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**Transit Passage in the Russian  
Arctic Straits**

*William V. Dunlap*



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## **Transit Passage in the Russian Arctic Straits**

by

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## Preface

The Russian Federation, continuing an initiative begun by the Soviet Union, is attempting to open the Northern Sea Route, the shipping route along the Arctic coast of Siberia from the Norwegian frontier through the Bering Strait, to international commerce. The goal of the effort is eventually to operate the route on a year-round basis, offering it to commercial shippers as an alternative, substantially shorter route from northern Europe to the Pacific Ocean in the hope of raising hard currency in exchange for pilotage, icebreaking, refuelling, 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 study summarises 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 the transit-passage regime.

Geographical names (except for the seas) are in transliterated 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 transliteration is that adopted by the Scott Polar Research Institute, conforming to the joint recommendation of the United Kingdom's Permanent Committee on Geographical Names and the United States Board on Geographical Names, but quotations follow the original transliteration. 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 metres.

Coordinates, which are included parenthetically in the descriptions of straits in section 6, are meant only to facilitate location on maps and charts, few of which identify all the straits and islands mentioned here, and the choice of coordinates is not methodical: Sometimes the coordinates locate the centre of a strait, sometimes one side of an entrance passage, sometimes the centre 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 pertaining to baselines, to the Pilot series.

This study 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).

For information on the geography, history, economics, politics, and administration of the Northern Sea Route, the following sources, all in English, are recommended: Armstrong, 1952; Butler, 1978; Krypton, 1953; Krypton, 1956; and Armstrong's reports in *Polar Record* from 1963 (annually from 1983 to 1992) summarizing the previous year's developments in the Northern Sea Route. In 1992, *International Challenges* devoted an entire issue to a review of a wide variety of aspects of the internationalisation of the Northern Sea Route (*International Challenges*, 1992). The Fridtjof Nansen Institute publishes the quarterly *INSROP Newsletter*, which announces developments in the effort to internationalize the Northern Sea Route and publicizes the research activities and results conducted under the auspices of the International Northern Sea Route Programme.

If there is anything original in this study, 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 can be expected to have on their legal status. Inasmuch as the transit-passage regime is quite recent (in fact, the convention that created it did not enter into force until 16 November 1994) and not yet the subject of any international litigation or incident, many of its implications are unclear, and this study does not provide any definitive answers. It aims, instead, at raising and investigating pertinent questions before they become contentious.

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The opinions and comments contained herein are those of the author and are not necessarily to be construed as those of the International Boundaries Research Unit.

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# Transit Passage in the Russian Arctic Straits

*William V. Dunlap*

## 1. Introduction

The 1982 United Nations Convention on the Law of the Sea (LOSC, 1982) introduced to international law a new concept - the right of transit passage through straits used for international navigation - that permits relatively free passage by ships, overflight by aircraft, and submerged transit by submarines through the territorial sea and, under certain conditions, even the internal waters of a coastal state - activities that can have significant implications for the national and environmental 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 coastal-state security because much of the area to which the new rules are being applied was, 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 LOSC 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 recognise a right of overflight or of submerged transit. In these areas, the new regime of transit passage significantly 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 and in turn, Russia, have 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, refuelling, weather forecasting, and ice forecasting services. If this plan should be realised, many of the major straits of the Northeast Passage, along the northern coast of Siberia from the Norwegian border to the Bering Strait, arguably would become straits 'used for international navigation' within the meaning of the LOSC and thus subject to the new regime. It would, for example, arguably prohibit Russia from denying access to Proliv Borisa Vil'kitskogo (Vilkitskiy Strait) to United States Coast Guard icebreakers, as the Soviet Union did in 1967.

This study 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 Russian 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 claim of significance for this study:

- the project may not succeed, leaving the Northern Sea Route a purely domestic transport route largely unaffected by international shipping and international law; even if failure were a likely prospect, which does not appear to be the case, that would not in itself be a reason to abandon or postpone this study, for the issues raised here may well have a direct bearing on the willingness of the Russian Federation to promote the venture.

- although the LOSC, the specific body of conventional law with which the study is concerned, came into effect in 1994, it has not been widely accepted among the major industrial and maritime states,<sup>1</sup> and, although the Soviet Union signed the LOSC, it never and Russia has not yet ratified the document.<sup>2</sup> On the other hand, strong arguments can be made that the 12-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 that codified them.<sup>3</sup>

## 2. Defining the Northern Sea Route

The terms ‘Northeast Passage’ and ‘Northern Sea Route’ are frequently used interchangeably (Roginko and La Mourie, 1992: 263; Franckx, 1991a: 33; Jorgensen-Dahl, 1990: 48). As Professor William Butler observes, however, the terms do not describe the same entity. The Northeast Passage is the geographical area from the Russian-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, in contrast, 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).

Since 1991, there has been an official definition,<sup>4</sup> set out in the Regulations for Navigation on the Seaways of the Northern Sea Route<sup>5</sup> (NSR Regulations, 1991), which entered into force on

<sup>1</sup> While most of the world’s states signed the 1982 convention on or shortly after 10 December 1982, it took until November 1993 to gain the 60 ratifications necessary for it to enter into force. Most of the major industrial and maritime powers refrained from ratifying, while Germany, the United Kingdom, and the United States did not sign. Major powers that signed but did not ratify soon afterwards include Australia, Canada, China, France, Italy, Japan, and Russia. The reluctance to become a party stemmed from a fundamental disagreement over the provisions of Part XI, concerning mining of the deep seabed, and was unrelated to any of the freedom of navigation issues that are the subject of this briefing.

Negotiations conducted in New York under the auspices of the United Nations may have broken the impasse. On 29 July 1994, the United States signed an agreement (UN Agreement, 1994) that modified the deep seabed provisions to the satisfaction of the United States government (Christopher, 1994). The agreement and the 1982 convention were submitted as a package to the United States Senate for advice and consent on 7 October 1994 (Clinton, 1994). By 6 September 1995, there were 81 parties to the convention, and 124 countries had agreed to apply the convention and agreement provisionally (ILM, 1995). The 1994 agreement appears to enhance considerably the likelihood that the major industrial and maritime nations will eventually become parties to the 1982 convention, assuring nearly universal acceptance of the convention as a statement of the law of the sea and codifying the transit-passage regime into international law.

<sup>2</sup> The signing of the convention, even in the absence of ratification, may impose some obligation on Russia. The customary-law principle of good faith has been held to include an obligation on a state that has signed, but not yet ratified, a treaty to refrain from acts that would substantially impair the value of the treaty as signed (Jennings and Watts, 1992: 1239; see, e.g., *German Interests in Polish Upper Silesia*, 1926: 30). The Vienna Convention on the Law of Treaties imposes an obligation on a state to refrain from acts that would defeat the object and purpose of a treaty that the state has signed but not ratified (VCLT 1969, art. 18). These obligations expire if the state subsequently makes clear an intention not to ratify or otherwise be bound by the treaty (Jennings and Watts, 1992: 1239). The Soviet Union did not do so, and Russia has not done so.

<sup>3</sup> This question is discussed in more detail in section 4.1, below.

<sup>4</sup> The 1971 statute on the administration of the Northern Sea Route contained no geographical definition, other than to declare the purpose of the law to be “ensuring the safety of Arctic navigation” and “to prevent and eliminate the consequences of pollution of the marine environment and the northern coast of the USSR” (Decree of 1971).

1 July of that year. The regulations, by defining the Northern Sea Route as an “*essential transportational line of the USSR*”, appear to agree with Butler’s distinction between the geographical area of the Northeast Passage and the ‘domestic transport concept’ of the Northern Sea Route. Nevertheless, it places the easternmost limit of the route in the Bering Strait, north of Ostrov Ratmanova (Big Diomedes Island), thus locating the route entirely within the Northeast Passage and the Arctic Basin. Presumably this relates to the fact that once a vessel has left the Arctic Basin, passed through the Bering Strait, and entered the North Pacific Ocean, navigation conditions improve considerably in terms of the hazards posed by the Arctic Basin’s multi-year ice cover and shallow navigable routes. Furthermore, the environmental hazards, though still serious, may be less in the open waters of the North Pacific than in the largely enclosed Arctic Ocean. Since 1991, most commentators locate the Northern Sea Route entirely within the Northeast Passage (Østreng, 1991: 260; Brubaker, 1992: 97; Timtchenko, 1994: 193-194).

It has been estimated that the sailing distance of the entire route can vary between 2,100 and 3,400 nautical miles, depending on the severity of ice conditions (Jørgensen, 1992: 68). This variable nature appears to be an important element of any definition. Ivanov and Ushakov, for example, define it as “*a series of shipping routes along the Russian coast passing through the seas of the Arctic Ocean ... which can be located, depending on ice conditions, in the Russian economic zone, territorial and inland waters, and include near-polar voyages*”, noting that the geographic definition of the route has changed significantly with time (Ivanov and Ushakov, 1992: 15). For some commentators, this variability, an inevitable result of the constantly changing ice conditions in the Arctic waters, is the defining factor (Østreng, 1991: 260; Kolodkin and Volosov, 1990: 164). Østreng goes so far as to describe the route as a ‘series of individual seas ... linked by straits [with] no single set channel to be followed’ (Østreng, 1992: 21). Those who acknowledge the variability do tend to stress, however, that a significant part of the route lies within waters under Soviet jurisdiction (Kolodkin and Volosov, 1990: 164).

This study 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 be irrevocably transformed if the Russian government succeeds in attracting foreign shipping to its Arctic shores.

### 3. Opening the Northern Sea Route

The Northern Sea Route has long played a significant role in Soviet and Russian economic history (Armstrong, 1992: 36-42), and the project to internationalise it has been on the Soviet and Russian agendas, in one form or another, for a quarter of a century.

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<sup>5</sup> The Regulations define the Northern Sea Route as “*the essential transportational line of the USSR that is situated within its inland seas, territorial seas (territorial waters), or exclusive economic zone adjacent to the USSR Northern Coast and includes seaways suitable for leading ships in ice, the extreme points of which are limited in the west by the western entrances to the Novaya Zemlya Straits and the meridian running north through Mys Zhelaniya, and in the east (in the Bering Strait) by the parallel 66°N and the meridian 168°58’37”W*” (NSR Regulations, 1991, §1.2) (parentheses in original English translation).

### 3.1 The History of the Northern Sea Route

The search for a Northeast Passage and a trade route between Europe and the Orient began in the 16th century, about the same time as the better-known (at least in Europe and North America) quest for the Northwest Passage. A number of European explorers, notably Willem Barents, got as far as the entrance to the Kara Sea and eventually some distance into it. The ships of the day, however, were unable to break their way through the Arctic ice to proceed farther. In 1619, the Muscovite regime began to discourage foreign activity along the Arctic coast.

During the 17th century, progress along the Northeast Passage occurred piecemeal, as cossacks and fur traders coasted from river to river, gaining familiarity with the passage but not recording the information systematically. In fact, when Semen Dezhnev sailed east from the Kolyma River in 1648, rounding the cape that now bears his name and passing through the Bering Strait from the north, he was unaware of having made any special discovery and the voyage was soon forgotten.

The first systematic attempt to find a Northeast Passage was instigated by Peter the Great, who instructed Vitus Bering, a Danish officer in the newly created Russian navy, to go to Kamchatka, build a ship, and sail northward to find where the land joined with America, Dezhnev's 1648 passage of the Bering Strait having been forgotten. In 1728, Bering sailed northward through the Bering Strait and round the northeast tip of Asia. The fact that he was unable to see the North American coast left open the question of whether the two continents joined, so Bering was sent out again in 1733, for what became known as the Great Northern Expedition, a major event in the history of the Northern Sea Route.

The Great Northern Expedition sought not only to locate the western coast of North America but to survey the north and east coasts of Russia, from the White Sea to Kamchatka. The coast was divided into sectors, separated by the great rivers, and a naval officer commanding 50 men was assigned to each sector. By 1742, the entire Siberian coast had been mapped, except for the stretch in the extreme northeast from Mys Bol'shoy Baranov to the Bering Strait. The omission led to further speculation about a land link with North America, which was not resolved until Baron F.P. Wrangel's land-based expedition of 1821-1824. By sledging along the north coast of Chukotka, the piece omitted by the Great Northern Expedition, Wrangel established that there was no land link with North America, clearing the way for a voyage through the Northeast Passage.<sup>6</sup> The voyage was not accomplished, however, until Baron A.E. Nordenskjöld, a Swedish Finn, sailed in the schooner *Vega* from Stockholm in 1878, and emerged at the Bering Strait in 1879, having been forced to winter over about 250 kilometres from the strait. The first westward passage of the Northern Sea Route was made in 1914-15 by *Taymyr* and *Vega*, two small icebreakers, built by the Russian government, that conducted hydrographic surveys of the Arctic each summer from 1910 to 1915. Among their achievements was the discovery of the last major island group to be found in the Arctic: Emperor Nicholas II Land, now called Severnaya Zemlya.

Systematic economic exploitation of the route began in the 1870s as Russian and British merchants sought to establish a trade route between Western Europe and the Ob' and Yenisey

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<sup>6</sup> It was on this expedition that Wrangel inferred, from the behaviour of reindeer along the shore, the existence of the island that now bears his name and which forms the northern shore of Proliv Longa (Long Strait) (Armstrong, 1992: 35).

Rivers, allowing the exchange of manufactured goods for raw Siberian natural resources. In 1911, trade began over the eastern part of the route, between the Pacific and the Kolyma River.

The 1917 Revolution did not alter the development significantly, but the political isolation of the Soviet state led to the exploitation of the natural resources of the Arctic. During the Civil War, goods were ferried across the Kara Sea to relieve shortages in western Siberia. During the seasons of 1918-20, Roald Amundsen sailed *Maud* through the Northeast Passage to the Bering Strait, and then drifted with the ice back to Ostrova Novo Sibirskiy. In 1920, the Committee of the Northern Sea Route was established to “*equip, improve, and study*” the entire length of the passage (Armstrong, 1992: 37). Traffic steadily increased, particularly the export trade. In the eastern and central sectors, development was much slower than in the west, along the Kara Sea. After the Civil War ended there in 1923, an annual voyage of one or two ships to Kolyma was organised.

Two major events occurred in 1932. First, a small icebreaking ship, *Aleksandr Sibiryakov*, made the first transit in a single season, while carrying out a programme of scientific observations for International Polar Year. Second, the Chief Administration of the Northern Sea Route was established to “*develop the Northern Sea Route from the White Sea to the Bering Strait, to equip it, to keep it in good order, and to secure the safety of shipping along it*” (Armstrong, 1992: 38). Under the direction of O.Yu. Shmidt, the leader of the *Sibiryakov* expedition, freighting along the route grew dramatically; ports were created or expanded at Dikson, Tiksi, Mys Shmidta, and Provideniya, and an icebreaker fleet was developed. Although the chief administration soon attained significant power and influence, its authority gradually diminished, and it was eventually absorbed into the Ministry of the Maritime Fleet.

During World War II, the Northern Sea Route was used to bring supplies from the Allies into Russia. The famous Arctic convoys did not use the route, but a new approach was opened from the North American west coast, through the Bering Strait, to any of the Siberian ports. The Germans sank a number of Russian ships, including *Aleksandr Sibiryakov*, in the Kara Sea.

Since 1945, there has been no accurate record, because no annual reports or other documentation have been published. Journals such as *Polar Record* and *Soviet Geography* have published regular summaries of the haphazard data that could be gleaned from the Soviet press and radio.

In 1971, a separate entity was again established to administer the Northern Sea Route, an indication of the growing importance attached to Arctic development (Decree of 1971). It appears that there has been a fairly steady growth in traffic and no great change in the overall pattern. The Kara Sea is still the busiest area. Timber from Igarka, long the major freight, has been surpassed by nickel ore from Noril'sk, shipped from Dudinka to Murmansk to be refined at Monchegorsk. By the 1980s, navigation into the Yenisey estuary had been extended into a year-round season, and the use of the Ob' River had increased significantly to support the oil and gas industry of the Yamal Peninsula.

While the route is quite busy during the navigation season, there is still very little through-traffic. The Northern Sea Route, as a shortcut between the Atlantic and the Pacific, has never

been seriously exploited since it was conceived in the 16th century, and it is only in the 1990s that the idea is being seriously considered again.<sup>7</sup>

### 3.2 Early Efforts at Internationalisation

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 refuelling 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 advertised saving of 4,332 nautical miles on a voyage from Yokohama to London (compared to the usual Suez route), 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, 1991a: 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, *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). 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). It is not only for international traffic that the route is important, however. Soviet economists long viewed it as crucial to the economic well being of the Arctic and Far East (e.g., 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:

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<sup>7</sup> This historical survey was summarised from Armstrong's histories of the Northern Sea Route cited in the References, particularly Armstrong, 1992.

*“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 normalisation of international relations, that we could open the Northern Sea Route for foreign shipping subject to the use of our icebreaker pilotage.”* (quoted in Franckx, 1991a: 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 begun decades ago. Japanese vessels have been using part of the route since before 1967 (Anderson, 1967), and Japan continues to show an interest in a further opening of the Route (Kitagawa, 1992: 64). 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, 1991a: 38). The ship traversed the Northern Sea Route both ways between August and November, calling at Chinese and Japanese ports. Two other freighters followed the route from western Europe to Japan in 23 days that year, 10 days faster than the Suez route (Armstrong, 1990: 128). Afterwards, *Izvestiya* was able to announce: *“[F]or the first time in its history, the Northern Sea Route provided the country with foreign currency...”* (quoted in Franckx, 1991a: 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, 1991a: 39; Schmemmann, 1983; Armstrong, 1984).

In another sense, the internationalisation of the route may have occurred in 1991, with the publication of the NSR Regulations (1991), which may be interpreted as a tacit invitation to foreign vessels to ply the route. The Regulations define ‘vessel’ as *“any ship or other craft regardless of her nationality”* (ibid., § 1.4, emphasis added), and further specifies: *“The Regulations shall, on the basis of non-discrimination for vessels of all States, regulate navigation through the Northern Sea Route...”* (ibid., § 2, emphasis added). While this does not, of course, constitute authorisation to navigate in Russian internal waters, the non-discriminatory approach indicates that the government contemplated the use of the route by foreign vessels.

In that year, the Administration of the Northern Sea Route issued three permits to foreign vessels. Two - *l’Astrolabe*, a French 950-dwt oceanographic and polar vessel, and *Dagmar Aaen*, a German yacht, sailed along the route (Timtchenko, 1994: 198). *L’Astrolabe*’s voyage was the first reported eastbound transit by a foreign vessel. Two Russian ice pilots and icebreaker assistance were provided by the Murmansk Shipping Company (Griffiths, 1992; Matyushenko, 1992: 62). In July of 1993, the Finnish tanker *Lunny* carried a cargo of diesel fuel as far as the Yana River in eastern Siberia and returned to take a second cargo, with plans to continue operating in northern latitudes until the end of September (Surikov, 1993). Aside from the use of foreign vessels, there appeared to be an increase in foreign interest in chartering Russian vessels. In August 1993, ITAR-TASS reported that a major Chinese company had chartered *Kandalaksha*, a Russian freighter, which made the eastbound voyage in two weeks’ less time than the Suez route (BBC, 1993).

In late 1995, Canada and Russia announced a series of economic agreements, including plans for the joint development of northern territories and for Canada's use of the Northern Sea Route (Zhelenin, 1995).

### 3.3 The International Northern Sea Route Programme

The present plan to open the Northern Sea Route to international shipping began in November 1988 when a delegation of the Soviet Ministry of the Merchant Marine visited the Fridtjof Nansen Institute, in Norway, to propose a joint research project that would assess the feasibility of opening the Northern Sea Route to permit year-round navigation between the Atlantic and Pacific Oceans. The Institute agreed, specifying that it be an international effort, drawing on expertise from around the world (Simonsen, 1992: 26). The Northern Sea Route Project began to take form at preliminary discussions in January 1990 in Moscow, and in June of that year in Oslo. The latter 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). A meeting of participating scientists was held in Oslo in June 1991, and in December 1991 the Fridtjof Nansen Institute published the *Northern Sea Route Project Pilot Studies Report*, summarising the research published to that time.

In March 1992, the Norwegian and Russian project groups met in St. Petersburg and, on the basis of the results of the pilot studies, agreed to begin a study to last three to five years and to be funded by public and private sources in Russia, Norway, Alaska, and Japan (Simonsen, 1992: 26-27). The research stage is being carried out by the Central Marine Research and Design Institute, in St. Petersburg; the Ship & Ocean Foundation, in Tokyo, and the Fridtjof Nansen Institute. The bulk of the funding came from the Ship & Ocean Foundation, which agreed to fund the project, now called the International Northern Sea Route Programme, for three years, beginning in June 1993, with the possibility of funding for an additional two years.

Willy Østreng, the director of the Fridtjof Nansen Institute, has described the aim of the programme as the development of "*a knowledge base adequate to provide a foundation for long-term planning and decisionmaking by state agencies as well as private companies etc., for purposes of promoting rational decisionmaking concerning the use of the Northern Sea Route for transit and regional development.*" (IST'95, 1995: 13). The four major areas of study are natural conditions and ice-navigation technology; the effect of opening the Northern Sea Route upon the Arctic environment; economic appraisal of the proposed development, including questions of trade and commercial shipping; and legal, political, and strategic factors (IST'95, 1995: 1, 13).



In October 1995, the programme sponsored an interdisciplinary symposium in Tokyo at which more than 250 scientists, engineers, economists, lawyers, and other specialists met to exchange findings and ideas. After the symposium, the decision was taken to extend the programme for a further two years.

One of the major tasks of the programme will be to quantify, to the extent possible, the advantages and drawbacks of the Northern Sea Route as compared to the usual southern route, through the Suez Canal. The study has established a savings of 61 per cent in mileage between Hamburg and Dutch Harbor, Alaska (10,400 nautical miles via Suez, 4,200 via the Northern Sea Route), and 36 per cent between Hamburg and Yokohama (11,430, 6,920) (Wergeland, 1992: 44). On the negative side, minimum depths in the Northern Sea Route can be as shallow as 8 metres, in Proliv Dmitriya Lapteva, forcing larger vessels into more northerly routes entailing longer distances or more severe ice conditions (Wergeland, 1992: 44). Furthermore, average speeds tend to be slower than on the Suez route (Wergeland, 1992: 46 (table 4)). Another less obvious drawback is that in the months when the ice cover is at its lowest, the remaining ice causes fog (Matyushenko, 1992: 58).

At least six important elements that influence the attractiveness of the Northern Sea Route to commercial shippers are related, directly or indirectly, to the ice environment: sailing distance, average speed, insurance costs, capital costs, icebreaker capacity, and transport regularity (Jørgensen, 1992: 69). As to ice conditions, the most favourable time to traverse the Northern Sea Route is between 1 August and 15 September (Sackinger, 1992: 76), when most of the route can ordinarily be sailed in open water (Jørgensen, 1992: 72), but wind conditions are more favourable in late September and early October (Sackinger, 1992: 77). One major source of information on ice conditions and other natural features is a database established at the Arctic and Antarctic Research Institute, in St. Petersburg, from research and experiments carried out by the Murmansk Shipping Company and Russian nautical institutions (Buzuev, 1992: 83-84).

Aside from questions about the economic viability of the route and technical problems relating to ice and other natural conditions, the most pressing concerns have to do with the environmental impact of any increase in the use of the route. The Arctic is hazardous to shipping: sea ice and icebergs pose constant threats, and dense fog frequently impairs navigation. Just as surely, shipping is hazardous to the Arctic: the low water temperatures are believed to retard the natural cleansing processes that can be expected to mitigate the damage of oil spills in other oceans, and the permanent ice cover makes clean-up operations more difficult and expensive (Hansson, 1992: 91-94; Dunlap, 1995).<sup>8</sup>

Terence Armstrong of the Scott Polar Research Institute, who participated in both of the original meetings of the Northern Sea Route Project and who has chronicled the use and development of the Northern Sea Route for the past four decades, has written that 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. ...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.”* (Armstrong, 1991).

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<sup>8</sup> See Brubaker, 1993: ch. 8, for a discussion of the potential impact on the Barents Sea of opening the Northern Sea Route.

## 4. The Maritime Zones

An understanding of the potential effect on the Arctic straits of the internationalisation of the Northern Sea Route requires a basic familiarity with the legal and political structure that the law of the sea has imposed on the world's oceans.

### 4.1 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:

- In the territorial sea, a belt of coastal waters widely but not universally recognised as three nautical miles wide, the coastal state exercised sovereignty subject to the rules of international law.
- One, probably the most significant, of those rules was a right of innocent passage for foreign vessels.
- Beyond the territorial sea lay the high seas, in which all states enjoyed equal rights, including freedom of navigation.
- Through straits used for international navigation, there was enhanced protection of the right of innocent passage, but in any event most of the important international straits contained a belt of high seas through which vessels of all states enjoyed freedom of navigation.

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 on the High Seas (HSC, 1958). Since that time, however, the relative clarity of those principles has been fairly persistently eroded in favour of what has come to be known as 'creeping jurisdiction', the gradual broadening of the authority of states to regulate the use of the waters off their coasts. This section will briefly describe the recent development and the current status of the law of the sea as it relates to straits used for international navigation.

The international law of the sea is generally regarded as having 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 in question is either required or permitted, as the case may be, by customary international law. Because of the importance that attaches to 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 LOSC alters many of the rights and duties of states established by the 1958 conventions and by customary law. Its provisions are binding as among the states that are parties to it, but their relations with non-parties and the relations between 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 LOSC have passed into customary law and are thus binding even on states that have not ratified the LOSC (Langdon, 1990; Burke and DeLeo, 1983: 407-408; O'Connell, 1982: 570; see also Larson, 1994). For example, that the transit-passage regime (along with the 12-mile territorial sea and the exclusive economic zone) is customary international law, reflected in the LOSC, has been described as "*the United States' unequivocal position.*" (Schachte, 1993: 185-186). This general argument, however, has been criticised as inconsistent, despite some historical validity, with the proceedings and results of the Third United Nations Conference on the Law of the Sea (UNCLOS III), at which the LOSC was negotiated and adopted (Larson, 1987: 427).<sup>9</sup>

## 4.2 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*; the boundary between the territorial sea and the internal waters is delineated by *baselines*. Following are brief definitions of 'baselines' and of each of the zones and a description of the legal regime that attaches to each of them.

### 4.2.1 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 recognised 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 harbour 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: article 4).<sup>10</sup> The LOSC and TSC methods for drawing straight baselines were derived from customary international law and were closely based on the rules articulated by the International Court of Justice in *Anglo-Norwegian Fisheries* (1951), a very influential case that helped to clarify and develop the law pertaining to straight baselines.

<sup>9</sup> For critiques of the United States position that the navigation rights are customary law while the obligations regarding the seabed can be avoided (and eventually renegotiated) by declining to sign the LOSC, see Sebenius, 1984: 84-109; Surace-Smith, 1984. For a useful analysis of the mixture of customary and conventional law in the 1982 convention, see Larson, 1994.

<sup>10</sup> Generally on baselines, see O'Connell, 1982: 171-230; Churchill and Lowe, 1988, ch. 2.

#### 4.2.2 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 LOSC, transit passage may apply (LOSC, 1982: article 35).<sup>11</sup>

Within 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 LOSC, 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 EEZ (LOSC, 1982: 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 over the extent of a port state's jurisdiction to enforce its laws aboard a ship 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 are 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 person not a member of the ship's complement is involved; when a national of the port state is involved; when a fugitive wanted

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<sup>11</sup> Under the Territorial Sea Convention, innocent passage applies in a strait used for international navigation, but the coastal state may not suspend the right (TSC, 1958: article 16(4)).

by the police of the port state is aboard; or when the gravity of the offence is particularly great, as in the case of murder.<sup>12</sup>

### 4.2.3 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 recognised in customary and conventional international law, (LOSC, 1982: article 2(2); TSC, 1958: article 2; CICA, 1944: 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).

There has never been universal agreement on the 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 12 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 LOSC recognises this as the maximum allowable breadth (LOSC, 1982: article 3). Several states, principally in Latin America, claim more, up to 200 miles, but these wider claims are not generally recognised other than between the states asserting them.

Foreign ships have a right of innocent passage through the territorial sea that has been recognised 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 Territorial Sea Convention, 'passage' means navigation through the territorial sea for purposes of traversing it or proceeding to or from internal waters (TSC, 1958: article 14); the LOSC extended the definition to include navigation to or from a roadstead or port facility outside internal waters (LOSC, 1982: 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),(3)). The LOSC 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)). It 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*

<sup>12</sup> Generally on internal waters, see O'Connell, 1982, ch. 9; Churchill and Lowe, 1988, ch. 3.

order to prevent these vessels from fishing in the territorial sea.” (article 14(5)). The LOSC 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 defence 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” (LOSC, 1982: 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 (Smith, 1980: ch. 2, esp. pp. 40-42). The customary law on the subject is “both unclear and controverted” (Jennings and Watts, 1992: 619), and both the Territorial Sea Convention and the LOSC are ambiguous on the issue. The 1958 convention has been read as granting a right of innocent passage to warships (Fitzmaurice, 1959: 102-103), but has also been interpreted as not resolving the question at all on the ground that the text is inconsistent with the intent of a majority of the delegations at the 1958 conference (Sorensen, 1958: 235). Although the 1982 LOSC goes into more detail and contains separate sets of rules for “Merchant Ships and Government Ships Operated for Commercial Purposes” (LOSC, 1982: Part II, section 3(B)) and for “Warships and Other Government Ships Operated for Non-Commercial Purposes” (*ibid.*, section 3(C)), it does not directly address the question of whether warships enjoy the right of innocent passage.

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 authorisation 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 USSR considers that a coastal State has the right to establish procedures for the authorisation 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 recognise a right of innocent passage for warships (Franckx, 1989). By 1989, the dispute appeared to have been settled, as the United States and the Soviet Union exchanged notes confirming that both states recognised the right of innocent passage of warships, without prior authorisation or notification (Joint Statement, 1989). Although each state 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 Soviet territorial waters of the Black Sea (Lowe, 1991), as it had been doing as part of its Freedom of Navigation Program (Juda, 1990).

The fact that the Soviet Union and the United States agreed that warships do have a right of innocent passage in the territorial sea will significantly bolster arguments that customary international law recognises such a right, but the issue is far from settled. There are still many coastal states that for reasons of national security would like the authority to exclude warships from the territorial sea and that do not share the major maritime powers' interests in unfettered freedom of navigation. China, for instance, when ratifying the 1982 Convention, declared that the LOSC provisions concerning innocent passage through the territorial sea "*shall not prejudice the right of a coastal state to request, in accordance with its laws and regulations, a foreign state to obtain advance approval from or give prior notification to the coastal state for the passage of its warships through the territorial sea of the coastal state*" (Chinese Statement, 1996).

If in the final analysis a distinction is drawn between warships and commercial vehicles in defining navigation rights in the territorial sea, it will be of particular significance to Arctic waters that Coast Guard vessels appear to qualify as warships under the terms of the LOSC (1982: article 29), even if it may have been arguable that they did not so qualify under the somewhat narrower wording of the analogous provision of the High Seas Convention (1958: article 8(2)) (Nanden *et al.*, 1993: 252; see also section 7.2.4, below, for some practical implications of this).

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 Territorial Sea Convention and the LOSC. As to legislative competence, the LOSC has taken a restrictive view of the coastal state's prescriptive authority over the innocent passage of ships transiting the territorial sea, listing specific categories of laws and regulations that the coastal state may adopt pertaining to the passage of the vessel through the territorial sea: navigational safety; protection of navigational aids, cables, and pipelines; conservation of living resources; environmental protection; scientific research; and preventing infringement of fisheries, customs, immigration, and sanitary laws (article 21). To be sure, article 21 does not limit the prescriptive jurisdiction of the coastal state, which may, for example, still declare homicide on a foreign ship in the territorial sea to be murder, or prohibit gambling or prostitution, though the coastal state's enforcement jurisdiction will be limited if the vessel remains in innocent passage. A vessel's violation of coastal-state regulations authorised by article 21 may not only be criminal according to local law but may render the passage non-innocent, subjecting the vessel and those aboard to prosecution for the violation not only of those regulations but of other criminal laws as well.

As to the coastal state's enforcement jurisdiction over crimes committed aboard a ship that remains in innocent passage through the territorial sea, the LOSC 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, when it is the kind of crime that disturbs the peace of the country or the good order of the territorial sea, when the coastal state's assistance has been requested by the ship's master or the flag state's consul, or when drug trafficking is involved (LOSC, 1982: 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 and must provide lighthouses, rescue facilities, and other basic navigational services (*Corfu Channel Case*, 1949; LOSC, 1982: article 24(2); TSC, 1958: article 15(2)).

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.

Under the LOSC, when a strait used for international navigation falls entirely within the territorial seas of one or more states, the right of innocent passage is replaced by a right of transit passage, which affords greater navigational freedom to maritime states and imposes greater restrictions on the exercise of jurisdiction by the coastal states. Transit passage represents a significant departure from prior customary international law and the Territorial Sea Convention. This is discussed in more detail in section 5.<sup>13</sup>

#### 4.2.4 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); the LOSC, reflecting the permissible extension of the Territorial Sea out to 12 miles, allows a contiguous zone out to 24 miles (article 33(2)).

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

<sup>13</sup> Generally on the territorial sea, see O'Connell, 1982, ch. 3-5; Churchill and Lowe, 1988: ch. 4.



contiguous zone, and some states have claimed jurisdiction to enforce interests not mentioned by the conventions, primarily security.<sup>14</sup>

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 LOSC, the contiguous zone is a part of the EEZ, in which no such presumption exists, a situation that may facilitate the extension of coastal-state legislative jurisdiction into the contiguous zone.<sup>15</sup>

#### 4.2.5 Exclusive economic zone

The EEZ, which may extend up to two hundred miles from the baseline, enjoys its own legal regime, separate from that of the territorial sea and the high seas. In the EEZ, the coastal state may assert sovereign rights over the exploration, exploitation, conservation, and management of 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)).<sup>16</sup> Other states have freedom of navigation and overflight and of laying submarine cables and pipelines (LOSC, 1982: article 58(1)), and, in general, the rights that pertain to the high seas to the extent that they are not incompatible with the regimes of the EEZ (LOSC, 1982: article 58(2)). The nature and extent - and even the name - of the EEZ vary from state to state, and the details are specified in national legislation, which must be consulted in each case. The United States, for example, has designated the 'exclusive economic zone' (Proclamation 5030, 1983); the Soviet Union, the 'economic zone' (Edicts of 1984); Canada, the 'fisheries zone' (Fishing Zones of Canada (Zones 1, 2, and 3) Order, 1970; Fishing Zones of Canada (Zones 4 and 5) Order, 1976).<sup>17</sup> Most states claim the maximum allowable 200 miles, but this too may vary, particularly when a 200-mile claim would overlap a claim by a coastal state on an opposite shore, in which event the boundary is determined through negotiation<sup>18</sup> or litigation.<sup>19</sup>

<sup>14</sup> See, e.g., Arctic Waters Pollution Prevention Act (AWPPA, 1970), in which Canada claimed jurisdiction to regulate navigation in Arctic coastal waters up to 100 miles offshore.

<sup>15</sup> Generally on the contiguous zone, see Churchill and Lowe, 1988: ch. 7.

<sup>16</sup> On the distinction between sovereignty and jurisdiction, generally, see Jennings and Watts, 1992: 457; Max Planck Institute, 1987: 277-283, 397-418. On the distinction as drawn in the UNCLOS III negotiations, see Nandan *et al.*, 1993: 525-544, para. 56.1-56.11(g).

<sup>17</sup> While the designated names may appear to suggest something of the character of the claim, this is probably misleading. Between the United States' exclusive economic zone and what is now the Russian economic zone, there is no significant difference. Canada's fisheries zone may appear to be a less comprehensive claim by restricting the assertion of sovereign rights to fish, but most sedentary fisheries and non-living resources are covered by claims to the continental shelf. Furthermore, it has been suggested that a fishery zone may actually represent a broader claim in that it may not entail obligations under the LOSC to ensure the preservation and optimal utilisation of fishery resources in an EEZ (Jennings and Watts, 1992: 804). It is worth noting that the Canadian claims to the fishing zones were proclaimed in 1970 and 1976, before the concept of the EEZ had been agreed in the UNCLOS III negotiations.

<sup>18</sup> For example, the maritime boundary between the Soviet Union and the United States was negotiated and ratified in 1990 (Soviet-US Maritime Boundary Agreement, 1990).

<sup>19</sup> For example, the Atlantic maritime boundary dispute between Canada and the United States was submitted to a chamber of the International Court of Justice (Gulf of Maine Case, 1984).

In its present form, the EEZ was created by the LOSC, 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.<sup>20</sup> Its principal effect has been to give coastal states exclusive rights to the fish and hydrocarbons situated off their shores. Its primary relevance to the Russian Arctic straits (other than as an exception to the transit-passage regime) is the jurisdiction granted to coastal states over the protection and preservation of the marine environment. If the Northern Sea Route does attract a significant volume of foreign commercial shipping, the additional traffic is likely to threaten the sensitive environment of the Arctic Ocean (see Brubaker, 1993: ch. 8). Jurisdiction over the marine environment of the EEZ will enable Russia to regulate shipping beyond its territorial sea in a way that probably would have been impermissible prior to the LOSC. Of special importance is article 234 of the LOSC,<sup>21</sup> which grants coastal states the right to enact and enforce special regulations for the control of marine pollution in ice-covered areas within the EEZ, where the ecological balance is recognised as particularly sensitive (LOSC, 1982, article 234; Dunlap, 1995; McRae, 1987; McRae and Goundrey, 1982).<sup>22</sup> The relationship between the straits regime and article 234 is not entirely clear, but it seems likely that, in the event of a conflict, the straits regime would prevail (Brubaker 1995: IV-1-2).

#### 4.2.6 High seas

The LOSC defines the high seas as “*all parts of the seas that are not included in the EEZ, 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 the high seas (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 unauthorised broadcasting (LOSC, 1982: article 109). In fact, the conventions, in the provisions just cited, impose an

<sup>20</sup> The modern movement towards ocean enclosure can be seen as having been started by the United States, with the issuance of the Truman Proclamation and its claim of national jurisdiction over the continental shelf and nearby high-seas fisheries (Truman Proclamation, 1945).

<sup>21</sup> The Soviet Union, in 1984 and in 1990, enacted significant legislation to prevent and regulate pollution in the exclusive economic zone, with references throughout to the protection of ice-covered marine areas (Edicts of 1984; Decree of 1990). These were enacted before the 1982 convention entered into force, and the Soviet Union had not (Russia still has not) ratified the convention, so strictly speaking the edicts were not predicated on article 234. Nevertheless, article 14 of the Edict on the EEZ dealt with ice-covered areas and was based, in large part, on the provisions of article 234 (Timtchenko, 1994: 196). It can be argued that the provisions of article 234 have become customary international law (see fn. 9, above, and accompanying text).

<sup>22</sup> Generally on the exclusive economic zone, see O’Connell, 1982, ch. 15; Churchill and Lowe, 1988, ch. 9.

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 vessels that have violated its laws in its territorial sea (LOSC, 1982: article 111(1); HSC, 1958: article 23), or in the EEZ or on the continental shelf (LOSC, 1982: article 111(2)).<sup>23</sup>

## 5. The Legal Regime of International Straits

Since early in the 19th century, when the maritime powers recognised the value of freedom of navigation on the high seas, the principal 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 within its territorial waters (Koh, 1982: 3).

### 5.1 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 to navigation. 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 them a major advantage in the enforcement of rules (Morris, 1987: 460), so that 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).

<sup>23</sup> Generally on the high seas, see Churchill and Lowe, 1988: ch. 11.

Indeed, as early as 1970, before UNCLOS III opened, the President of the United States had outlined a new oceans policy recognising 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 authorising 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)

## 5.2 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 exceed the critical width, so it is upon specialised rules of 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 worldwide adoption of the 12-mile territorial sea (Office of the Geographer, 1974; Harlow, 1967: 193-194).<sup>24</sup> This would have relegated foreign ships in these straits to the right of innocent passage, which is significantly more restrictive of ships’ movements and activities (Koh, 1982: 3-6).<sup>25</sup> 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 (LOSC, 1982: article 20; TSC, 1958:

<sup>24</sup> Various studies have identified as many as 130 straits that would cease to be high seas, and as few as 102 (Lay *et al.*, 1973: 885-891). One study identified 220 international straits (without regard to width) (W.Smith, 1973: app. 1). O’Connell, on the other hand, doubted that many of such straits identified as international meet the use requirements of the *Corfu Channel Case* (O’Connell, 1975: 97).

<sup>25</sup> In most parts of the territorial sea, the right of innocent passage could be suspended by the coastal state for security reasons (TSC, 1958 article 16(3)). In straits used for international navigation, however, the right was nonsuspendable, both in customary (*Corfu Channel*, 1949: 29) and conventional (TSC, 1958: article 16(4)) law.

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 authorisation of the coastal state. To be sure, the Territorial Sea Convention provided for innocent passage through internal waters, previously regarded as a part of the territorial sea or the high seas, that had been enclosed by straight baselines pursuant to article 4 (TSC, 1958: article 5(2)). Even this, though, would allow significantly less navigational freedom than the regime of the high seas.

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 behaviour 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: 28-29) 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."* (TSC, 1958: article 16(4)).<sup>26</sup>

### 5.2.1 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, and in so doing, through Albania's territorial sea. 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 ICJ, which, after some procedural disagreement, accepted jurisdiction. The United Kingdom alleged that the Albanian government either had caused the mines to be laid

<sup>26</sup> An analogous provision for nonsuspendable innocent passage is applied by the 1982 convention to certain straits that are not subject to the transit passage regime (article 45(2)).

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 ICJ 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 study, but the answer to the second forms the core of the discussion of the international-straits regime since 1949. The ICJ 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 authorisation of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an 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, 1949: 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 subsequent minesweeping operations, however, were found not to have been within the ambit of innocent passage. Further, the court rejected the British defence 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: firstly, its geographical situation and, secondly, 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, as applied to the Russian Arctic straits, in section 8.

### 5.2.2 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 judgement as to the innocence *vel non* of a particular passage (Maduro, 1980: 73). Further, despite the clear judgement of the ICJ that innocent passage applied to all vessels, the warships question 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 'authorisation or notification'. The question was not resolved explicitly by the 1958 convention. While both issues are of significance to Russia's Arctic straits, neither bears directly on the straits' legal status should they be used for international navigation.

### 5.3 International Straits in the LOSC

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, the delegates 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 LOSC retained the rule that passage is not innocent if "*prejudicial to the peace, good order or security of the coastal State*", but added the list of 12 categories of activities considered to be prejudicial (article 19). As there is no indication that the list is to be taken as exhaustive, and because of the vagueness of the final category ("*any other activity not having a direct bearing on passage*"), it is unlikely that the list can resolve all ambiguity. As for the warships problem, the LOSC 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” (Moore, 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).<sup>27</sup>

The drafters attempted to resolve the ‘creeping jurisdiction’ dispute as it affected straits by creating a new right of transit passage. Unknown in customary international law and created by the LOSC, 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 that includes 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; Friedheim, 1993: 84, 89). The regime assures access to straits enclosed by expanded territorial seas and internal waters, and transit passage is far more favourable to maritime states than is the relatively restrictive innocent passage (Robertson, 1980: 812).

### 5.3.1 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 or an exclusive economic zone” (article 38(2)). It differs significantly from innocent passage in that:

- it applies to overflights by aircraft as well as to navigation (ibid.);
- it may not be hampered or suspended (article 44); and
- 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 appears to mean that the rules of innocent passage take effect once a vessel engages in any unauthorised activity, permitting the coastal state to bar the vessel or to assume jurisdiction over the offending behaviour.

In addition, by reference to ‘normal modes’ of transit, article 39(1)(c) permits submarines to transit submerged. Reisman (1980: 71-75) argued early on that this was not unambiguous, but Moore and others have found that the language of the convention’s text undeniably establishes the right of submerged transit through straits (Moore, 1980: 95-102; Schachte and Bernhardt, 1993: 538-539; Nandan *et al.*, 1993: 343, 39.10(e)).<sup>28</sup> Friedheim agrees with the latter position, but adds an historical explanation of the phrase “normal modes of...transit” in article 39(1)(c): Transit passage applies to aircraft, surface vessels, and submarines. The first two have no optional modes of transit through a strait; submarines, on the other hand, may transit a

<sup>27</sup> See section 4.2.3, above.

<sup>28</sup> Nandan reinforces this interpretation with statements made by the United States delegation in the Second Committee, and by the failure of Greece’s attempt at the fourth session of UNCLOS III to require submarines to transit on the surface and to show the flag, unless otherwise authorised by the coastal state.



strait either on the surface or submerged. On the surface, they are low in the water, provide a small radar profile, and are not easily manoeuvrable, and thus pose a hazard to other surface vessels. For these reasons, Friedheim says, submarines are permitted to transit in their normal mode, submerged (Friedheim, 1993: 91).

Transit passage affords to the coastal state significantly more jurisdiction over foreign vessels than do the rules governing freedom of the high seas or EEZs 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 (article 42(1)(b)).

Now that the LOSC appears on the verge of widespread acceptance, it may be less important than it once was to ascertain whether the right of transit passage has been incorporated into customary international law. Nevertheless, until there is universal acceptance of the LOSC, there is always the possibility of a dispute involving a non-party to which the 1958 conventions or customary international law will apply, so the question of transit passage's legal status is a relevant one. The position that customary international law recognises the right of transit passage is held by the government of the United States (Schachte, 1993: 185-186), and the governments of the United Kingdom and France (Straits of Dover Declaration, 1988). A number of scholars acknowledge this possibility as well. This somewhat controversial question is discussed in section 4.1, above.

### 5.3.2 Conditions for applying transit passage

The LOSC 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:

- 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));
- waters of the high seas or an EEZ (article 35(b));
- straits in which passage is regulated by long-standing international conventions (article 35(c)); and
- straits through which there exists, in the high seas or an EEZ, 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):

- a strait between the mainland and an island of a state if, seaward of the island, there exists through the high seas or an EEZ 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)).

### 5.3.3 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 EEZ not with another part of the high seas or an EEZ 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 Russian 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 Russian internal waters, territorial sea, or EEZ, 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.<sup>29</sup>

## 6. 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 (illustrated in Appendix 2) 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;

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<sup>29</sup> There are major archipelagos in the Russian 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)

- its width, which determines whether it is capable of including a route of similar convenience through the high seas or an exclusive zone;
- if it separates an island from the mainland, whether there is a seaward route of similar convenience through the high seas or an EEZ; 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 for transiting the Northeast Arctic Passage or possibly becoming essential under certain conditions (Butler, 1978: 38-41).<sup>30</sup>

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 straits 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.

## 6.1 Barents Sea

**1. Proliv Kil'dinskiy (Kildin Strait)** (69°20'N, 33°59'E), 4½ 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 & 3. 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).

**4. Proliv Kostin Shar** (70°52'N, 53°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 Russia to draw a bay-closing line (Arctic Pilot, 4.10).

**5. 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).

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<sup>30</sup> The word 'essential' is not used here with a legal connotation, inasmuch as the importance of a strait to international navigation is not 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.

6. **Proliv Uzkiy** (71°19'N, 53°21'E), 5½ cables wide, 25 to 50 metres 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).
7. **Proliv Petukhovskiy Shar**, 2 to 3 cables wide and 5½ miles long, is between Ostrov Bol'shoy Olynyi and the southern side of Novaya Zemlya's Poluoostrov Rusanov (70°34'N, 56°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).
8. **Proliv Nikol'skiy Shar** (70°30'N, 57°13'E), ½-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 Poluoostrov Piritovyy on Novaya Zemlya. It is within the straight baselines that enclose Novaya Zemlya (Arctic Pilot, 3.125).

## 6.2 White Sea

The White Sea is a large bay opening into the Barents Sea between Poluoostrov Kol'skiy (Kola Peninsula) and Poluoostrov 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. The Gorlo ('throat', in Russian) is the only passage between the White Sea's southern basin 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.<sup>31</sup>

Nevertheless, this briefing does not survey the straits of the White Sea, for two reasons. First, the internationalisation of the Northern Sea Route entails 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, if internationally valid, 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 LOSC (or article 4 of the 1958 Territorial Sea Convention), the exceptions of articles 35(a) (transit passage) and 8(a) (innocent passage) in the LOSC, 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 EEZ, so the straits do not meet the section 37 condition for transit passage. The international validity of the closing line has not been established.<sup>32</sup> Nevertheless, because the White Sea straits are not on the route between the Atlantic and Pacific Oceans, they will not be catalogued further.

<sup>31</sup> The other six White Sea straits are Proliv Orlovskaya Salma, the principal approach from the Barents Sea, and, south of the Gorlo, Proliv Sosnovskaya Salma, Proliv Vostochnaya Solovetskaya Salma, Proliv Zapadnaya Solovetskaya Salma, Proliv Anzerskaya Salma, and Proliv Zhizhnginskaya (Butler, 1978: 15-17).

<sup>32</sup> The United States is believed to have objected to the closing line soon after it was announced. No objection had been officially published as of 1 January 1996, presumably because talks with the Russian government were continuing.

### 6.3 Linking the 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.

**9. Proliv Matochkin Shar** (73°20'N, 54°00'E), ½-mile wide, 55 miles long, and at least 11.9 metres 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 EEZ at each end, beyond the territorial sea (Arctic Pilot, 5.1).

**10. Proliv Karskiye Vorota (Kara Gates Strait)** (70°30'N, 58°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 EEZ 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 13½ miles, however, and if each islet were assigned its own baselines, it is likely that the territorial seas would overlap, eliminating the EEZ. Like Proliv Yugorskiy Shar, it is in internal waters with EEZ at each end beyond the 12-mile territorial sea (Arctic Pilot, 2.68).

**11. Proliv Yugorskiy Shar**, 5½ miles wide, about 21 miles long and at least 12 metres deep in the fairway, lies between Ostrov Vaygach and Poluostrov Yugorskiy on the mainland. The southwest entrance is between Mys Belyy Nos (69°36'N, 60°11'E) and Mys Greben', 5½ miles to the northwest. The northeast entrance is between Mys Yarossel' (60°51'N, 60°47'E) and Mys Belyy, 7½ 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. The strait 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, lies Russian EEZ, in the Barents Sea to the southwest and in the Kara Sea to the northeast (Arctic Pilot, 2.32).

### 6.4 Kara Sea

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

**12. Proliv Morozova**, ½ mile wide, separates the southeastern end of Ostrov Mestnyy (69° 51' N, 61° 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 metres deep, lies between the mainland and Sharapovy Koshki, a chain of sandy spits extending from Mys Porny-Salya (70°26'N, 66°59'E) about 40 miles north to Mys Kharasovoy. It is a textbook case for the

argument that in the Arctic there is no such thing as a seaward route of similar convenience: depths range between 2-3/4 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**, 4½ miles wide and 32 miles long, lies between Ostrov Belyy (White Island) (73°15'N, 70°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°35'N, 78°40'E), 22 miles wide and 3½ to 6½ 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 metres deep in the fairway, separates Ostrov Krestovskiy (72°26'N, 80°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 EEZ (Arctic Pilot, 11.236).

#### **6.5 Dikson Island Straits (in the Kara Sea)**

**17. Proliv Lena** (73°31' N, 80°28'E), 1 cable wide and 2.1 metres 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 EEZ, but its southern end leads to internal waters (Arctic Pilot, 11.147).

**18. Proliv Vega** (73°28'N, 80°29'E), at least 10 metres 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).

**19. Proliv Preven** (73° 31' N, 80° 30' E), 15.8 metres 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 harbour 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).

## 6.6 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).

**20. Proliv Dubravina** (74°24'N, 85°12'E), 2 miles wide and 20 to 26 metres deep in the fairway, separates Ostrov Kosterina from Ostrov Severnyy Karzar (Northern Karzar Island) (Arctic Pilot, 13.121).

**21. Proliv Glubokiyy** (74°26'N, 85°41'E) is narrow and 10 to 13 metres 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).

**22. Proliv Iney** (74°50'N, 86°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).

**23. Proliv Stalintsa (Stalinets Strait)**, 7 cables wide and at least 11 metres deep, separates the northeastern group, including Ostrov Kolosovykh (74°55'N, 86°40'E) from the mainland. The strait is so far within the straight baselines that any similarly convenient seaward route will be within internal waters. It is the last of the four straits of the Shkhery Minina to be discussed here (Arctic Pilot, 13.188).

**24. Proliv Frama (Fram Strait)**, 1¼ miles wide and generally deep but less than 11 metres at points, separates the south side of Ostrov Nansena (Nansen Island) (76°12'N, 94°57'E) from Poluoostrov 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).

**25. Proliv Sverdrup**, not surveyed but known to be deep and clear of known dangers in the fairway, lies between Ostrov Nansena and Ostrov Boney (76°10'N, 95°00'E). It lies within the straight baselines of Arkhipelag Nordenshel'da (Arctic Pilot, 14.30).

**26. Proliv Zarya** (76°10'N, 95°00'E) 1½ miles wide and 10 to 15 metres deep in the fairway, lies between Ostrov Boney 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).

**27. Proliv Palander**, 2¼ miles wide and 38 to 49 metres deep in the fairway, separates Ostrov Boney and Ostrov Nansena on the west and Ostrov Taymyr (76°17'N, 95°22'E) on the east. It lies within the straight baselines of the Arkhipelag Nordenshel'da (Arctic Pilot, 14.41).

**28. Proliv Matisena** lies between Ostrov Pilota Makhotkina (76°22'N, 96°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 metres deep in the fairway. It is within the straight baselines that enclose the archipelago (Arctic Pilot, 14.76).

**29. Proliv Toros** (76°19'N, 96°29'E), unexamined but known to be about 16 miles long and 1 to 2 miles wide with depths of about 20 metres, 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).

**30. Proliv Vostochnyy**, 1 mile wide, 6 miles long, and at least 8.8 metres deep in the fairway, lies between Ostrov Pilota Makhotkina and Mys Kamen' (76°17'N, 96°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).

### **6.7 Linking the 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 (Vilkitskiy Strait)** (77°23'N, 102°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 or EEZ at least 6 miles wide (Arctic Pilot, 2.132).

**32. Proliv Shokal'skogo (Shokalskiy Strait)** (77°55'N, 99°33'E), 10½ 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 Revolyutsiy (October Revolution Island). It is within the baselines that enclose Severnaya Zemlya (Arctic Pilot, 2.156).

**33. Proliv Krasnoy Armii (Red Army Strait)** (79°40'N, 93°00'E), 1½ 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 Pioner (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 Yungshturm**, unexamined but known to be 3 miles wide at its narrowest and 30 miles long, separates Ostrov Pioner (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).

### **6.8 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 metres. 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 metres. It is enclosed by straight baselines; the convenience of the seaward route depends upon ice conditions (Arctic Pilot, 15.37).

## 6.9 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 Sannikova - 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 metres. 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 EEZ, 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 EEZ despite the 30-mile width (Arctic Pilot, 2.221).

**39. Proliv Zarya** (75°36'N, 136°35'E) is 10 miles wide and 18 to 22 metres deep on the eastern side, 10 to 15 metres 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).

**40. 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 EEZ at least a mile wide running through the centre 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 sea 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 metres. Relative ice conditions, of course, are unpredictable (Arctic Pilot, 16.59).

## 6.10 East Siberian Sea

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

**41. An unnamed strait (the Kolyma River strait),** of unknown width and 7.3 metres depth 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 EEZ would have to go around the north and east of all six islands (Arctic Pilot, 16.94).

**42. Proliv Melyokhov,** width unknown and 9 metres 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).

## 6.11 Linking the East Siberian and Chukchi Seas

**43. Proliv Longa (Long Strait),** 75 miles wide, lies between Ostrov Vrangelya (Wrangel Island) (71°20'N, 179°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 EEZ 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).

## 7. Russian Jurisdiction over the Arctic Straits

By and large, the legal status of a strait used for international navigation can be determined rather straightforwardly by identifying the maritime zone in which it is located, through reference to national legislation establishing baselines and zones (particularly the 12-mile territorial sea), though some analysis may be required to ascertain whether the claims set forth by the legislation comport with international law. The relevant Soviet legislation is described briefly in section 7.1.

For those straits enclosed by straight baselines drawn pursuant to article 7 of the LOSC or article 4 of the Territorial Sea Convention, 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 LOSC 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 are discussed in section 7.2.

## 7.1 Soviet and Russian 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, 1971a: 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 (Law on the State Boundary, 1982: article 5). The qualifying phrase had tracked the language of the 1958 Territorial Sea Convention; its elimination, in Pharand's phrase, gave the Soviet Union *“considerable latitude as to where such lines may be used”* (Pharand, 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, 1971a: 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, 1993: 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 LOSC and are thus valid as a matter of international law (Franckx, 1993: 366). Butler has reprinted the list of baselines in English translation, stressing that Notices to Mariners does not have the status of an official gazette and that it often contains abridged or summarised notices (Butler, 1986).

## 7.2 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 study, these waters 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. First, however, brief mentions of two much-discussed theories that have played no official role in the legal status of the waters of the Northern Sea Route.

### 7.2.1 The sector principle

Although for many years Soviet commentators attempted to base jurisdiction over the waters of the Northern Sea Route in the so-called 'sector principle', it has never been asserted by the Soviet or Russian government to claim jurisdiction over maritime areas and therefore does not affect the outcome of this analysis. The 'sector principle' attempts to justify claims of national sovereignty over the area north of a state's territorial boundaries by positing a series of pie-shaped wedges bounded on the east and west by meridians of longitude converging at the North Pole (Roth, 1990: 857). It was originally put forward by a Canadian legislator in 1907 as a means of assuring Canadian sovereignty over the Canadian Arctic archipelago. The Canadian government never relied on the principle, though it gained some popularity among legal commentators and the press; some Canadian governments went so far as to publish maps showing the eastern and western boundaries of Canada as the meridians of 60°W longitude and 141°W longitude, respectively, extending north to the pole (Pharand, 1989: 151).

In 1926, however, the Soviet Union did apply the sector principle, without mentioning it by name, in the decree entitled *On Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR* (Decree of 1926).<sup>33</sup> By its own terms, the decree concerned only land and islands and did not purport to assert sovereignty or jurisdiction over maritime areas. Nevertheless, the sector principle and the 1926 decree have been put forward as bases for claiming jurisdiction over maritime areas, but only by individual politicians and legal commentators (e.g., Machowski, 1992: 167; Vyshnepolski, 1952: 40), never by a government.<sup>34</sup> The sector principle provides no basis in international law or in Soviet/Russian law for a claim of jurisdiction over the maritime areas of the Northeast Passage.

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<sup>33</sup> "All lands and islands, both discovered and which may be discovered in the future, which do not comprise at the time of publication of the present decree the territory of any foreign state recognised by the Government of the USSR, located in the Northern Arctic Ocean, north of the shores of the Union of Soviet Socialist Republics up to the North Pole between the meridian 32°04'35"E. long. from Greenwich, running along the eastern side of Vaida Bay through the triangular marker on Cape Kokurskii, and the meridian 168°49'30"W. long. from Greenwich, bisecting the strait separating the Ratmanov and Kruzenstern Islands of the Diomedea group in the Bering Sea, are proclaimed to be territory of the USSR" (Decree of 1926).

<sup>34</sup> For a brief review of the role of the sector principle in Soviet legal literature and its apparent decline in Russian law and practice, see Timtchenko, 1994: 194.

### 7.2.2 Ice as territory

Another theory put forward by jurists but never accepted in international law or adopted by the Soviet/Russian government equates ice, particularly fast ice, with land and incorporates it into the territory of the state. In 1905, Martens rejected the equation of ice with dry land, and argued that even if the Kara Sea was closed by ice for nine months a year, other states might be interested in using the sea during the navigation season. After that, however, a number of prominent Soviet jurists argued that permanent ice adjacent to Arctic lands and islands was inseparable from the land and should serve as the baseline for measuring the territorial sea. Nevertheless, Timtchenko reports that recent Soviet and Russian commentators have adopted the Martens position, which comports with international law (Timtchenko, 1994: 194).

### 7.2.3 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. While it is clear that historic waters are regarded as internal waters, and subject to state sovereignty, it is not so clear which waters may be so classified. According to O'Connell, the doctrine has three elements: effectiveness of control, effluxion of time, and the attitude of other states (O'Connell, 1982: ch. 11, esp. 427-435). Pharand has interpreted this to mean that there must be:

*"1. exclusive authority and control over the maritime area claimed, including the expulsion of foreign ships if necessary; 2. long usage or the passage of a long period of time, the length of the period depending on the circumstances; and 3. acquiescence by foreign States, particularly those clearly affected by the claim."* (Pharand, 1988: 105).

Soviet jurists defined historic waters as those having special economic or strategic significance for the coastal state, or having been established by historical tradition, or, more recently, having special geographic conditions (Butler, 1971b: 107). The difficulty arises in the application of the factors and in the fact that Soviet jurists frequently classified seas in different ways. The White Sea, for example, has been described as a closed sea, an internal Russian sea, an historic bay, and an historic sea; in 1969, it was classified as a "*sea of the bay type*" (Butler, 1971b: 107-108).<sup>35</sup>

Neither the Soviet Union nor Russia has ever claimed any of the Arctic seas as historic waters, though Soviet legal writers consistently made such claims as recently as the 1980s (Timtchenko, 1994: 195).<sup>36</sup> There is, however, some evidence of claims to historic straits, but the claims tend to be vague as to their basis and content (Alexander, 1987a: 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

<sup>35</sup> A 'sea of the bay type' is encircled by the coast of a single state but connected to the ocean by a strait or canal, and has been regarded by some Soviet jurists as internal waters (Butler, 1971b: 106).

<sup>36</sup> P. Odnozov regarded the Kara, Laptev, and East Siberian Seas as historic waters of the Soviet Union. F. Boitsov and V. Meshera added the Chukchi Sea. See Russian-language works cited at Timtchenko, 1994: 195.

Coast Guard icebreaker *Northwind* through Proliv Borisa Vil'kitskogo, the Soviet Union reportedly relied on a claim of 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 Sannikov 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.”*<sup>37</sup>

Between that time and the dissolution of the Soviet Union, a fairly substantial body of literature advocating the inclusion of historic seas and historic straits in Soviet internal waters emerged. The most extensive analysis of straits was that of P.D. Barabolia, who identified five categories: straits leading to internal seas or bays and constituting internal waters, historic straits, archipelagic straits, straits leading to closed seas, and 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 defence 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 authorisation of the coastal State.”*<sup>38</sup>

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

<sup>37</sup> Butler, 1978: 86, quoting and translating Barabolia *et al.* (1966: 289). The original cites *Izveshcheniia moreplavateliam*, no. 31, 1965, p. 10. Butler goes on to note that in 1965, a substantial monograph by Soviet naval lawyers made no mention of claims to historic straits (Barabolia *et al.*, 1965).

<sup>38</sup> Butler, 1978: 87, quoting and translating P.D. Barabolia (1972) ‘*Problemy ispol'zovaniia mezhdunarodnykh proliviv*’, in M.I. Lazarev and L.V. Speranskaia (eds.) (1972) *Okean, Tekhnika, Pravo*, Moscow, p. 17. For reviews of the literature, see Butler, 1978: 86-87; Franckx, 1989: 482-499. The 1982 Convention includes an analogous, but somewhat broader, provision that, fairly unambiguously, includes Coast Guard vessels by referring to “*armed forces*” instead of “*naval forces*” (LOSC, 1982: article 29; see Nanden *et al.*, 1993: 252)

miles, respectively (Pharand, 1988: 108).<sup>39</sup> 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) and approved by Soviet scholars (Butler, 1972: 418). 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 at least one legal scholar has concluded that the Soviet Union successfully enforced the claim (Pharand, 1988: 107). The United States is believed to have lodged protests specifically against the 1985 claims of the White Sea, Cheshskaya Bay, and Baidaratskaya Bay, and talks are apparently continuing over the extent to which Russia's deviation from the 24-mile norm established by the LOSC will be regarded as acceptable by the international community.

As the Soviet government never formally claimed the Arctic seas themselves as historic waters, Franckx argues that the claims to the three bays as historic waters establishes conclusively that the Soviet government did not regard the Kara, Laptev, East Siberian, and Chukchi Seas to be historic internal waters (Franckx, 1993: 185). A review of Soviet efforts to exercise jurisdiction there will provide further evidence of the official Soviet view of the status of those waters.

#### 7.2.4 Soviet and Russian practice in the Arctic Seas

If the Soviet government regarded the Arctic seas as historic internal waters of the Soviet Union, it could 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 did not do 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, *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; taking the cores could be regarded as a violation of the 1958 Continental Shelf Convention (CSC, 1958) (Pharand, 1988: 107-110).<sup>40</sup> Butler asserted in 1971 that the voyages of American icebreakers into the polar seas confirmed that as a matter of state practice the Soviet Union treated them as open seas (Butler, 1971b: 115).

In 1967, two United States Coast Guard icebreakers, *Edisto* and *Eastwind*, 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 Proliv Borisa Vil'kitskogo, 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).

<sup>39</sup> For maps of the closing lines, see Scovazzi, 1988: 39, 40.

<sup>40</sup> "The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf and undertaken there" (CSC, 1958: article 5(8)).

The text of the radio message received by the icebreakers from the USSR 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 Proliv Borisa Vil’kitskogo 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 (Hockin and Brennan, 1976: 107; Pharand, 1988: 107-110; Butler, 1978: 125).<sup>41</sup> It has also been suggested that the Soviet case was based on *“the fact that the straits had not been used much for international traffic”* (O’Connell, 1982: 317-318).

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).

Western legal observers have suggested that much of the ambiguity surrounding the official Soviet and Russian positions may be intentional, and that United States naval activity in the Arctic may have been designed in part to compel the Soviet Union to clarify its position on navigation of the Northeast Passage (Franckx, 1993: 193-194; Luton, 1986: 414; Dosman, 1976b: 39).

### 7.2.5 National transport route

In 1985, when another United States Coast Guard icebreaker, *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 (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 lies seaward of the customary baselines. In *Anglo-Norwegian Fisheries* (1951: 132), the ICJ declared Norway’s 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”*, thus

<sup>41</sup> *“[T]he term ‘warship’ means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.”* (HSC, 1958: article 8(2)). This definition appears in a context different from that in which the Soviet Union may have been applying it; nevertheless, it may be useful in ascertaining the Soviet motives in refusing passage.



sanctioning Norway's enclosure of the entire route by straight baselines. Canada has similarly enclosed its Arctic archipelago by straight baselines, even though the archipelago's configuration, unlike that of the Indreleia, bears no similarity to the "*fringe of islands along the coast*" that appears to be a condition of straight baselines in the 1958 and 1982 conventions (TSC, 1958 article 4(1); LOSC, 1982, article 7(1)). Furthermore, Canada's claim may violate the requirement that the straight baselines "*must not depart to any appreciable extent from the general direction of the coast*" (TSC, 1958: article 4(2); LOSC, 1982, article 7(3)). Pharand has, nevertheless, argued 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 (Pharand, 1988).<sup>42</sup> It is not surprising, then, that Soviet jurists 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 Russia to make such a claim official.

Except for the straight baselines enclosing the three major Arctic archipelagos, the straight baselines enclosing most of the Northern Sea Route arguably meet the requirements of the *Anglo-Norwegian Fisheries Case* and the two conventions. Those enclosing Novaya Zemlya, Severnaya Zemlya, and Ostrova Novo Sibirskiy appear to face the same objections as the straight baselines that enclose much of the Canadian Arctic archipelago.

The argument that the Northern Sea Route is a national transport route is not new, as it dates back at least to 1582, when Russia granted to English merchants exclusive trading privileges around the Arctic mouths of some Siberian rivers. Between 1616 and 1620, Tsar Ivan IV promulgated four edicts forbidding commercial navigation in the Kara Sea. It was more than three centuries until foreign governments protested the regime that the Russians had claimed in the Kara Sea (Butler, 1971b: 113).

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 Russian maritime boundaries into the high seas or EEZ affect Russian 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 recognised. 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."* (Kolodkin and Volosov, 1990: 164).

<sup>42</sup> Pharand's argument on the Arctic character of the straits and islands may be strengthened by article 234 of the LOSC and the enhanced jurisdiction it grants to Arctic coastal states over navigation in ice-covered areas.

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 national 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 judgement 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 emphasised that the positive reply of the ICJ with respect to Norway is fully applicable to the USSR.”* (Kolodkin and Volosov, 1990: 166).

Kolodkin and Volosov go on to advance a separate argument, but with little legal foundation, that there should be no right of innocent passage through the many straits that were incorporated into Soviet internal waters through the drawing of straight baselines, making an analogy to Canadian claims in the Northwest Passage (Pharand, 1988: 223-229). They fail to note, however, 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 ratified the convention, was, and Russia is, bound by article 5(2), which retains the right of innocent passage through waters enclosed by straight baselines but previously considered to be high seas or territorial sea (Franckx, 1993: 185).

Butler wrote in 1971 that the strongest argument for Soviet jurisdiction was the coastal nature of the route. According to Vyshnepol'skii, the decisive criteria for determining the coastal nature were not merely the oceans and basins through which the route passed, but also the nature of the usage, the destination of cargo, and the initial and final ports of destination of the vessels plying the route. Applying these standards, Vyshnepol'skii concluded that the Northern Sea Route was a coastal route (Butler, 1971b: 113, citing Vyshnepol'skii, 1953: 52-53).

From this viewpoint, the Soviet and Russian efforts to internationalise the route may serve to confirm, rather than weaken, jurisdiction over the route. Soviet jurists have attributed Soviet sovereign rights to the *“economic, administrative, and scientific activities carried on by the USSR in the northern Polar Basin, to the opening of the northern sea route, to the exploration and discoveries in polar seas by Russian navigators and explorers, and to the historical traditions based on these factors”*. A.K. Zhudro argued that the agreement of foreign vessels under contract to Soviet foreign trade organisations to follow navigation instructions transmitted to them while in Arctic waters indicated the acceptance of Soviet authority and constituted the establishment of a generally recognised international custom (Butler, 1971b: 114).

Butler has suggested that the 1967 effort to attract foreign shipping was an attempt “to accentuate the sovereign authority of the USSR over the northern sea route” (ibid.). If this is the case, the promulgation of the NSR Regulations (1991) is another such effort. The Regulations assert very strict control over navigation in the Russian Arctic seas, requiring advance requests for permission to transit (§ 3), “special requirements” for vessels (§ 4), the assignment of a state pilot to assist an inexperienced master in leading the vessel (§ 4), proof of financial security for satisfying any civil liability for pollution damage (§ 5), and submission to inspection of the vessel, cargo, and documents when unfavourable conditions endanger a vessel or there is a threat of pollution (§ 6). In addition, icebreaker-assisted pilotage is made compulsory in Proliv Borisa Vil’kitskogo, Proliv Shokal’skogo, Proliv Dmitriya Lapteva, and Proliv Sannikova; in other areas, Marine Operations Headquarters may prescribe, depending upon conditions, shore-based pilotage, aircraft-assisted pilotage, conventional pilotage, icebreaker leading, or icebreaker-assisted pilotage (§ 7.4). In all cases, vessels are required to follow assigned routes and route corrections issued in response to changes in ice conditions and other circumstances affecting safety or the environment (§ 7.2-7.3). If foreign vessels routinely adhere to these regulations, it is likely that Zhudro’s assertions will resurface in support of the national-transport-route argument.

### 7.3 Summary

The Russian 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 were internal waters, the Soviet government never claimed them as historic waters, and Soviet practice in the region was not consistent with their having been internal waters before their enclosure. Soviet commentators have suggested that the entire Northern Sea Route should be regarded as a national transport route under coastal-state jurisdiction, but this has not been Soviet or Russian 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.

## 8. Transit Passage in the Russian Arctic Straits

To summarise the conditions of transit passage described in section 5, transit passage applies to a strait used for international navigation

1. between one part of the high seas or an EEZ and another part of the high seas or an EEZ, 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 EEZ, 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 EEZ, 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 EEZ 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 Russian internal waters, territorial sea, or EEZ, article 45(1)(b), (2) does not affect the analysis.

## 8.1 Conditions of Applying Transit Passage

The following review discusses each of the five requirements and identifies the Russian Arctic straits to which they apply.

### 8.1.1 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* judgement:

*“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 LOSC 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 EEZ:

*“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, emphasis added).

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 EEZs (article 37), but nonsuspendable innocent passage for straits connecting high seas or an EEZ 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 conditions 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 EEZ (see Appendix 2, inset 4). Is a strait in this situation being used for navigation between two parts of the high seas or EEZ? Without analysing 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 Vil’kitskogo, Shokal’skogo, Krasnoy Armii, and, arguably, Yungsturm, in Severnaya Zemlya; and Dmitriya Lapteva and Sannikova, in Ostrova Novo Sibirskiy.<sup>43</sup>

A more problematic situation arises when a strait lies well within straight baselines (see Appendix 2, inset 3). 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 internal waters. While the strait might well be used by a ship going from one part of the EEZ to another, it has to pass through internal waters at both ends of the strait. The question is whether 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.

Twenty-four 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 EEZ, though passing through territorial sea. In the latter case, the route could remain in internal waters as long as the straight baselines continue 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 (see Appendix 2, inset 2). A ship transiting the strait may, but need

<sup>43</sup> Proliv Yungsturm’s situation is doubly ambiguous, as it forms one of the arms of a ‘Y’-shaped configuration, with Proliv Krasnoy Armii as the base and the other arm. Maps therefore depict Proliv Yungsturm as connecting the Kara Sea with the territorial waters of Proliv Krasnoy Armii. Given the absence of a definition of ‘strait’ in the LOSC and the arbitrary nature of denominating them, it seems appropriate to treat Proliv Yungsturm as connecting the EEZs of the Kara and Laptev Seas.

not, leave internal waters immediately by passing through the territorial sea on the way to the EEZ. This is the situation of Proliv Kil'dinskiy, Proliv Mod, and Proliv Murmantsa and at one end of Proliv Lena and Proliv Preven.

### 8.1.2 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 EEZs 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 EEZ, or the high seas; if the newly enclosed waters constitute a strait used for international navigation, then Part III of the LOSC 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 neither to innocent passage nor to 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 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, if the closing line is eventually recognised as internationally valid.

At three of the four boundaries between the Russian 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 across 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 neither the Soviet Union nor Russia has ever 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 (Vilkitskiy 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 would not block through traffic in the way closing the inter-sea archipelagic straits would do. Ice conditions permitting, these straits can be bypassed.

In short, except for Proliv Zarya, Proliv Melyokhov, the unnamed strait at Reka Kolyma, Proliv Blagoveshchenskiy, and Proliv Longa, article 35(a) applies to every strait under consideration.<sup>44</sup> Nevertheless, as section 7's survey of boundaries and jurisdictional claims makes reasonably clear, none of the straits under consideration is in historic waters or has otherwise been previously classified as internal waters; having thus been newly enclosed, they are not excluded by article 35(a) from the LOSC's international-straits regime.

### 8.1.3 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 hydrographical 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)).

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<sup>44</sup> All five of the exceptions are in the territorial sea, and the last two have belts of exclusive economic zone running through them as well.

A route in the high seas or an EEZ will exist through a strait when, through the entire length of the strait, the territorial seas generated by the land on each side of the 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 EEZ 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 EEZ might also occur in straits narrower than 24 miles, 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 EEZ 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 would retain greater authority over the waters it had so claimed. 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 EEZ (Alexander, 1987b: 482), but this appears to have been due to territorial sea claims made before the LOSC approved the 12-mile limit. Since that time, Japan, by way of example, has limited its territorial sea in five straits, thus creating corridors of similar convenience through the EEZ down the middle of the straits (Schachte and Bernhardt, 1993: 536).<sup>45</sup> The width of the territorial sea in the Russian Arctic straits has not been modified 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 EEZ must be “*of similar convenience*”. Even in non-Arctic waters, where depth is the critical, but reasonably stable, parameter of convenience, this issue is much more complex than it first seems. 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 vessel. Consider a strait with a relatively shallow belt of high seas or EEZ at the centre, and a much deeper fairway towards one side in the territorial sea. It is conceivable that a tramp steamer drawing 15 feet and finding the high-seas route to be of similar convenience would thus be entitled only to innocent passage in the territorial sea, while a supertanker drawing 55 feet and unable to use the shallower high-seas route would thus be entitled to transit passage in the deeper territorial sea (Langdon, 1990). An influential and persuasive commentary confirms this unambiguously in the affirmative, concluding that vessels with radar or elevated navigational bridges might be able to navigate safely beyond the 12-mile limit and thus might be required to do so, while a vessel without radar or with a lower profile that prevented it from seeing shore navigational aids might be entitled to exercise the right of transit passage (Nandan et al., 1993: 315, para. 36.7(b)).

In the Arctic seas, it is far less likely than in more southerly oceans that routes of similar convenience will exist in any consistent and predictable 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 are 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

<sup>45</sup> E.g., in the Tsugara Strait, between Hokkaido and Honshu, Japan has claimed a territorial sea of three miles on each side of the strait, but has claimed 12 miles in the Pacific Ocean to the east and in the Sea of Japan to the west, at either end of the strait. For a map, see Schachte and Bernhardt, 1993: 551.



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 being subject to a right of 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), Sannikova (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 EEZ, as the others are entirely enclosed by straight baselines. If the straight baselines enclosing Severnaya Zemlya and Ostrova Novo Sibirskiy are found not to be internationally valid, then all five straits will contain belts of EEZ.

#### 8.1.4 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 EEZ, 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 the Strait of Messina, between Sicily and the Italian mainland (Schachte and Bernhardt, 1993: 541), and Pemba Channel, between Pemba Island and the Tanzanian mainland (Nandan et al., 1993: 328-329, para. 38.8(a)).

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 are unpredictable. The Arctic problem aside, the convention offers little guidance as to standards, such as minimum width or depth, for determining similar convenience (Alexander, 1987a: 336).

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

- In the Barents Sea, Proliv 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, though 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  $2\frac{3}{4}$  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 Krestovskiyy, between Ostrov Krestovskiyy 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 Nansen and Poluostrov Yeremeyeva; 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 Borisa Vil'kitskogo between Ostrov Bol'shevik and Poluostrov 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 Dmitriya Lapteva, between Ostrov Bol'shoy Liakhovskiyy and the mainland, and in the East Siberian Sea is the unnamed strait (Kolyma River strait) between Ostrov Krestovskiyy 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 Russian Federation, then Proliv Longa 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 has been described as unclear, because of arguable claims to sovereignty by Canada, the United Kingdom, and the United States, the island has been under Soviet/Russian administration since 1924, and there appears to have been at least a *de facto* acceptance of Soviet control (Westermeyer and Shusterich, 1984: 256-260).<sup>46</sup>

### 8.1.5 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).*

<sup>46</sup> As recently as 1991, United States Senator Jesse Helms announced that his vote in favour of the Soviet Maritime Boundary Agreement was predicated upon his understanding, and assurances from the Department of State, that the treaty did not affect the status of Wrangel Island and that the United States had neither relinquished any claim nor acquiesced in any Soviet claim to the island (Senate Treaty Document, 1991: 6).

This exception was designed to preserve existing regimes in straits where navigation was already regulated under international conventions, on the ground that they were better served by existing legal regimes that already provided for freedom of navigation through the straits. The convention does not specify to which straits the exception applies. During the negotiations of UNCLOS III, however, the following straits were mentioned by various delegations: the straits of the Dardanelles and Bosphorus (Turkey); the Straits of Magellan (Argentina and Chile); the Danish Straits, including the Belts (Denmark) and the Sound (Denmark-Sweden); and the Aaland Strait (Sweden-Finland) (Nandan *et al.*, 1993: 307-308, 35.7(c), citing relevant conventions; Moore, 1980: 111; Brüel, 1947 for a history of these straits regimes). No long-standing international convention governs passage through any of the straits considered in this study, and article 35 thus has no effect on the legal status of the Russian Arctic straits.

## 8.2 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 ‘polar experiment’ will succeed and that the straits will eventually find themselves on an international shipping route. Nevertheless, 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.<sup>47</sup>

### 8.2.1 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 Territorial Sea Convention, which will help cast light on its meaning.

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<sup>47</sup> Oddly, perhaps, a relevant exception to this may be the even more fundamental term ‘strait’, which appears to have no legal meaning in the convention and which is applied in its dictionary or geographical sense (Churchill and Lowe, 1988: 87). Nevertheless, a dispute can be expected to arise sooner or later 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’. To be sure, article 36 does imply a partial definition, as it arguably rejects narrowness as an essential element of ‘strait’ for the purposes of the Convention (Nandan *et al.*, 1993: 315, para. 36.7(e)). Friedheim suggests that there are limits as to how wide a passage may be and still be regarded, legally, as a strait (1993: 86). Koh discusses four criteria (natural waterway, geographical connection, utility, and breadth) as possible factors in determining what would constitute a strait for purposes of imposing a straits regime (1982: 12-27). As a practical matter, however, the question is probably largely academic as any passage wider than 24 miles will have a belt of exclusive economic zone and/or high seas that can be expected to render the transit-passage issue moot, absent problems in finding a route of similar convenience. For a discussion of the linguistic, geographical, and legal conceptions of straits, see Brüel, 1947: 15-47.

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.<sup>48</sup> 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 channel forming the frontier between two hostile states in a tense, post-war, revolutionary period (*Corfu Channel*, 1949). 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 likely in the Russian Arctic should the straits along the Northern Sea Route ever be opened to regular 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 ICJ 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:

“*[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.*” (McDougal and Burke, 1987: 189).

Upon the suggestion of the Soviet delegate, the International Law Commission, in its draft codification, inserted the word ‘normally’ into the ICJ’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 intent was more closely 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 LOSC adopted that language in article 37.

### 8.2.2 Unresolved issues

If the Northern Sea Route does become a regular international route, 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

<sup>48</sup> Hakapää concludes, without discussion, that “*international traffic in the [Northeast and Northwest Passages] has remained so scarce that they could hardly be designated as straits ‘used for international navigation’*” (Hakapää, 1990: 71).

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 transit, under the new regime, any strait through which another foreign vessel has already passed.

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 *l'Astrolabe* navigated the Northern Sea Route in 1993, with the permission of the Russian government, did it clear the way for submarines and overflight through and above each strait it transited?

Second, the new regime's use requirement does not appear to contemplate only vessels invited by the coastal state. If an American submarine were to transit Proliv Borisa Vil'kitskogo, submerged and uninvited, it would be using the strait for international navigation. Is there a possibility of 'bootstrapping' a strait into the transit-passage regime 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, 1987b: 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 study does no more than raise these particular questions.

## 9. Conclusion

Of the 43 straits considered, how many may become subject to transit passage if Russia succeeds in opening its Arctic waters 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 the transit-passage regime or from the entire regime for international straits:

- **Not connecting two parts of the high seas or EEZ.** 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 EEZ. 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 EEZ: Yugorskiy Shar, Karskiye Vorota, Matochkin Shar, Borisa Vil'kitskogo, Shokal'skogo, Krasnoy Armii, Yungsturm, Dmitriya Lapteva, and Sannikova. The other 29 are all entirely within straight baselines and arguably may be excluded (assuming the validity of the straight baselines), though such an interpretation would tend to create a conflict between article 37 and the internal-waters exception of article 35(a). For that reason, it is arguable that they do satisfy the article 37 condition and are not excluded from transit passage on

this basis. If any straight baselines are eventually found not to be valid, it appears that all of the straits now enclosed by them would unambiguously meet the geographical requirement of article 37.

- **Being in internal waters (other than those newly enclosed under article 7's method).** With the exception of five straits (Longa, Blagoveshchenskiy, Zarya, Melykhov, and the Kolyma River strait), all the straits under consideration are in internal waters. In all 38 cases, however, the waters have been enclosed by straight baselines (ostensibly complying with the two conventions' procedure for deeply indented coasts and fringes of coastal islands) and before enclosure were not regarded as internal waters; consequently, their being in internal waters does not disqualify them from transit passage, even if the straight baselines are valid. If the straight baselines are not valid, all 38 straits are in the territorial sea, with the exceptions of Borisa Vil'kitskogo, Dmitriya Lapteva, and Sannikova, which contain belts of EEZ between belts of territorial sea.
- **A through route of similar convenience in the high seas or EEZ.** The territorial sea has not been narrowed in any Russian Arctic strait 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 EEZ (the others are in internal waters, but would also contain belts of EEZ if the straight baselines enclosing them were found to be invalid). It would appear, however, that the unpredictability of ice conditions makes it impossible to categorise any Arctic route as similarly convenient, so that the existence of such an alternative route would have to be determined on a vessel-by-vessel basis.
- **A seaward route of similar convenience through the high seas or EEZ,** 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 should rule out the possibility of categorising any through routes as similarly convenient.
- **Being subject to a long-standing international convention.** As already discussed, none of these straits is covered by such a convention.

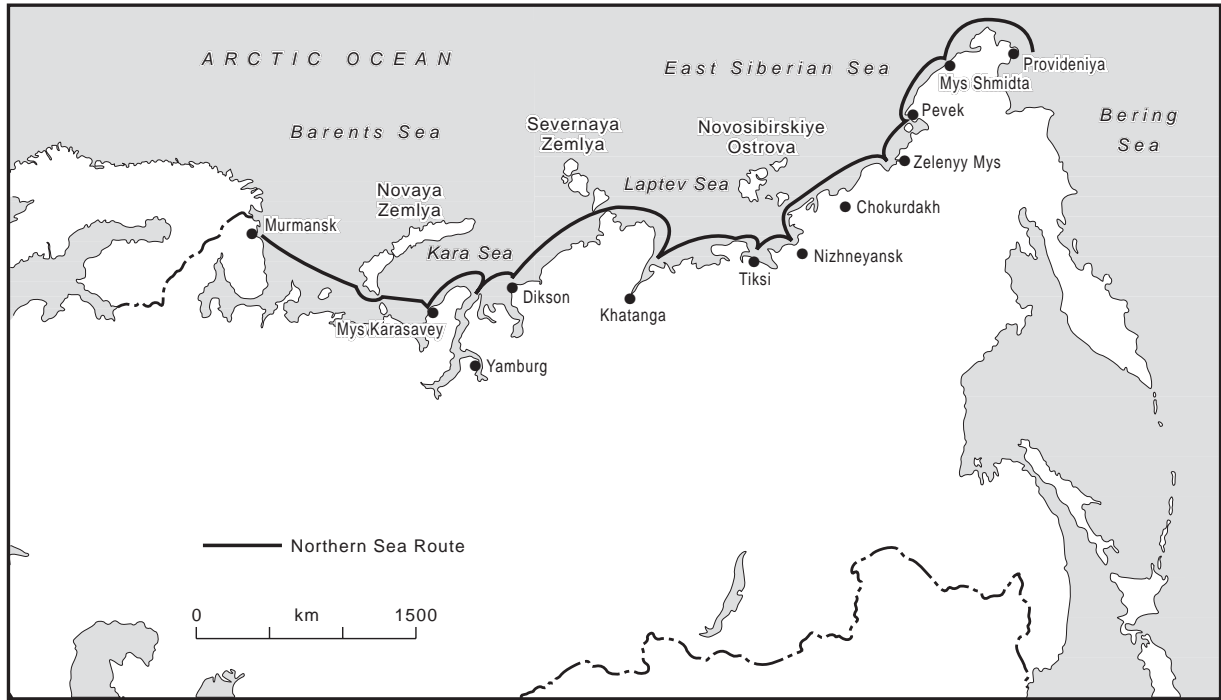
In the final analysis, there are strong arguments that none of the five exemptions removes any of the 43 straits from the overall regime of international straits or from the transit-passage regime. Whether, assuming that the Northern Sea Route initiative eventually succeeds, they will be "*used for international 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 EEZ already permit foreign warships free access to most of the Arctic seas, and the conventions guarantee them at least the right of innocent passage through the straits. The only significant practical difference, then, may be the overflight provision of transit passage, which could prove to be of great importance if it is found to grant foreign military aircraft access to coastal routes throughout much of the Russian Arctic.

The strongest argument that Russia could make for complete jurisdiction over navigation through the Northeast Passage would be to characterise the Northern Sea Route as a national transport route comparable to Norway's Indreleia and thus justify enclosing it as internal waters by a method that does not invoke the straits regime of the LOSC. The difficulty here lies in the extraordinary variability of the route and the great differences between the geographical configurations of the Northern Sea Route and the Indreleia.

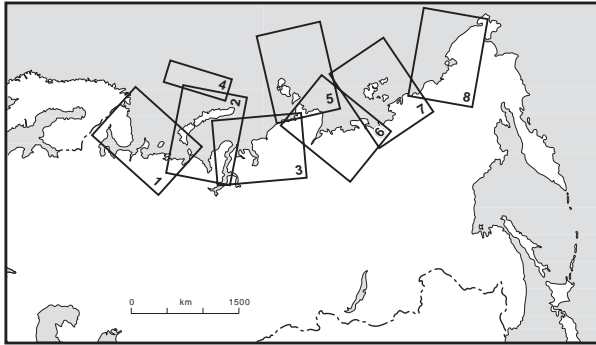
A less contentious solution to most, if not all, of the outstanding issues - an international convention to govern the regime of the Northern Sea Route - was proposed at the First Northern Forum Conference in Tromsø in 1993, and has been echoed since (Timtchenko, 1994: 199). There does not appear to have been any movement in this direction, however.

At this time, many of the issues are still unresolved and, given the nature of international lawmaking, are likely to remain so long after foreign ships are regularly plying the Northern Sea Route. Nevertheless, however the legal questions are eventually resolved, as a practical matter the Russians may already have won the argument. As one commentator (Shusterich, 1984: 257) observed more than a decade ago, between the 12-mile territorial sea and the difficulty of negotiating ice passage without icebreaker and ice-forecasting support, the Soviet Union effectively nationalised the route years ago.

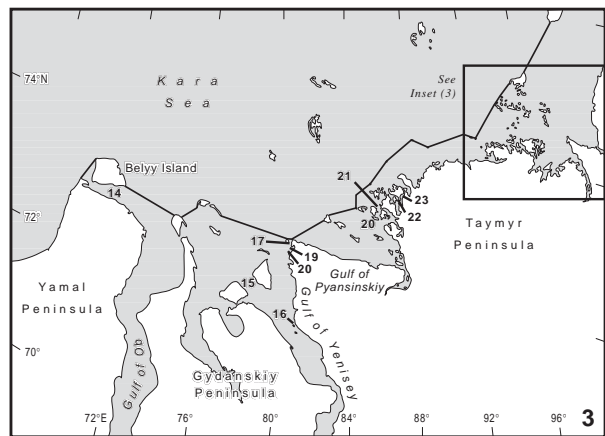
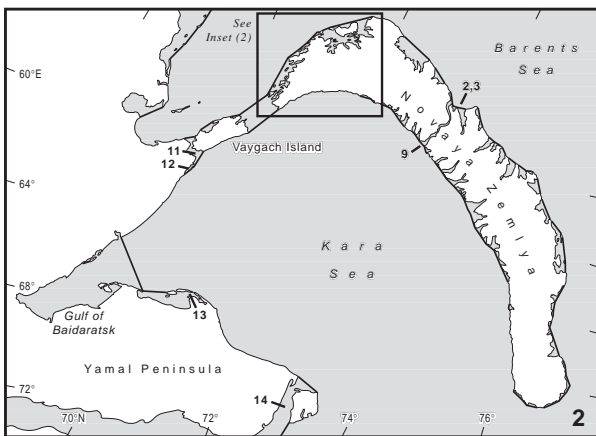
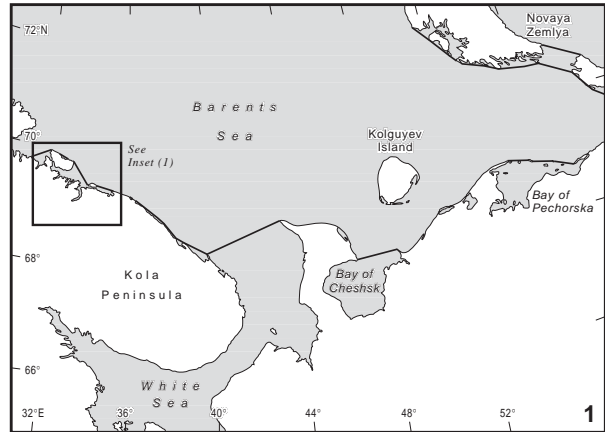


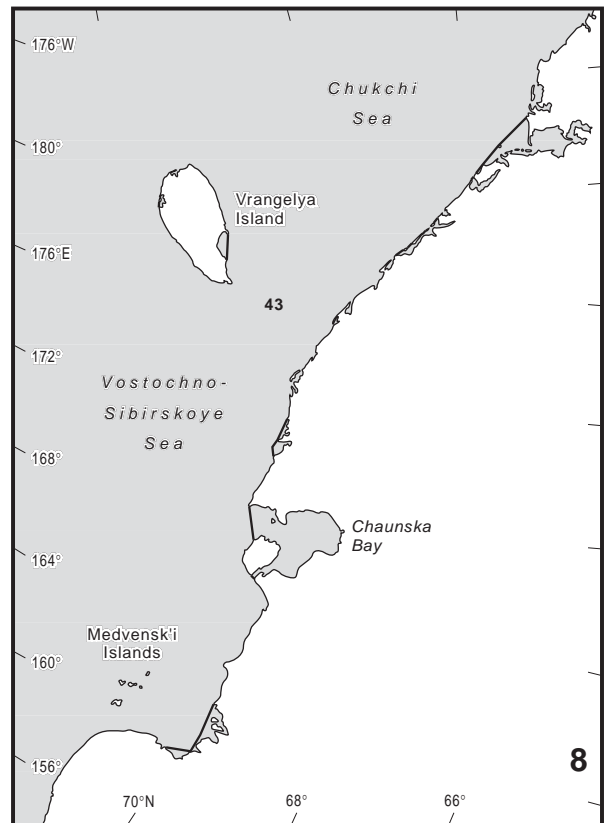
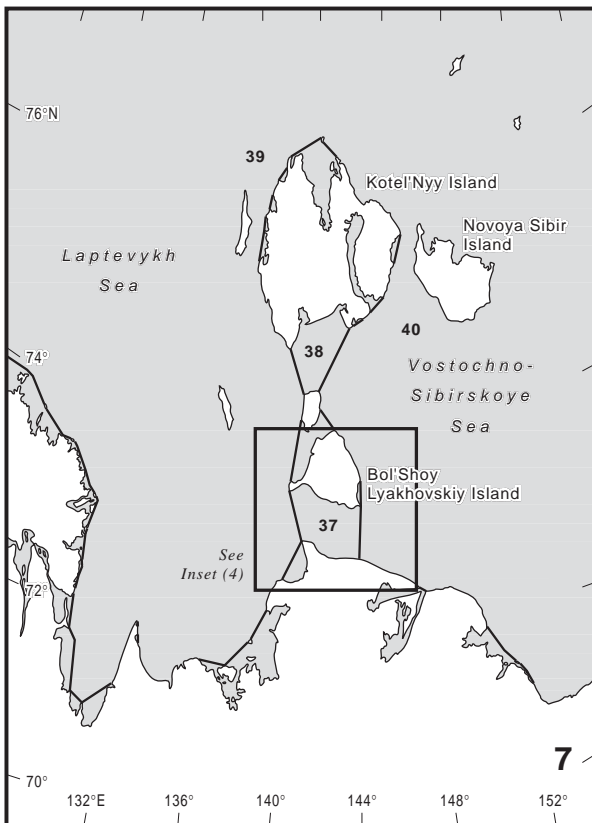
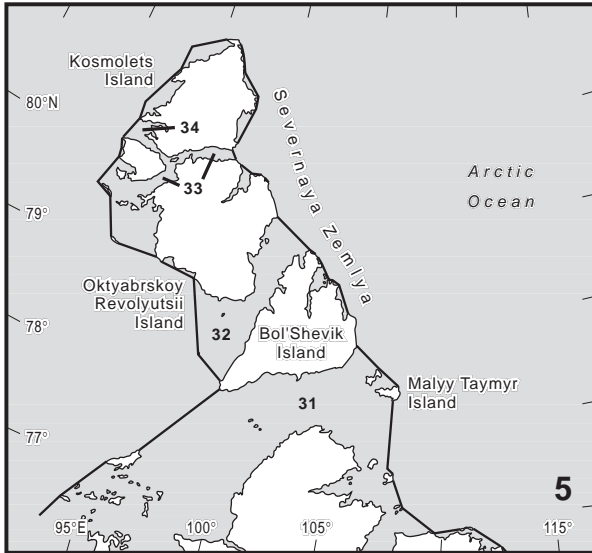
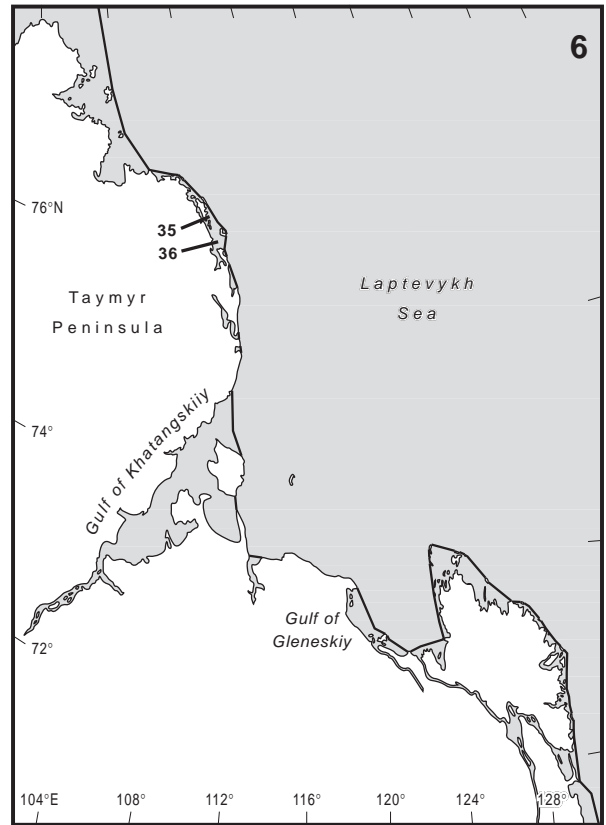
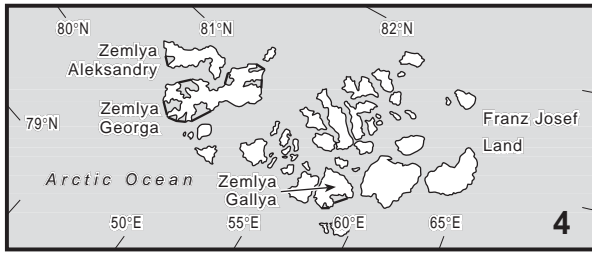


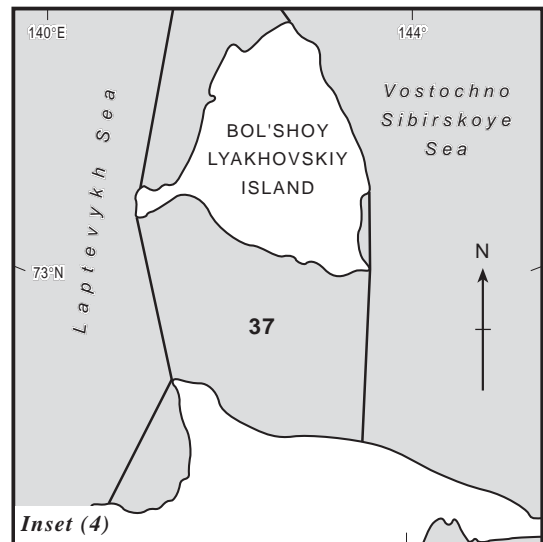
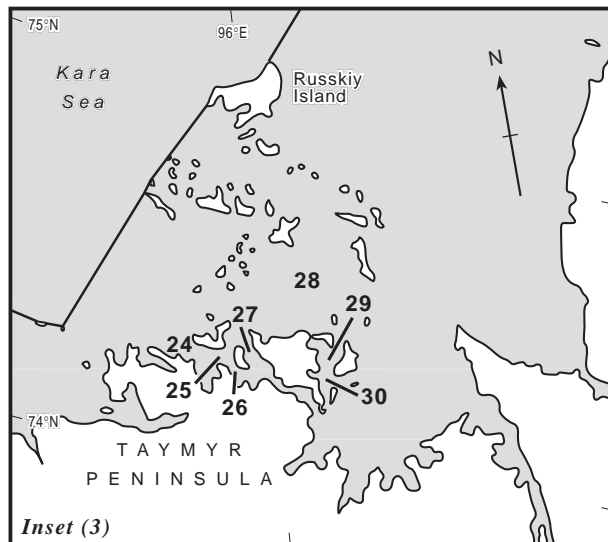
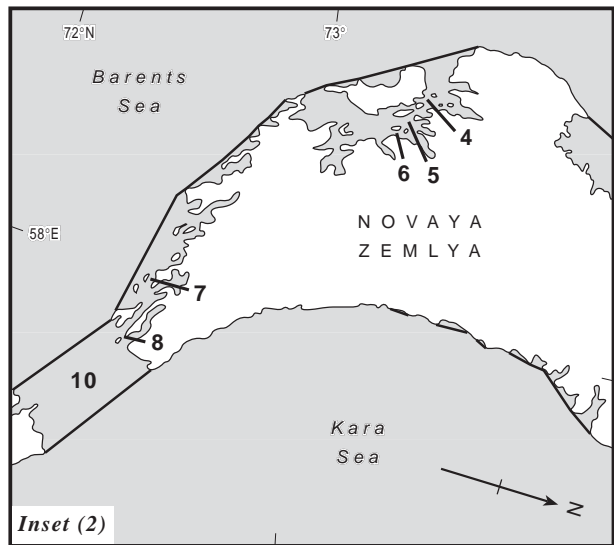
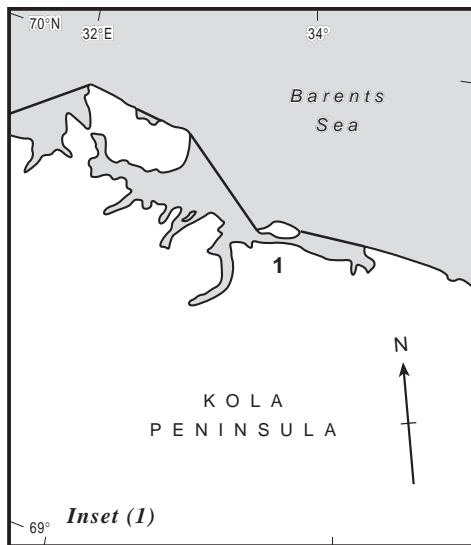
Appendix 2: Maps of Straight Baselines and Russian Arctic Straits



Appendix 2: The Arctic Straits and Baselines  
 The following eight maps correspond to inserts 1 to 8 above plus insets. They indicate the location of the 43 straits described in Chapter 6 and of the baselines, from the Norwegian frontier to the Bering Strait, established by the decree of 1985. A key to the straits follows.







**Key to the Maps of Straits and Baselines**

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

**Appendix 3: Glossary**

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

## Appendix 4: Regulations for Navigation on the Seaways of the Northern Sea Route

### Published by the Head Department of Navigation and Oceanography, USSR Ministry of Defence, 1991

These regulations were worked out in accordance with the USSR Council of Ministers Decision No. 565 of 1 June 1990, taking into account the relevant provisions of the Soviet legislation and rules of international law.

#### 1. Definitions

The terms and phrases listed below shall have the following meaning when cited in the text:

1.1 *The Regulations* - these Regulations for Navigation on the Seaways of the Northern Sea Route the official text of which is published in the Notices to Mariners;

1.2 *The Northern Sea Route* - the essential transportation line of the USSR that is situated within its inland seas, territorial sea (territorial waters), or exclusive economic zone adjacent to the USSR Northern Coast and includes seaways suitable for leading ships in ice, the extreme points of which are limited in the west by the WESTERN entrances to the Novaya Zemlya Straits and the meridian running north through Mys Zhelaniya, and in the east (in the Bering Strait) by the parallel 66°N and the meridian 168° 58' 37"W;

1.3 *The Administration* - the Administration of the Northern Sea Route, USSR Ministry of Merchant Marine, established by the USSR Council of Ministers Decision No. 683 of 16 September 1971 and having its domicile at 1/4 Rozhdetvenka, Moscow, 103759, USSR;

1.4 *Vessel* - any ship or other craft regardless of her nationality;

1.5 *Special requirements* - technical and operational rates and standards as set forth in publications issued by the Administration in addition to the Regulations, including the Guide to Navigation through the Northern Sea Route and the Requirements for the Design, Equipment, and Supply of Vessels Navigating the Northern Sea Route;

1.6 *Administration Representative(s)* - the Head, Deputy Head, Chief State Inspectors, or State Inspectors of the Administration as well as officials of Marine Operations Headquarters and other persons authorized by the Administration to exercise specific functions within its competence; and

1.7 *Marine Operations Headquarters* - special navigational services of the Murmansk and Far East Shipping Companies, directly performing ice operations at sea on the Northern Sea Route, the work of which is generally co-ordinated by the Administration. The requisite postal date of the Marine Operations Headquarters are given in the Guide to Navigation through the Northern Sea Route.

## **2. Principles, Object, and Goals of Regulating**

The Regulations shall, on the basis of non-discrimination for vessels of all States, regulate navigation through the Northern Sea Route for the purposes of ensuring safe navigation and preventing, reducing, or keeping under control marine environment pollution from vessels since the specifically severe climatic conditions that exist in the Arctic Regions and the presence of ice during the most part of the year bring about obstacles, or increased danger, to navigation while pollution of sea or the Northern Coast of the USSR might cause harm to the ecological balance or upset it irreparably, as well as inflict damage on the interests and well-being of the Northern peoples.

## **3. Request for Leading through the Route**

3.1 The Owner or Master of a vessel intending to navigate through the Northern Sea Route shall submit to the Administration (Marine Operations Headquarters) a notification and request for leading through the Northern Sea Route in compliance with the form and time stated in the Guide to Navigation through the Northern Sea Route.

3.2 The Administration (Marine Operations Headquarters) shall consider the submitted request and inform the submitter of the possibility of leading through the Route and other circumstances to be taken into consideration by the Owner or Master.

## **4. Requirements for Vessels and Command Personnel**

To navigate the Northern Sea Route, a vessel shall satisfy special requirements while the Master, or the person that performs his duties, shall be experienced in operating the vessel in ice.

In case where those persons have no such experience, or when the Master requests so, the Administration (Marine Operations Headquarters) may assign a State Pilot to the vessel to assist in leading it through the Northern Sea Route.

## **5. Due Security of Liability**

It should not be permitted to navigate the Northern Sea Route to vessels that have not aboard a certificate of due financial security with respect to the civil liability of the Owner for damage inflicted by polluting marine environment and the Northern Coast of the USSR.

## **6. Check**

6.1 In cases where unfavourable ice, navigational, hydrographic, weather and other conditions occur that might endanger a vessel, or where there is a threat of polluting marine environment of the USSR Northern Coast, an Administration Representative may carry out an inspection of the vessel while it navigates the Northern Sea Route.

6.2 In case where there is a threat of polluting marine environment of the USSR Northern Coast, inspections of vessels may be also carried out by representatives of the other Soviet State Bodies authorized to do so.

6.3 At the discretion of the Administration Representative, inspections may include examination of documents certifying that the vessel complies with special requirements and cargo documents and, depending upon the particular circumstances, direct examination of the vessel's condition, her equipment, facilities, technical navigational instruments, and readiness and ability to fulfil requirements concerning prevention of marine pollution.

6.4 The Master of the vessel shall be obliged to render necessary assistance to the Administration Representative in order that examinations should be completed in the most comprehensive and prompt way.

## **7. Order of Navigation**

7.1 The leading of vessels through the seaways of the Northern Sea Route shall be performed during the navigational period the beginning and the end of which shall be determined by the Administration and Marine Operations Headquarters taking into account predictions and the actual state of ice, navigational, hydrographic, weather, and other conditions.

7.2 A vessel that has been admitted for leading through the Northern Sea Route shall navigate it following the seaway that has been assigned her and keeping the routes recommended by the Marine Operations Headquarters.

7.3 The Master of a vessel navigating the Northern Sea Route shall be obliged to carry out orders from the Marine Operations Headquarters concerning correction of the route due to changes in ice conditions and occurrence of other circumstances capable of affecting safety of navigation or bringing about threat to the ecological situation.

7.4 Compulsory ice-breaker assisted pilotage<sup>1</sup> is established in the Proliv Vil'kitskogo, Proliv Shokal'skogo, Proliv Dmitriya Lapteva, and Proliv Sannikova due to adverse navigational situation and ice conditions and for the purposes of ensuring safe navigation.

In other regions the Marine Operations Headquarters shall, in consideration of ensuring safe navigation and for the purpose of providing the most favourable navigating conditions, prescribe one of the following types of leading as determined by the circumstances:

- (1) Leading along recommended routes up to a certain geographical point;<sup>2</sup>
- (2) Aircraft-assisted leading;<sup>3</sup>
- (3) Conventional pilotage;
- (4) Icebreaker leading; and
- (5) Icebreaker-assisted pilotage.

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<sup>1</sup> "Ice-breaker-assisted pilotage" implies an ice-breaker leading a vessel, a pilot being on board the latter (Note by the Administration).

<sup>2</sup> Shore-based pilotage.

<sup>3</sup> May be conducted by planes or helicopters (Notes by the Administration).



The Marine Operations Headquarters shall be entitled to substitute one type or leading for another.

7.5 The Master of the vessel navigating the Northern Sea Route shall be obliged to maintain contact with the Radio Centre of the appropriate Marine Operations Headquarters, depending upon the geographical position of the vessel.

## **8. Control of Navigation**

8.1 Navigation of vessels admitted to be led through the Northern Sea Route shall be organized and controlled by the Administration through the Marine Operations Headquarters.

8.2 Navigation of vessels through the seaways of the Northern Sea Route shall be organized and controlled by the following authorities:

- (1) In the western part, up to the meridian 125°E - by the West Marine Operations Headquarters at the port of Dikson; and
- (2) In the eastern part, E of the meridian 125°E - by the East Marine Operations Headquarters at the port of Pevek.

8.3 Marine Operations Headquarters (or the Administration) shall provide that vessels should be supplied with navigational information and rendered leading and rescuing services.

8.4 When navigating the Northern Sea Route, payments for the services rendered to vessels by the Marine Operations Headquarters and the Administration shall be collected in accordance with the rates duly adopted.

## **9. Suspension of navigation**

In cases where an obvious necessity of environment protection or safe navigation dictates so, the Administration or Marine Operations Headquarters may suspend navigation of specific parts of the Northern Sea Route for the period that the circumstances exist that have caused such a measure.

## **10. Removal of vessels off the route**

If a vessel navigating the Northern Sea Route violates the provisions of these Regulations, in particular Regulations 3 and 4, it may be ordered to leave the Route.

The direction of the vessel's leaving the Route shall be determined by Marine Operations Headquarters taking into account the safety of the vessel, its crew, and cargo and necessary measures to protect nature.

**11. Liability**

The Administration and Marine Operations Headquarters shall not be liable for damage inflicted on a vessel or property located aboard her by leading in ice conditions unless it is proved that they bear guilt for the damage inflicted.

**12. Notification**

In addition to the existing requirements concerning reports on marine environment pollution, the Master of a vessel navigating the Northern Sea Route shall be obliged to promptly inform an Administration representative of any fact of pollutant discharge, as effected by that vessel or detected nearby.

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