Soviet control. (Westermeyer and Shusterich 1984:256-260)

##### 5. Long-Standing International Conventions

Nothing in this Part affects: (c) the legal régime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits. (article 35)

This exception was designed to exclude the Bosphorus, the Danish Straits, and the Straits of Magellan from the transit passage regime on the ground they were better served by existing legal regimes that already provided for freedom of navigation through the straits. (Moore 1980:111) There are no long-

standing international conventions relating to any of the straits under consideration here, and this clause has no effect on the Soviet Arctic straits.

#### B. Straits Used for International Navigation

This section applies to straits which are used for international navigation ...." (article 37)

One crucial condition of the regime for international straits -- that the strait be used for international navigation - has been disregarded until this stage of the analysis. Inasmuch as the question under consideration is the status of the straits should they be used for international navigation, the discussion so far has assumed that the Northern Sea Route Project will succeed and that the straits will be used for international navigation. Nevertheless, the "fact" that ships of more than one state will be using the straits will not necessarily satisfy article 37; a seemingly unambiguous phrase in a statute or international convention will almost inevitably have a legal content to supplement its ordinary meaning.

(Oddly, a relevant exception to this may be the even more fundamental term "strait," which appears to have no legal meaning in the convention and is applied in its dictionary or geographical sense. (Churchill and Lowe 1988:87) Nevertheless, sooner or later a dispute can be expected to arise as to whether a particular passage constitutes a strait within the meaning of the convention, and the resolution of that incident will begin to establish a legal content to the meaning of "strait.")

##### 1. The Law

For the new regime to be applied to the straits of the Northern Sea Route, they must be "used for international

navigation" within the meaning of article 37. While there is little history to article 37, the phrase did derive from customary law by way of the Corfu Channel case and the 1958 convention, which will help cast light on its meaning.

The "use" element in the identification of international straits is far more problematical than the geographical one, but there has been surprisingly little discussion of its precise scope and content, given its importance as the basic definitional component of the straits regime. This apparent lack of interest in the scholarly literature may be attributable to a general understanding, reflected in the practice of states, as to what constitutes an international strait, an understanding that has failed only in the fairly extreme case of a relatively unimportant strait forming the frontier between two hostile states in a tense, post-war, revolutionary period. One of the few other situations in which the question is likely to become contentious is the first use for international navigation of a strait that theretofore has been inaccessible or purely local. This scenario has already ignited a dispute between Canada and the United States over rights of transit through the Northwest Passage straits of the Canadian Arctic. (Pharand 1988) A similar controversy appears almost inevitable in the Soviet Arctic should the straits along the Northern Sea Route ever be opened to international traffic.

Prior to Corfu Channel, a distinction had been drawn between "indispensability" and "usage" in international navigation (O'Connell 1982:315), and the right of nonsuspendable passage arguably attached only to those straits that were indispensable

to international navigation. The International Court of Justice abolished the distinction by holding that the decisive criterion was that the strait was used in international navigation. That most of the traffic through the channel was local and that from the standpoint of international shipping it was merely an alternative route between the Aegean and Adriatic Seas were irrelevant to the channel's legal status as an international strait.

McDougal and Burke apparently agree with that aspect of the holding:

"[T]he importance of straits to international transport and, presumably, the degree of special protection required, may be a function of time and of variations in conditions too complex to succumb to easy or effective foresight. It would appear, accordingly, that for community policy purposes all straits, irrespective of their utility at any particular period in time, ought to be treated alike for purposes of rejecting coastal authority to deny all passage." (1987:189)

It was upon the suggestion of the Soviet delegate that the International Law Commission, in its draft codification, inserted the word "normally" into the International Court's phrase "straits used for international navigation." The commentary to the draft article, however, explained that the commission intended the article to conform to Corfu Channel. (Mangone 1987:401)

This was reflected in the language of the 1958 Territorial Sea Convention, which dropped the word "normally" and preserved innocent passage through "straits which are used for international navigation...." (article 16(4)) The 1982 convention adopted that language. (article 37)

## 2. Unresolved Issues

If the Northern Sea Route is opened to foreign commercial shipping, the major inter-sea straits certainly, and many of the smaller straits probably, will be used for international navigation. At what point will the traffic be heavy enough to justify a claim of transit passage through the internal waters of, say, Novaya Zemlya. On one level, it would not be unreasonable to assert that any foreign vessel engaged in international navigation would be entitled to pass through under the new regime, that the regime applies to the first, and every subsequent, vessel to make the voyage: The convention says "which are used for" and that is precisely what it mean; it is designed to protect the first vessel through.

The issue is not so simple, however, for two reasons. First, the new regime of straits does not apply only to foreign commercial vessels. It also applies to foreign warships, submarines, and aircraft. Did the convention intend to open the airspace over a strait to foreign aircraft after one commercial vessel has passed through? When the Tiksi sailed from Hamburg to Osaka in 1989, did it clear the way for submarines and overflight?

Second, the new regime does not apply only to ships invited by the coastal state. If an American submarine were to transit Proliv Vil'kitskogo, submerged and uninvited, it would be using the strait for international navigation. Would the first British plane to fly over the strait be using it for international navigation, or does a right of overflight depend upon use by ships? Is there a possibility of "bootstrapping" a strait into

transit passage simply by transiting it? It has been suggested that, in the absence of any generally accepted criteria, "[p]erhaps one foreign-flag vessel would suffice." (Alexander 1987a:490 fn.3)

These questions have not been answered, nor do they appear even to have been widely discussed, largely because the vast majority of the world's straits have enjoyed a reasonably stable regime for years and the questions are largely irrelevant. It is only in the rare instances that previously impassable straits become commercially viable that these questions are of more than academic interest.

The few official statements by the governments of Canada and the Soviet Union regarding the legal status of their Arctic straits have tended to deal with historical claims and the inland transport route, but apparently have made no attempt to define the use requirement. This paper does no more than raise these particular questions.



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## CONCLUSION

Of the 43 straits considered, how many may become subject to transit passage if the Northern Sea Route Project succeeds in opening the Arctic seas to international shipping? On the assumption that they all will be "used for international navigation" within the meaning of article 37, there are five conditions any one of which may disqualify a strait from transit passage or from the entire regime for international straits:

(1) A through route of similar convenience in the high seas or exclusive economic zone. The Soviet Union has not narrowed the territorial sea in any straits to avoid the application of transit passage, and only five straits are wide enough (greater than 24 miles) to have such a belt between two 12-mile territorial seas. Of these, only two, Proliv Blagoveshchenskiy and Proliv Longa, have belts of exclusive economic zone; the others are in internal waters. It seems, however, that the unpredictability of ice conditions makes it impossible to categorize any Arctic route as similarly convenient.

(2) A seaward route of similar convenience through the high seas or exclusive economic zone, if the strait is between an island and the mainland. As a matter of location, only 20 straits are capable of satisfying this exception. Again, the unpredictability of ice rules out any similarly convenient route.

(3) Being in internal waters (other than those newly enclosed under article 7's method) or in the high seas or exclusive economic zone. None of the straits contains high seas, and only two, Proliv Longa and Proliv Blagoveshchenskiy, contain

exclusive economic zone, along with territorial sea. Three -- Proliv Zarya, Proliv Melykhov, and the Kolyma River strait -- are in the territorial sea. All 38 others are in internal waters, but in all cases the waters have been enclosed by baselines ostensibly complying with article 7's procedure for deeply indented coasts. Only the belts of exclusive economic zone running through Proliv Longa and Proliv Blagoveshchenskiy are exempted by this exception, and their territorial sea remains unaffected.

(4) Not being between two parts of the high seas or exclusive economic zone. This is the most problematic exception, as it is not entirely clear how it relates to straits situated in internal waters. Five straits -- Blagoveshchenskiy, Zarya, Melyokhov, Longa, and the Kolyma River strait -- unambiguously connect two parts of the exclusive economic zone. Nine others would but for the belt of territorial sea outside the baseline at each end of each strait and ought to be regarded as serving navigation between parts of the exclusive economic zone: Yugorskiy Shar, Karskiye Vorota, Matochkin Shar, Borisa Vil'kitskogo, Shokal'skogo, Krasnoy Armii, Yungshturm, Dmitriya Lapteva, and Savnikova. The other 29 are all entirely within internal waters and arguably may be excluded, though such an interpretation would tend to create a conflict between article 37 and the exception contained in article 35(a). For that reason, it seems reasonable to suggest that they do satisfy the article 37 condition and are not excluded from transit passage on this basis.

(5) Being subject to a long-standing international convention. As already discussed, none of these straits is covered by such a convention.

In brief, it appears that none of the five exemptions removes any of the 43 straits from the overall regime or from transit passage. Whether, assuming that the Northern Sea Route Project eventually succeeds, they will be "used for international navigation" within the meaning of article 37, is still an open question.

In the event, many of the issues surrounding transit passage may turn out to be uncontroversial. The straits of the Northeast Passage are not, for the most part, suitable for submerged transit by submarine. The navigational freedoms of the high seas and exclusive economic zone already permit foreign warships free access to most of the Arctic seas, and the conventions guarantee them nonsuspendable innocent passage through the straits, if the analysis above is correct. The only significant practical difference, then, may be the overflight provision of transit passage, which could prove of great importance if it is found to grant foreign military aircraft access to coastal routes along much of the Soviet Arctic.

Many of the issues are still unresolved, and given the nature of international lawmaking, may remain so long after foreign ships are regularly plying the Northern Sea Route.

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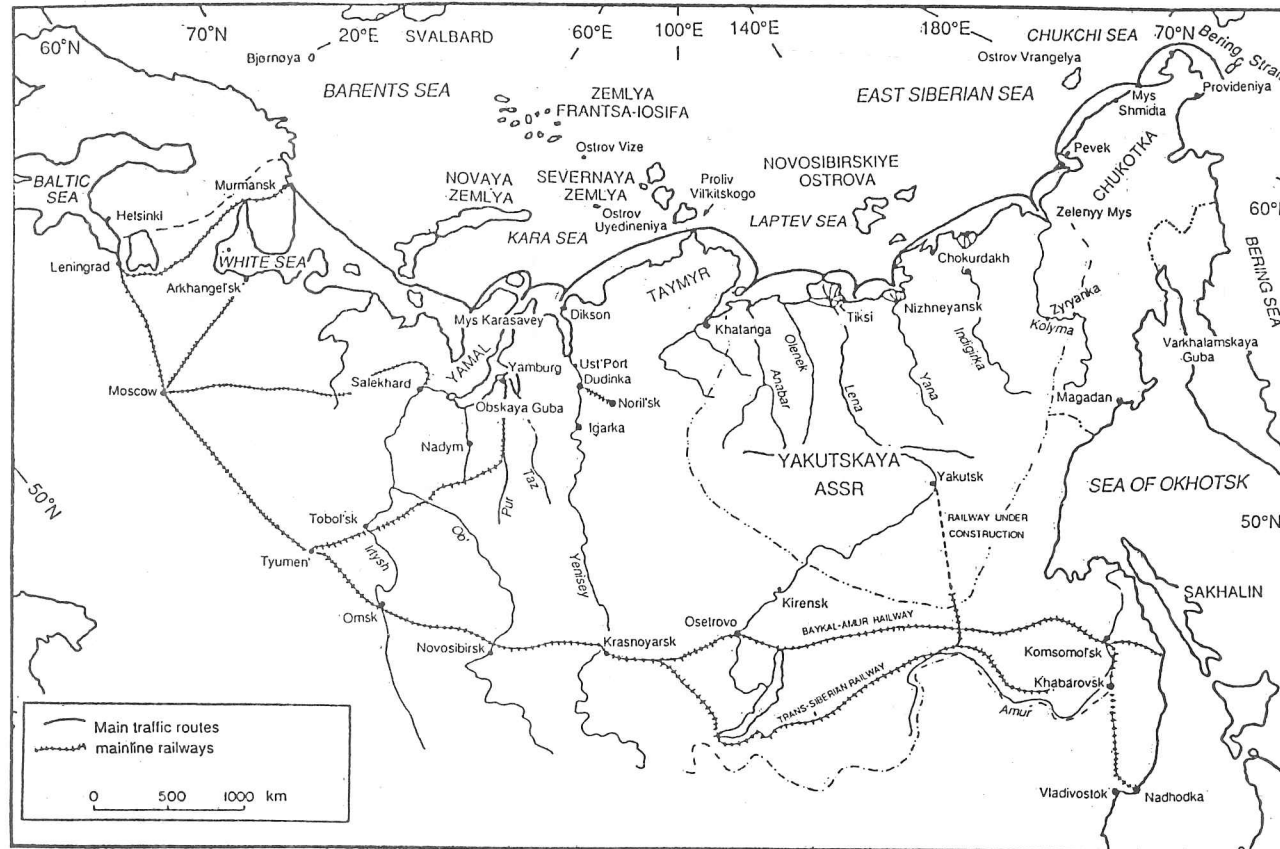
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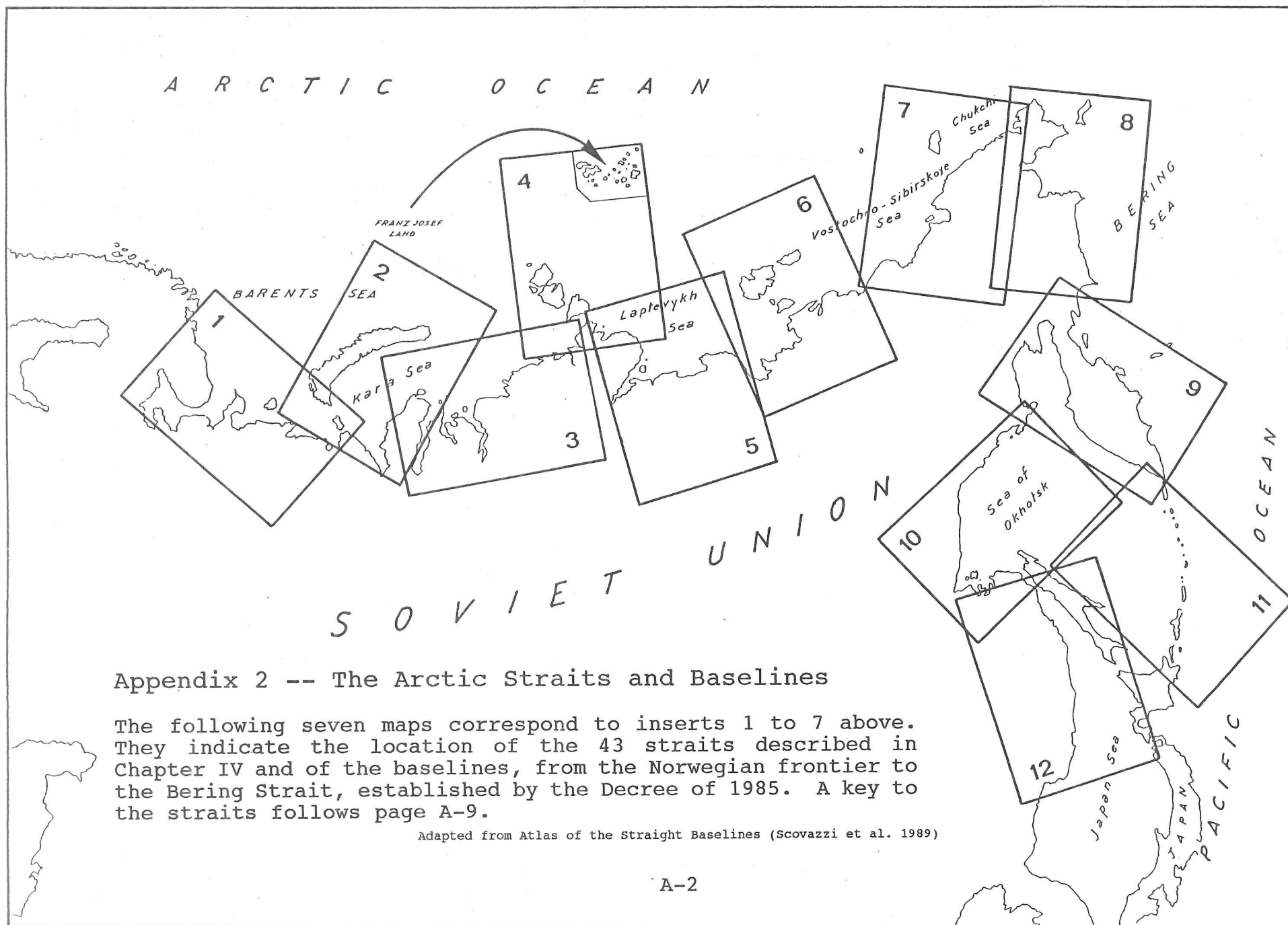
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## Appendix 1 -- The Northern Sea Route



Source: Armstrong 1990:128

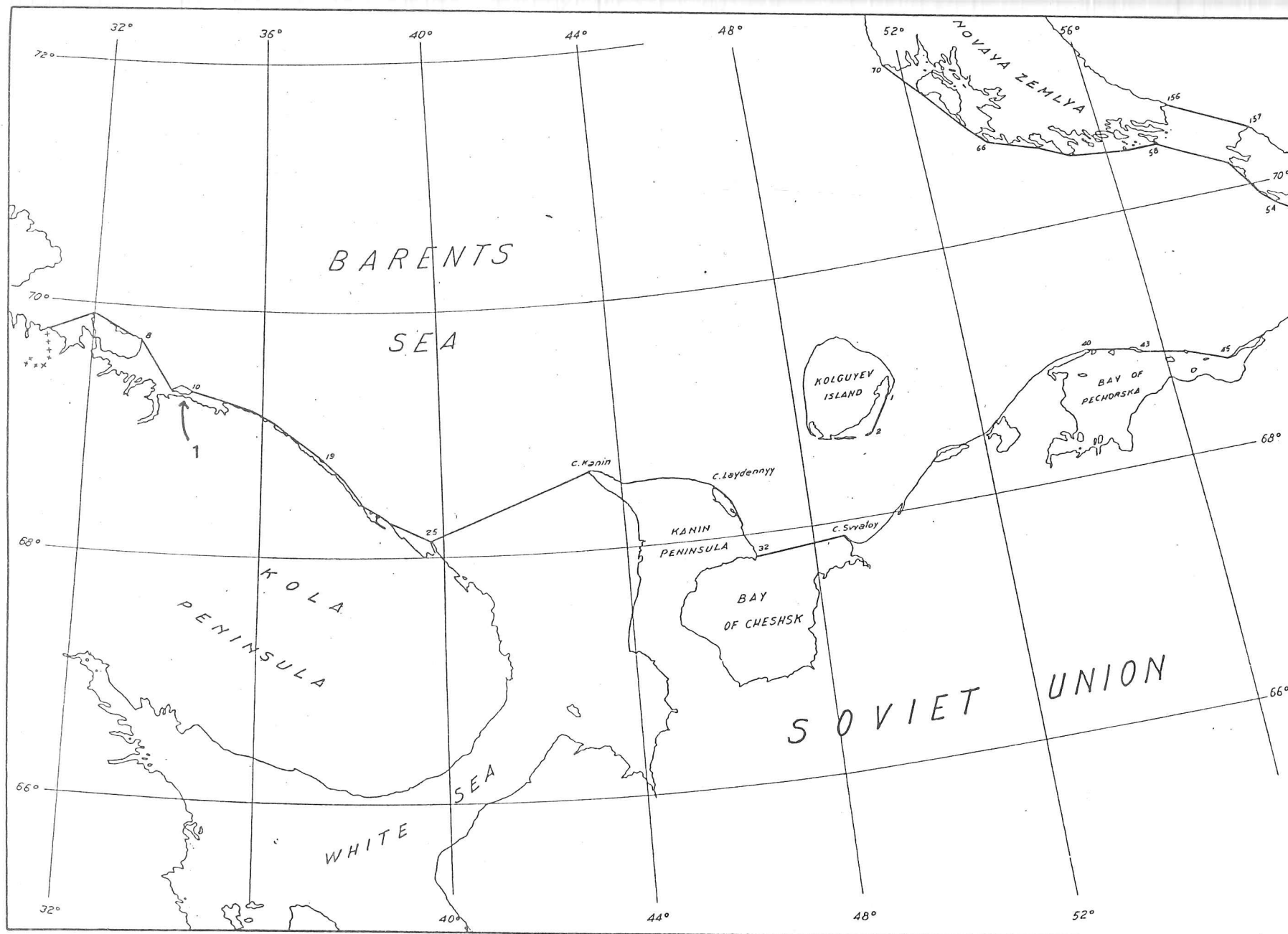




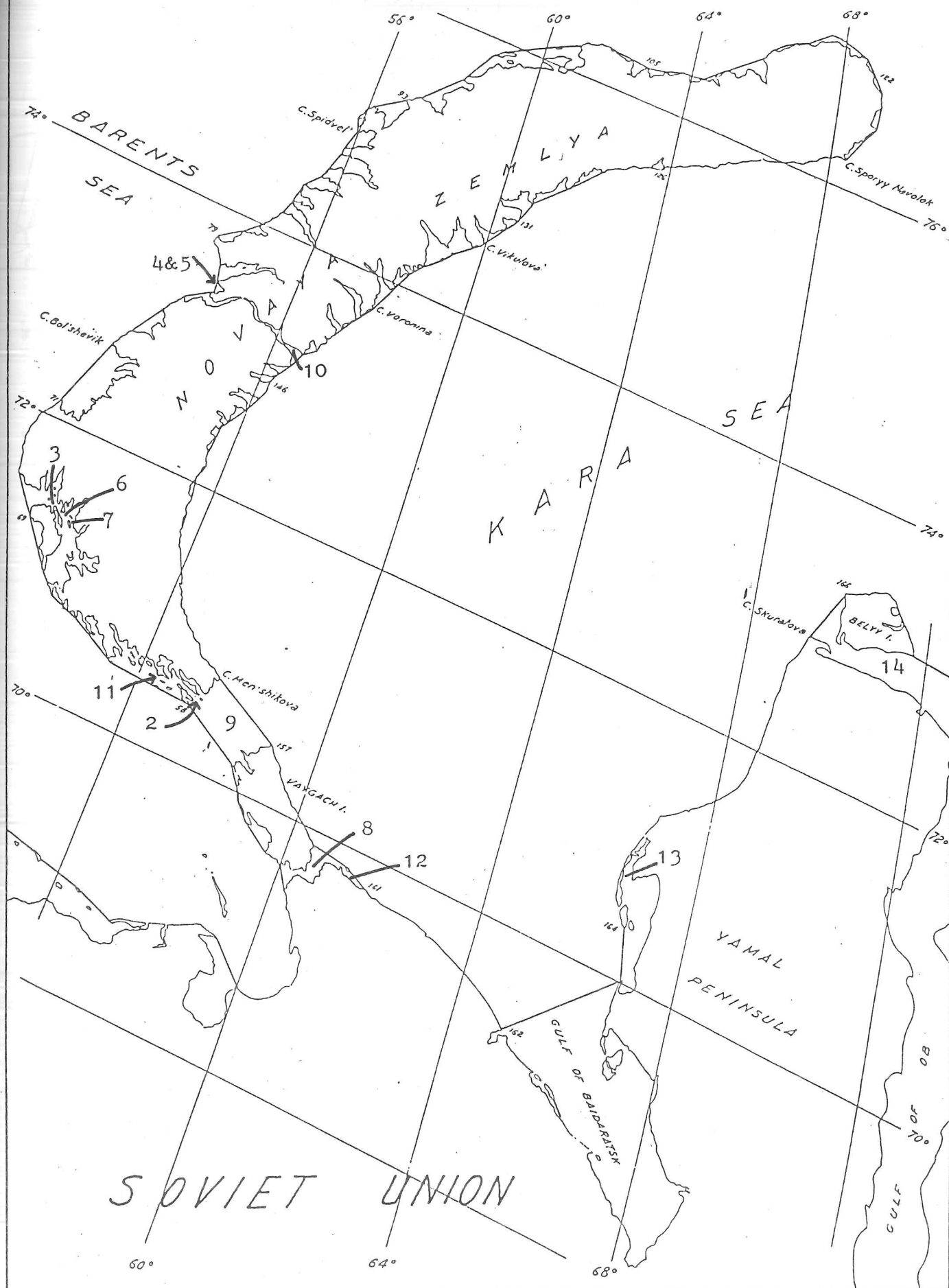
## Appendix 2 -- The Arctic Straits and Baselines

The following seven maps correspond to inserts 1 to 7 above. They indicate the location of the 43 straits described in Chapter IV and of the baselines, from the Norwegian frontier to the Bering Strait, established by the Decree of 1985. A key to the straits follows page A-9.

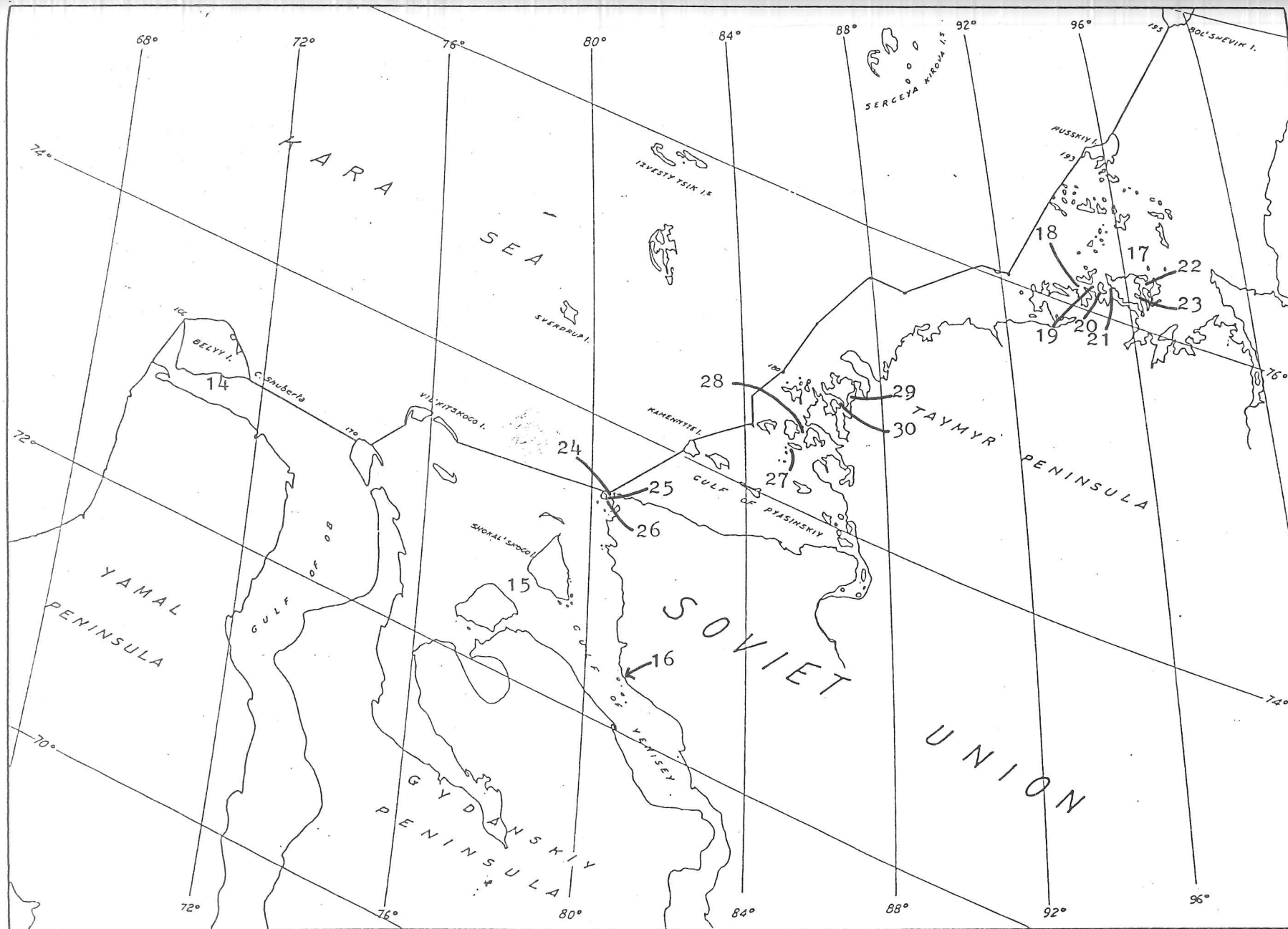
Adapted from Atlas of the Straight Baselines (Scovazzi et al. 1989)



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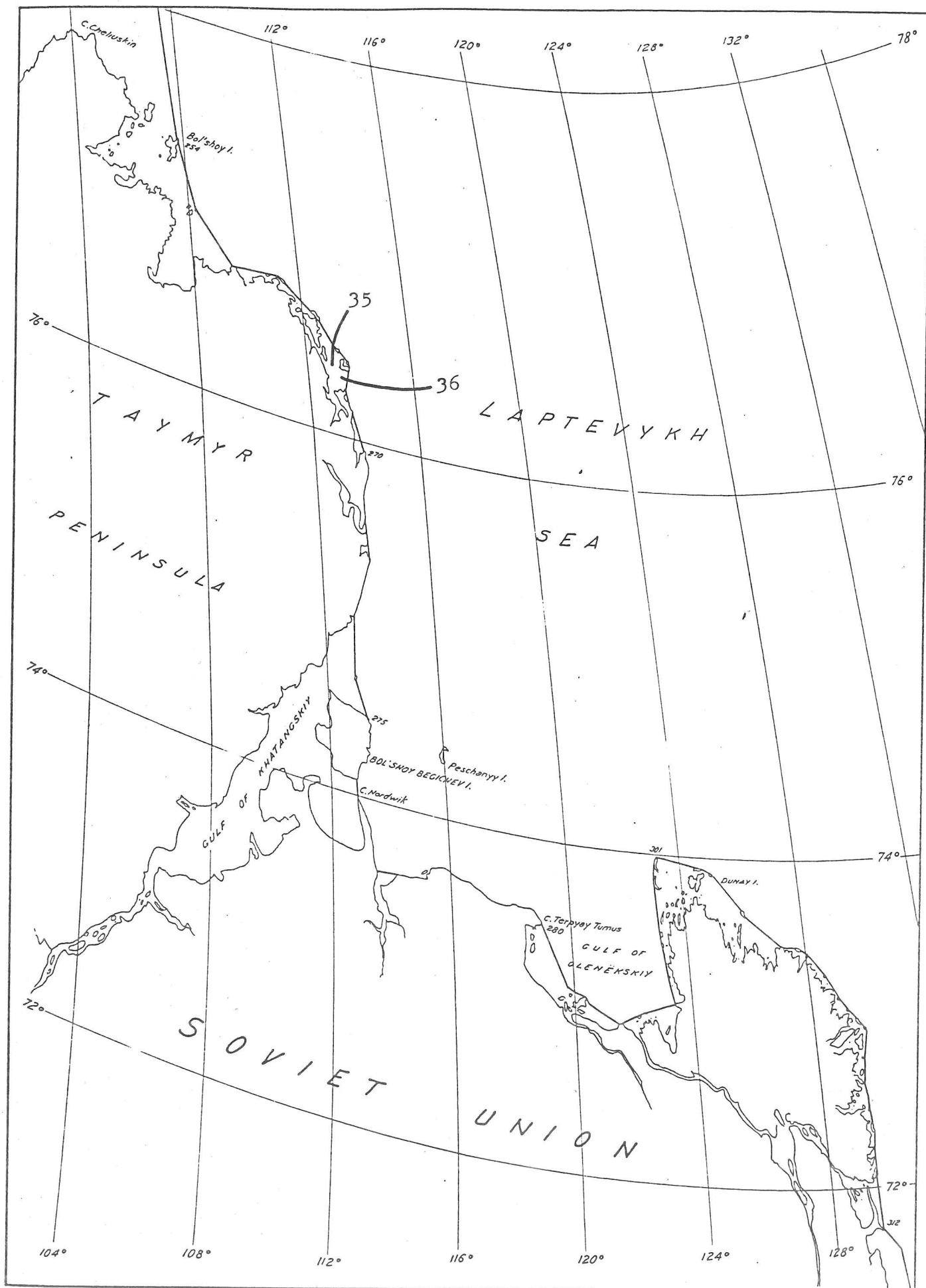


Adapted from Atlas of the Straight Baselines (Scovazzi et al. 1989)



Adapted from Atlas of the Straight Baselines (Scovazzi et al. 1989)





Adapted from Atlas of the Straight Baselines (Scovazzi et al. 1989)





Adapted from Atlas of the Straight Baselines (Scovazzi et al. 1989)



## Key to the Maps of Straits and Baselines

1. Proliv Kil'dinskiy (Kil'din Strait)
2. Proliv Nikol'skiy Shar
3. Proliv Kostin Shar
4. Proliv Krotova
5. Proliv Kazakova
6. Proliv Shirokiy
7. Proliv Uzkii Strait
8. Proliv Yugorskiy Shar
9. Proliv Karskiye Vorota (Kara Gates Strait)
10. Proliv Matochkin Shar
11. Proliv Petukhovskiy Shar
12. Proliv Morozova
13. Proliv Sharapov Shar
14. Proliv Malygina
15. Proliv Ovtsyna
16. Proliv Krestovskiy
17. Proliv Matisena
18. Proliv Frama (Fram Strait)
19. Proliv Sverdrup
20. Proliv Zarya
21. Proliv Palander
22. Proliv Toros
23. Proliv Vostochnyy
24. Proliv Lena
25. Proliv Preven
26. Proliv Vega
27. Proliv Dubravina
28. Proliv Gluboki
29. Proliv Stalintsa (Stalinets Strait)
30. Proliv Iney
31. Proliv Borisa Vil'kitskogo (Vil'kitskii Strait)
32. Proliv Shokal'skogo (Shokal'skii Strait)
33. Proliv Krasnoy Armii (Red Army Strait)
34. Proliv Yungshturm
35. Proliv Mod (Maud Strait)
36. Proliv Murmantsa (Murmanets Strait)
37. Proliv Dmitriya Lapteva (Dmitrii Laptev Strait)
38. Proliv Sannikova
39. Proliv Blagoveshchenskiy
40. Proliv Zaria
41. Proliv Melyokhov
42. Kolyma River strait
43. Proliv Longa (Long Strait)

### Appendix 3 -- Glossary

arkhipelag	archipelago
belaya (yy, oye)	white
bol'shaya (oy, oye)	great, large
gavan'	harbor, basin
guba	gulf, bay, inlet
kamen'	rock, stone
malaya (yy, oye)	little, small
more	sea
mys	cape, point, or headland
nos	headland
novaya (yy, oye)	new
ostrov	island
poluostrov	peninsula
proliv	strait
reka	river
salma	strait
severnaya (yy, oye)	northern
shar	channel
vorota	gap, gate, entrance
vostochnaya (yy, oye)	eastern
vostok	east
zaliv	gulf, bay, inlet
zapadnaya (yy, oye)	western
zemlya	land

Source: Arctic Pilot 1985:x-xi

## Appendix 4 -- Relevant Provisions of the 1982 United Nations Convention on the Law of the Sea

### SECTION 3. INNOCENT PASSAGE IN THE TERRITORIAL SEA

#### SUBSECTION A. RULES APPLICABLE TO ALL SHIPS

##### *Article 17*

##### *Right of innocent passage*

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

##### *Article 18*

##### *Meaning of passage*

1. Passage means navigation through the territorial sea for the purpose of:
  - (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
  - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

##### *Article 19*

##### *Meaning of innocent passage*

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
  - (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
  - (b) any exercise or practice with weapons of any kind;
  - (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
  - (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
  - (e) the launching, landing or taking on board of any aircraft;
  - (f) the launching, landing or taking on board of any military device;
  - (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
  - (h) any act of wilful and serious pollution contrary to this Convention;
  - (i) any fishing activities;
  - (j) the carrying out of research or survey activities;
  - (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
  - (l) any other activity not having a direct bearing on passage.

##### *Article 20*

##### *Submarines and other underwater vehicles*

In the territorial sea, submarines and other underwater vehicles are required to navigate on the surface and to show their flag.

*Article 21*  
*Laws and regulations of the coastal State relating to*  
*innocent passage*

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

3. The coastal State shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

*Article 22*  
*Sea lanes and traffic separation schemes*  
*in the territorial sea*

1. The coastal State may, where necessary having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships.

2. In particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes.

3. In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account:

- (a) the recommendations of the competent international organization;
- (b) any channels customarily used for international navigation;
- (c) the special characteristics of particular ships and channels; and
- (d) the density of traffic.

4. The coastal State shall clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity shall be given.

*Article 23*  
*Foreign nuclear-powered ships and ships carrying nuclear or*  
*other inherently dangerous or noxious substances*

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.



*Article 24*  
*Duties of the coastal State*

1. The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not:

- (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or
- (b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.

2. The coastal State shall give appropriate publicity to any danger to navigation, of which it has knowledge, within its territorial sea.

*Article 25*  
*Rights of protection of the coastal State*

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

*Article 26*  
*Charges which may be levied upon foreign ships*

1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.

2. Charges may be levied upon a foreign ship passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.

*Article 24*  
*Duties of the coastal State*

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## PART III

### STRAITS USED FOR INTERNATIONAL NAVIGATION

#### SECTION 1. GENERAL PROVISIONS

##### *Article 34*

##### *Legal status of waters forming straits used for international navigation*

1. The régime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

##### *Article 35*

##### *Scope of this Part*

Nothing in this Part affects:

- (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such;
- (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or
- (c) the legal régime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

##### *Article 36*

##### *High seas routes or routes through exclusive economic zones through straits used for international navigation*

This Part does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply.

#### SECTION 2. TRANSIT PASSAGE

##### *Article 37*

##### *Scope of this section*

This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

##### *Article 38*

##### *Right of transit passage*

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does

not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

#### *Article 39*

##### *Duties of ships and aircraft during transit passage*

1. Ships and aircraft, while exercising the right of transit passage, shall:

- (a) proceed without delay through or over the strait;
- (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
- (d) comply with other relevant provisions of this Part.

2. Ships in transit passage shall:

- (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
- (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

3. Aircraft in transit passage shall:

- (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
- (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

#### *Article 40*

##### *Research and survey activities*

During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.

#### *Article 41*

##### *Sea lanes and traffic separation schemes in straits used for international navigation*

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.

2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes for any sea lanes or traffic separation schemes previously designated or prescribed by them.

3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.

4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.

5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall co-operate in formulating proposals in consultation with the competent international organization.

6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.

7. Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

#### *Article 42*

##### *Laws and regulations of States bordering straits relating to transit passage*

1. Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic, as provided in article 41;
- (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
- (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
- (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

2. Such laws and regulations shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section.

3. States bordering straits shall give due publicity to all such laws and regulations.

4. Foreign ships exercising the right of transit passage shall comply with such laws and regulations.

5. The flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits.

#### *Article 43*

##### *Navigational and safety aids and other improvements and the prevention, reduction and control of pollution*

User States and States bordering a strait should by agreement co-operate:

- (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
- (b) for the prevention, reduction and control of pollution from ships.

#### *Article 44*

##### *Duties of States bordering straits*

States bordering straits shall not hamper transit passage and shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. There shall be no suspension of transit passage.

### SECTION 3. INNOCENT PASSAGE

#### *Article 45*

##### *Innocent passage*

1. The régime of innocent passage, in accordance with Part II, section 3, shall apply in straits used for international navigation:
  - (a) excluded from the application of the régime of transit passage under article 38, paragraph 1; or
  - (b) between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State.
2. There shall be no suspension of innocent passage through such straits.

### SECTION 8. ICE-COVERED AREAS

#### *Article 234*

##### *Ice-covered areas*

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.