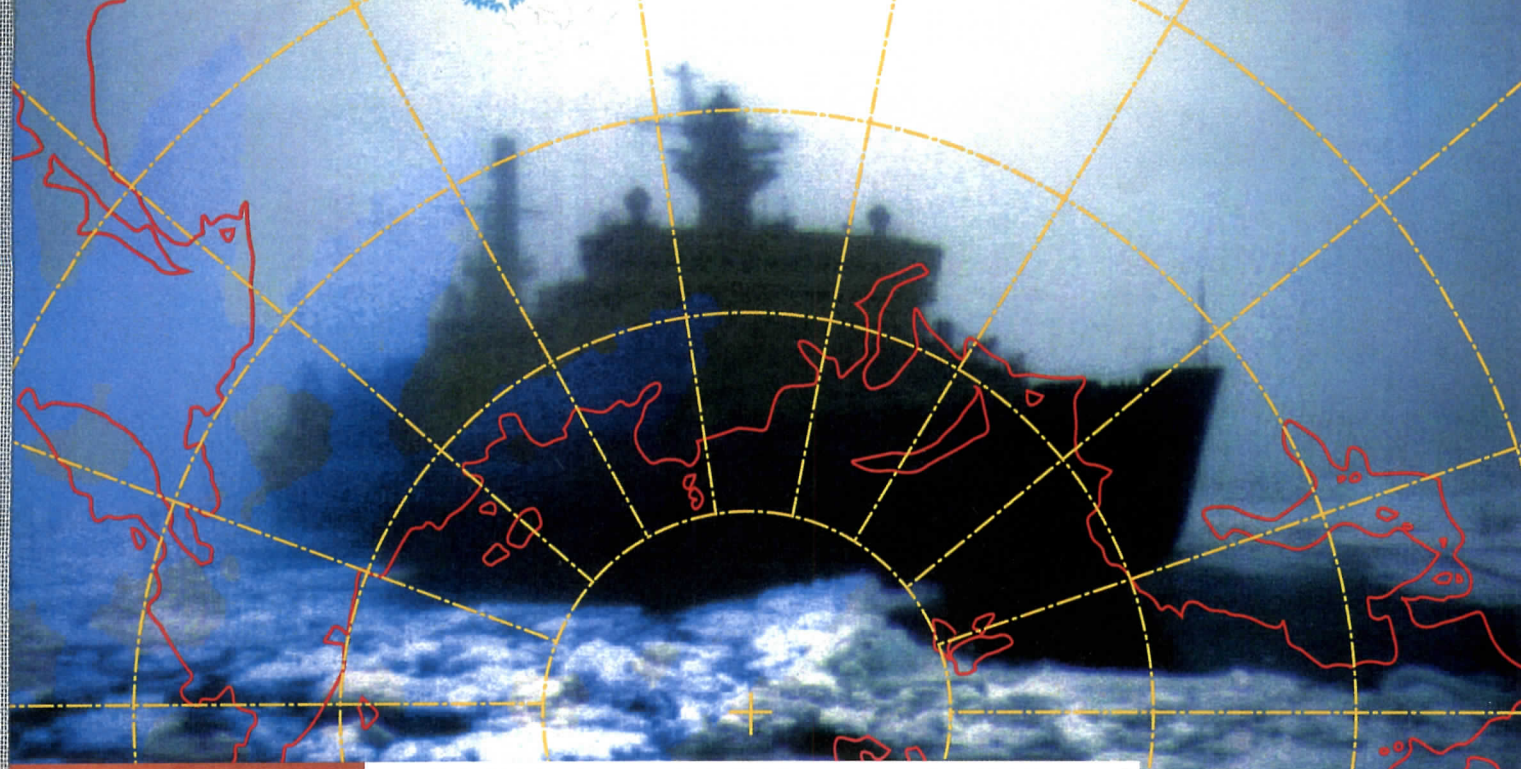

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The Legal Status of the Russian Baselines in the Arctic

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6. The Legal Status of the Russian Baselines in the Arctic

6.1. Introduction - Definitions

In this Section the validity under international law of the straight baselines the Soviet Union established in the Arctic and which Russia maintained will be examined. The baseline is the line from which the outer limit of the territorial sea and other coastal State zones including the contiguous zone, exclusive fishing zone and the exclusive economic zone is measured.[1] TSC Article 3 and LOSC Article 5 specify that the normal baseline is the low-water mark along the coast as marked on official large scale charts.[2] Straight baselines are straight lines connecting the outermost points on a *skjærgaard*. These were historically used by Norway as a baseline from the mid-nineteenth century onwards and were opposed by the U.K. from the 1930's as being contrary to international law. This resulted in the *Anglo-Norwegian Fisheries Case*[3] in which the ICJ accepted the Norwegian straight baselines as consistent with international law and provided criteria for their legal definition. These criteria with some changes were later incorporated into the TSC Article 4 and the LOSC Article 7.

6.2. Salient International Issues - Straight Baselines

The issues which will be addressed include the limits of the criteria for establishing straight baselines set forth in the sources mentioned. These are by no means clear, not only due to vagueness in language used, but especially the subsequent general State practice. Using the international limits ascertained, a comparison will then be carried out with the Russian straight baselines in order to examine the level of compliance. This has relevance not only for the location of maritime zones mentioned, but also whether the enclosure of the straits examined in Section 5 is valid.

The criteria developed under the *Anglo-Norwegian Fisheries Case*, TSC Article 4 and LOSC Article 7 will be considered below.

6.2.1. Criteria Developed under the *Anglo-Norwegian Fisheries Case*, the TSC and the LOSC

The issue between Norway and the U.K. in the *Anglo-Norwegian Fisheries Case* was "whether the lines prescribed by the Royal Decree of 1935 as the base-lines for the delimitation of the

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1Churchill, Robin R. and A.V. Lowe, *The Law of the Sea*, 2nd ed. 1988, (Churchill), p. 26.

2Respectively Convention on the Territorial Sea and the Contiguous Zone (TSC), 516 *United Nations Treaty Series* 206. Done at Geneva, 29 April 1958, in force 10 September 1964. United Nations Convention on the Law of the Sea, (LOSC), 21 *International Legal Materials* 1261. In force 16 November 1994. See Appendix 6 for all TSC and LOSC Articles referred to in this Section.

3ICJ Reports (1951) p. 116. The case will not be dealt with in any great detail due to the amount of literature already devoted to it. See Reisman, W. Michael and Gayl S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation*, MacMillan, (1992) (Reisman and Westerman) pp. 19-37 and Churchill pp. 26-50.

fisheries zone have or have not been drawn in accordance with the applicable rules of international law."[4]

The key passages in the ICJ's decision are as follows.[5]

"*Where a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the "skjærgaard"* along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometric construction. In such circumstances the line of the low-water mark can no longer be put forward as a rule requiring the coast line to be followed in all its sinuosities;"

...

" This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them. This has been done, not only in the case of well-define bays, but also in cases of minor curvatures of the coast line where it was solely a question of giving a simpler form to the belt of territorial waters."

...

"It follows that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, *the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast.*

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect *whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters*. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: *that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.*"

...

"The delimitation of the Lopphavet basin has also been criticized by the United Kingdom...The Lopphavet basin constitutes an ill-defined geographic whole. It cannot be regarded as having the character of a bay. It is made up on an extensive area of water dotted with large islands which are separated by inlets that terminate in the various fjords. The base-line has been challenged on the ground that it does not respect the general direction of the coast. It should

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4Op.cit. p. 125.

5Op.cit. pp. 128-130, 133, 141-142. Italics are added for emphasis. The vote was ten to two that the delimitation of the fisheries zone by the Royal Norwegian Decree of 1935 was not contrary to international law; and eight to four that the base-lines fixed by the Decree in application of this method were not contrary to international law.

be observed that, however justified the rule in question may be, it is devoid of any mathematical precision. In order to properly to apply the rule, regard must be had for the relation between the deviation complained of and what, according to the terms of the rule, must be regarded as the *general* direction of the coast. Therefore, one cannot confine oneself to examining one sector of the coast alone, except in a case of manifest abuse; nor can one rely on the impression that may be gathered from a large scale chart of these sector alone. In the case in point, the divergence between the base-line and the land formations is not such that it is a distortion of the general direction of the Norwegian coast."

...

"The Court considers that, although it is not always clear to what specific areas they apply, the historical data produced in support of this contention by the Norwegian Government[6] lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation, particularly in the case of Lopphavet. *Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line* which, moreover, appears to the Court to have been kept within the bounds of what is moderate and reasonable."

These principles were consolidated into TSC Article 4 and reaffirmed in LOSC Article 7.[7]

From the *Anglo-Norwegian Fisheries Case*, TSC Article 4 and LOSC Article 7, the issues that arise are generally as follows. What are the permissible interpretations of the terms "deeply indented and cut into", "fringe of islands in the immediate vicinity" and "general direction of the coast," Are the terms, "deeply indented and cut into," and "fringe islands in the immediate vicinity" conditions precedent to the criteria on drawing baselines.

These will be dealt with below as well as related sub issues. Treaty interpretation and State practice will play prominent roles, however historical analysis will be given less weight due to the varying modern State practice. It is submitted that the latter plays a more substantial role in the determination of the law.[8] When there are infringements in State practice, some stretching back as much as thirty years, of the major criteria set forth in the *Anglo Norwegian Fisheries Case*, TSC

6The contention was that the fisheries zone reserved before 1812 was in fact much more extensive than the one delimited in 1935. Op cite. p. 142.

7See Section 6.2.1.7. for discussion of other important but less central criteria under these Articles.

8See Sections 2.2.2. and 2.3.2. See also Churchill pp. 45-46, Reisman and Westerman pp. 105-190 and O'Connell, D.P., *The International Law of the Sea*, Vols. I and II (O'Connell) 1989, pp. 206-208 for overviews of the UNCLOS I and ILC controversies with corresponding citations. Basically in the ILC the controversies involved the terms "deeply indented and cut into," "length of straight baselines," "low water mark," "closely linked," and "economic interests". Under UNCLOS I "length of straight baselines," "long usage", "basepoints," and "breadth of the territorial sea as a limitation for location of basepoints" were under discussion. O'Connell notes that in spite of the controversy TSC Article 4, "was a faithful expression of the principal criteria" in the *Anglo-Norwegian Fisheries Case*. UNCLOS III dealt little with straight baselines with the exception of the Bangladesh river delta problem resulting in LOSC Article 7(2). See Nordquist, Myron H., *United Nations Convention on the Law of the Sea 1982 - A Commentary*, Centre for Oceans Law and Policy, University of Virginia, Vol II, 1991, (Nordquist II), pp. 97-100 and generally Brownlie, Ian, *Principles of Public International Law*, 4th ed., 1990, (Brownlie) pp. 186-194.

Article 4, and LOSC Article 7, with little subsequent State protest, the fine points in interpretations and historical negotiations, though possibly legally correct, would seem to be of less significance.[9] Doctrine will be referred to where relevant; however very little non-official literature by Russian authors published in English was found and is unfortunately under-represented.[10] This is felt to be offset by the significantly divergent State practice. The source referred to for U.S. practice is the U.S. State Department.[11]

6.2.1.1. "Deeply Indented and Cut Into"

As seen this excerpt was taken directly from the *Anglo-Norwegian Fisheries Case* and duplicated in both TSC Article 4 and LOSC Article 7, with the exception that the Conventions add "in localities where the coastline is deeply indented and cut into..."[12] The ICJ specifies that the expression is intended to indicate a coast similar to eastern Finnmark. A quick look at that geographical area concerned indicates the existence of fjords, bays of substantial size and smaller inlets all in the same area.[13]

In its plain meaning "deeply indented and cut into" would seem to include both deep fjords and shallow indentations, especially given the eastern Finnmark example. What is in contention here is the plurality of the terms connected by the conjunction "and". The ICJ clearly meant the terms to be interpreted in the plural and cumulative since the explanation regarding Finnmark is made in the subsequent phrase.[14] However TSC Article 4 and LOSC Article 7 permits the interpretation that a coastline with a singular deep indentation would suffice. All three sources use adjectives, rather than nouns, which can be interpreted both in the plural and singular. The Conventions do not

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9See Prescott, J.R.V., *The Maritime Political Boundaries of the World*, (1985), (Prescott), p. 63, who states emphatically, (T)here is no point in making an exhaustive analysis of the range of meanings which can be attached to the terms emphasized in this quotation (LOSC Article 7), because there is not the slightest evidence that the majority of governments of coastal states is interested in more precise definition of any of these terms. Agreement on the rules quoted was reached very early in the United Nations Conference on the Law of the Sea. This is not surprising because the imprecise language would allow any coastal country, anywhere in the world, to draw straight baselines along its coast. Various studies of specific baselines by the (U.S. State Department) Geographer have included the obvious criticisms that such baselines contravene existing regulations but that seems to have been the sole effort to hold the line against the indiscriminate declarations. Nor would it be necessary for countries to introduce some enterprising, new interpretation of the debatable terms to justify the selection of a baseline, because existing baselines provide all the justification which any country could need..." Parentheses added. See also Prescott, J.R.V., "Straight and Archipelagic Baselines," *Maritime Boundaries and Ocean Resources*, (ed. Blake), (Prescott Maritime) pp. 41-46; *The Law of the Sea*, (ed. Alexander), (1967), Alexander, Lewis M., "Offshore Claims of the World", pp. 76-77; and generally U.N. Baselines pp. 1-390.

10This included a data search over the last ten years carried out by the Library at the Law Faculty, University of Oslo, October 1995 of Dialog, Legal Research Index, which is said to encompass some five hundred law journals.

11Smith, Robert W. and J. Ashley Roach (1994), *International Law Studies - Excessive Maritime Claims*, Naval War College, Vol. 66, (Smith and Roach). The authors are respectively from the U.S. Department of State, Office of Ocean Affairs and Office of the Legal Advisor. Smith and Roach p. xiv.

12See Section 6.2.1.

13See *The Times, Composite Atlas of the World*, Times Newspapers Limited (1973) (Atlas), pp. 26 and 27, Reisman and Westerman p. 25, and Francalance G. and T. Scovazzi, *Lines in the Sea*, (eds.) Martinus Nijhoff, (1994), (Francalance and Scovazzi), p. 37.

14See Section 6.2.1.

address the issue, either in the respective Articles or surrounding Articles. However, again the ICJ's Finnmark example would seem to counter this interpretation. In addition in the Conventions separate Articles would seem to cover this situation, TSC Article 7 and LOSC Article 10 dealing with juridical bays,[15] thus excluding the interpretation allowing a single deep indentation. To have two Articles with different criteria covering the case of a singular indentation would seem contrary to the intention of the drafters, especially since if allowed, TSC Article 4 and LOSC Article 7 would consequently subvert all juridical bays with closing lines greater than 24 nautical miles, or less area than the permitted semicircle of the length of the closing line.[16] Though the issue was controversial, especially under the TSC negotiations related to the length of baselines,[17] it is illogical that such an interpretation would be intended.[18] Therefore it would seem that more than one deep indentation would be needed, a view supported by most other doctrine.[19]

Another possible interpretation involves "deeply indented" used absolutely or relatively. As seen in the ICJ's example of Finnmark the fjords are of substantial size, and in an absolute interpretation, indentations of approximately 50 to 75 miles would be required for baselines to be established.[20] Another interpretation would allow less substantial indentations to suffice related to area of land indented.[21] It is submitted that the latter view would be the better one. The ICJ stated in its decision that straight baselines could be established where coasts were like that of eastern Finnmark. This would not be compromised for cases involving small land areas with small narrow indentations; the coast would still be deeply indented and cut into, though less grandiosely than the Norwegian coast.[22]

In addition using a criterion allowing proportionality, rather than absoluteness, would seem to be more in line with equity, considerations of fairness, reasonableness and policy, forwarded by the ICJ in recent cases concerning maritime delimitation and fisheries jurisdiction, which are also closely connected to straight baselines.[23]

15See Section 6.2.1.8.

16Ibid. See also Reisman and Westerman pp. 81, 102-103.

17Churchill pp. 30-31.

18See Reisman and Westerman pp. 81 and 102 and 103.

19See Churchill pp. 29, 34, Nordquist II p. 100, Pharand, Donat, *Canada's Arctic Waters in International Law*, (Pharand Arctic) pp. 134-135 and O'Connell pp. 217-218. But see Section 6.2.1.8. and *U.N. Office for Ocean Affairs and the Law of the Sea, The Law of the Sea - Baselines*, U.N. Sales No. E.88V.5 (1989), (U.N. Baselines) p. 20, possibly implying the contrary.

20See Atlas pp. 26-27 and Reisman and Westerman pp. 25 and 80.

21U.N. Baselines p. 20.

22Even Reisman and Westerman pp. 81, 112, 113, proponents for the absolute interpretation acknowledged that the Canadian coasts, enclosed by straight baselines on Vancouver Island, Queen Charlotte Islands and eastern Ellesmere Island, have coasts quite similar to the Scandinavian coasts with numerous fjords and fringing islands, though only approximately one-half the size.

23*North Sea Continental Cases*, ICJ Reports (1969) 3 at 46-52; *Fisheries Jurisdiction Case (United Kingdom v. Iceland*, ICJ Reports (1973) 3, ICJ Reports (1974) 3, at 30-35; Brownlie pp. 26-27; and Reisman and Westerman pp. 78, 191-198.

Limiting the concept of proportionality however would be the requirement that the indentation both be deep and the coast cut into. Shallow indentations indicated on a chart of large magnitude which might appear as to cut into the coast would at the same time have to be deep related to the relative land area.[24] Most of the other doctrine do not address this issue, implicitly supporting the proportionality view, especially given the ICJ's statement regarding liberal application of establishing straight baselines as long as there is a close link to land and the sea areas enclosed.

This leads to the next Section covering the additions made by TSC Article 4 and LOSC Article 7 to the ICJ's central statement in its decision, "in localities where the coastline..."

6.2.1.1.1. Coastline, Localities

The question can be asked whether anything is added to the term "coast" used by the ICJ in its decision by the phrase in both Conventions, "in localities where the coastline" (is deeply indented and cut into). It is submitted that nothing is added. Addressing the term "coastline" first, Merriam-Webster's defines "coast" as "1. obsolete: border, frontier, 2 : land near the seashore...;"[25] while Black's defines "coast" as "The edge or margin of a country bounding on the sea. The term includes small islands and reefs naturally connected with the adjacent land, and rising above the surface of the water, but not shoals perpetually covered by water."[26] Black's fails to define "coastline," and as seen Black's modern definition of "coast" tends imply "coastline."[27]

Though there may be some relevance in the argument that through the interchangeability of the terms, "coast" could mean that "a series of interconnecting lines between points from the actual interface of the *terra firma* and the hydrosphere *ipso facto* produces a "coast" which is indented and cut into,"[28] generally the distinction would appear to be insignificant. For these cases the second alternative involving "fringe of islands" would appear to apply, arriving at much the same result.[29]

The term "localities" is much the same; it is submitted that little has been changed. The ICJ's statements all refer to regions, eastern Finnmark, sea areas, Lopphavet basin, and areas related to historical activities. The only part of the decision departing from this relates to discussion of "general direction of the coast" which must be seen as a whole on a small scale chart.[30] This

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24Ibid. p. 82.

25*Merriam-Webster'sSeventh New Collegiate Dictionary*, G.&C. Merriam Company, 1972, p. 158.

26*Black's Law Dictionary*, Fifth Edition, West Publishing Co. (1979) p. 232. The definition continues, "This word is particularly appropriate to the edge of the sea, while "shore" may be used of huge margins of inland waters. In precise modern usage, the term "shore" denotes line of low water mark along mainland, while term "coast" denotes line of shore plus line where inland waters meet open sea."

27*Encyclopedic Dictionary of International Law*, (Parry, Grant, Parry, Watts, eds.), Oceana, (1988), p. 62 fails to define either term.

28Reisman and Westerman p. 78.

29See Section 6.2.1.2.

30See Section 6.2.1.4.

would apparently link up the regions, both with straight baselines and normal baselines, and as will be seen, not permit a divergent straight baseline in a region not consistent with the other regions seen as a whole. Thus the term "localities" used in TSC Article 4(1) and LOSC Article 7(1) in its usual meaning cannot be seen to be inconsistent with the ICJ's decision.[31]

Though these arguments may have some meaning,[32] and further research could be conducted especially in the UNCLOS I negotiations regarding the legislative history of these terms, as noted, it is submitted that they have little relevance to modern developments concerning State practice.

This leads to the next criterion, fringing islands, along which straight baselines may be established.

6.2.1.2. Bordered by an Archipelago Such As the Skjærgaard - Fringe of Islands along the Coast in the Immediate Vicinity

This criterion as seen in the ICJ's decision was set forth as "where it is bordered by an archipelago such as the 'skjærgaard' along the western sector of the coast here in question..." Another look at the geographical area intended reveals an region made up of many islands, some large, some small, lying off the mainland.[33] Changes were made in the Conventions by the inclusion of hte excerpt, "or if there is a fringe of islands along the coast in its immediate vicinity." Again questions can be raised as to the extent of the changes desired by the drafters of the Articles. No clarification is given in the surrounding Articles in either the TSC or the LOSC.

At first glance there appears to be no problem, the term "skjærgaard," especially with the ICJ's example of Finnmark, being fully compatible with "fringe of islands lying in the immediate vicinity". Both imply the existence of numerous islands.[34] However "fringe," "along the coast" and "immediate vicinity" may be more applicable for qualifying the establishment of straight baselines.[35] These are through several modes, "fringing" implying that the islands tend to form a barrier in the immediate vicinity of the mainland, linearly, in the vicinity of each other, parallel to

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31This is basically the position of Reisman and Westerman pp. 78-80, though they also show the meaning for "locality" in the singular based upon more recent ICJ practice which is maintained not to be applicable to establishment of straight baselines along entire coastlines.

32With the exception of ibid., most doctrine does not address these issues. O'Connell pp. 199, 202, 203 uses the terms interchangeably.

33See Atlas pp. 26 and 27, Reisman and Westerman p. 25, and Francalance and Scovazzi p. 37.

34Yet see the view of the U.N. Group of Experts, in U.N. Baselines p. 20, "(C)learly there must be more than one island in the fringe but it is difficult to specify on any particular minimum number."

35Reisman and Westerman pp. 82-83. Ibid. p. 85 also make the distinction that islands must be as defined under LOSC Article 121(3), "capable of sustaining human habitation or economic life of their own." Rocks (low-tide elevations) among the islands may only be used as basepoints under LOSC Article 7(4) if lighthouses or similar installations permanently above sea level have been built on them, or where such baselines to and from such elevations has received general international recognition. In other words a fringe of rocks is argued not to suffice, though they might under the TSC due to the earlier less precise definition of island.

the coast and not perpendicular.[36] Using this interpretation a scattering of islands would not qualify unless the coast were deeply indented and cut into, nor would an island cluster in a single place.[37] The U.N. Group of Experts see two possibilities for fringing islands under TSC Article 4(1) and LOSC Article 7(1), islands forming a unity with the mainland, and islands some distance from the coast forming a screen which "masks a large proportion of the coast from the sea."[38] "Immediate vicinity" is viewed as generally agreed to be a maximum of 24 miles, and islands lying linearly perpendicular or at an acute angle to the coast are also excluded as not lying "along" the coast.[39]

Though the conventional language is imprecise defining "fringing islands," nevertheless due to the expansive State practice, as mentioned above it seems of little value to examine the various interpretations extensively. TSC Article 4(1) and LOSC Article 7(1) clearly include a fringe of islands three miles offshore, but most probably not a fringe one hundred miles from the coast.[40] A fringe fifty miles from the coast if reasonably parallel is arguably acceptable. A fringe lying three miles but at an acute angle may also be acceptable.[41] The possibilities lying in between are grey areas, though clearly islands lying at a large distance from the mainland and perpendicular would not suffice. Most other doctrine equates the "archipelago such as the skjærgaard" with "fringing islands along the coast in the immediate vicinity" with little elaboration.[42]

Whether "deeply indented and cut into" and "fringing islands" are meant to be cumulative and conditions precedent to the other criteria will now be addressed.

6.2.1.3. Non Cumulative, Conditions Precedent

From above due to the structure of the ICJ's phrasing in its decision, and TSC Article 4(1) and LOSC Article 7(1), it is clear that the conditions "deeply indented and cut into" and "fringing

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36Ibid. pp. 86-90. The authors believe "immediate vicinity" to mean not more than 12 miles seaward from the low water mark of the mainland to the inner edge of the islands.

37Ibid.

38U.N. Baselines p. 20. The Norwegian *skjærgaard* is given as an example of the first, and the Recherche off Western Australia as an example of the second.

39Ibid. p. 21.

40Ibid.

41See Reisman and Westerman p. 89 citing U.S. position; and O'Connell p. 209, "general direction of the coast."

42Churchill pp. 28-30, Prescott Maritime p. 40, Nordquist II p. 100 differentiate slightly between the two, noting that the latter excludes the presence of a few isolated islands. Proper fringe groups are one of two categories, following the view set forth by U.S. Baselines p. 20 above. O'Connell p. 209 sees questions regarding fringing islands to be answered by looking at the criterion "general direction of the coast", "which is thus a criterion of when the method may be used and not a mere condition." Pharand Arctic pp. 133-134 sees a difference yet concludes they mean the same. Customary law as formulated by the ICJ would require only that an archipelago, such as the Norwegian consisting of 120,000 formations, would be close to the coast. Fringing islands in the immediate vicinity of the coast on the other hand would seem to be a serrated edging in the immediate vicinity of the coast. Since in the author's opinion proximity is widely interpreted by the ICJ, including in the *North Sea Continental Shelf Cases* (1969) op.cit. at 31, "immediate vicinity" would also receive a wide interpretation, thus bringing the conventional phrases within the customary rule.

from all three sources either one of the conditions will suffice for the establishment of straight baselines, since they are connected by the conjunction, "or". It also seems safe to maintain that in their ordinary meanings from all three sources either condition must be fulfilled completely, thus excluding situations with permutations of "deeply indented" combined with "fringing islands," "cut into" with islands in the "immediate vicinity," etc.[43] If the geographical situation satisfies both conditions simultaneously yet completely, the outcome is not affected, since the minimum threshold has been met.

A more difficult question perhaps involves their use as conditions precedent to the establishment of straight baselines subject to the restrictions of "general direction," "close linkage between sea and land" and "economic interests evidenced by a long usage," set forth in the ICJ's decision, TSC Article 4(2) and (4) and LOSC Article 7(3) and (5). Again it is maintained in the ordinary meaning "deeply indented and cut into" and "fringing islands along the coast in its immediate vicinity" are intended to be interpreted as conditions precedent due to their initial placement with respect to the restrictions in all three sources.[44] However O'Connell maintains that "general direction of the coast is a criterion for when straight baselines may be used, and not a mere condition."[45]

O'Connell's reasoning is as follows. TSC Article 4 (and necessarily LOSC Article 7) through its impreciseness limits straight baselines to localities where the coastline is deeply indented or cut into or where there are fringing islands in its immediate vicinity. A straight baseline system would not follow the coast in the absence of these geographical conditions. However the questions noted above concerning number of islands in a fringe and their relation to each other and to the mainland can only be answered by looking at the "general direction of the coast," set forth in TSC Article 4. Although Article 4 appears as an exception to the "normal rule" in TSC Article 3, the general rule is the general direction of the coast, and that rule is exceptionally applied in the situations enumerated in Article 4, where the coast is exceptional. As such the straight baseline method is not special "but a specific instance of a single principle."[46]

It is maintained in this context that the two interpretations are generally not antithetical. Under the ordinary meaning, "general direction" is still a primary condition, and lack of such, defeats the establishment of straight baselines even though one of the two conditions precedent, in the view set forth above, are met. More generally it would appear from TSC Article 3 and LOSC Article 5 that "general direction" of the coast is naturally required if the normal baseline is the low water line along the coast. As such O'Connell's argument is reasonable, and "general direction" is arguably even more than a primary condition and also a condition precedent, for normal baselines including straight baselines. Thus though it may be argued that the "general direction" criterion is not a

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43Reisman and Westerman p. 90.

44Respectively the *Anglo-Norwegian Fisheries Case*, op.cit. pp. 128-129; TSC Article 4(1) and LOSC Article 7(1).

45O'Connell pp. 208-209 from which the following points are taken.

46O'Connell p. 209.

condition precedent, it is one of the primary conditions under all views and lacking such, the establishment of straight baselines would fail. Doctrine tends to follow this view.[47] At the same time O'Connell's sophistication is lost in the coarseness of State practice, and in this context the point is of lesser relevance.

It is now appropriate to briefly analyze "general direction of the coast" itself.

6.2.1.4. General Direction of the Coast

As seen the straight baselines must not depart to any appreciable extent from the general direction of the coast, as advanced in the *Anglo-Norwegian Fisheries Case*, TSC Article 4(2) and LOSC Article 7(3). This is to be viewed on a small scale chart showing the general coast. Although this seems simple enough, variations have apparently occurred in its application related to tautology of terms, the use of large scale charts and specific geographic sections, the ICJ "squint" test, as well as liberal interpretations of the term "fringing islands" mentioned above.[48]

Though neither mentioned nor implied by any of these sources, calculations have been carried out indicating that with the exception of one straight baseline and the initiating and terminating baseline segments, the Norwegian straight baselines at issue in the *Anglo-Norwegian Fisheries Case* did not deviate more than *15 degrees* from the general direction of the coast.[49] The use of such a standard is probably not warranted however. All doctrine notes divergent State practice, with several not bothering to interpret the term.[50] As with the other criteria, due to the divergent State practice establishing straight baselines departing an appreciable extent from the general direction of the coast, not much more discussion than this will be presented.

47Churchill p. 30, Prescott p. 40, and Nordquist II, pp. 100-102. Pharand Arctic pp. 134-135 follows both views noting the geographic conditions precedent, the questions between TSC Articles 3 and 4 and LOSC Articles 5 and 7, application of general international law to a specific case, O'Connell's answer, and the criteria to be followed in the "mode of application" of straight baselines, including "general direction."

48Reisman and Westerman pp. 95-98. The authors also indicate that the arcs of circles method has been used in negotiated settlements of maritime boundaries rather than straight baselines.

49Ibid. p. 97. The authors believe that general direction of the coast can be found by the low water mark or the arcs of circles method.

50Churchill p. 32 sees the 15 degrees as a "standard model." Pharand Arctic p. 136 takes a lenient view, stressing allowance for a "reasonable degree of latitude" of State discretion in meeting this criterion based upon the ICJ's statement relating to lack of mathematical precision noted in Section 6.2.1. Prescott p. 64 concentrating totally on State practice has been noted above. Prescott Maritime pp. 40-41 notes the inherent vagueness based upon different lengths of coast results in different general direction, and the ICJ's statement related to lack of mathematical precision, unsatisfactory examinations of single sectors or large scale charts. O'Connell pp. 205, 209 215 and 216 as noted believes this to be the chief criterion, yet "susceptible" to subjective State evaluation. Due to subsequent State practice, the requirement parallel fringing islands closely linked to the mainland no longer can be sustained. Nordquist II p. 102 notes the inherent ambiguity of the term "appreciable," meaning either "capable of being perceived," or "considerable," emanating from the ICJ decision and not "touched" in the transfer to the TSC and LOSC. Reisman and Westerman p. 97 do not subscribe to a numerical limit because of its substantial addition to the language of the TSC Article 4(2) and LOSC 7(3), as well as inherent arbitrariness.

The next criterion set forth in the ICJ decision and incorporated in TSC Article 4(2) and LOSC Article 7(3) requires sea areas enclosed by the straight baselines to be sufficiently closely linked to the land. This will be addressed below.

6.2.1.5. Close Link between Enclosed Waters and Land

The sea areas enclosed by straight baselines under the *Anglo-Norwegian Fisheries Case*, TSC Article 4(2) and LOSC Article 7(3) must be closely linked to the land areas to be subject to the regime of internal waters. This criterion is also characterized by vagueness along similar lines as "general direction of the coast," but some main features can be given.

From the ICJ's decision the linkage is to be similar to that used in the determination of the rules relating to bays, liberally applied to coasts geographically as unusual as Norway's. Although this seems fairly uncomplicated, variations in the application of such have included non-proximity of internal waters to islands or promontories,[52] and demands for evidence of practice over time and intensity of use.[53] Mathematical ratios have also been employed for this criterion based upon the Norwegian example in the *Anglo-Norwegian Fisheries Case* where it has been calculated that the ratio of water to land is 3.5:1.[54] Although attractive the same objections may be made here as to the mathematical calculations derived from the ICJ's decision related to "general direction." Such a limitation is inherently arbitrary and furthermore amounts to an addition to the language of TSC Article 4(2) and LOSC 7(3). All doctrine notes divergent State practice, with several not bothering to interpret the term.[55] As with the other criteria, due to the divergent State practice establishing straight baselines enclosing waters dubiously closely linked to enclosed land areas, not much more discussion will be presented.

52U.N. Baselines p. 25.

53Reisman and Westerman pp. 99-100. The authors claim this addition is justified in relation to the parallel requirement for establishing historic title or for establishing that the waters of a bay meet requirements for internalization. "If the preliminary inference to be drawn from the geographical configuration is not determinative in a given case, factual evidence of the use of waters over time by coastal inhabitants and others must be adduced." Questions to be considered include the presence of trade routes, usages by coastal inhabitants, passage of foreign ships, successful opposition by coastal State of foreign use, and the presence of security installations.

54Churchill p. 32 and Pharand Arctic p. 137. This represents a comparison of water areas to areas of islands lying within the straight baselines.

55Churchill p. 32 appears to use the figure as a standard model. Reisman and Westerman pp. 99-100 concentrate on pressing into this geographical criterion elements of burden of proof, practice through time and intensity of use. Pharand Arctic p. 137 takes a liberal view, noting from the ICJ decision that the criterion should be liberally applied in the case of a coast so unusual as Norway's, and did in fact liberally apply the criterion to the Lopphavet and Vestfjorden areas. The author argues additionally that due to the TSC Article 5(2) and LOSC Article 8(2) exceptions, allowing innocent passage through internal waters where it existed in these areas before the enclosure by straight baselines, the necessity for such a close link decreases. When innocent passage is preserved, these internal waters are assimilated to territorial waters, and the reason for intimate relationships between sea and land lessens. As such application of this criterion should correspondingly be liberalized. Prescott Maritime p. 41 notes that the ICJ's call for more liberal application of the close link criterion has been followed with remarkable enthusiasm by various States. O'Connell p. 215 believes that though the ICJ intended in its decision that the waters enclosed assume the character of territory so that it was reasonable to treat them as internal waters, that due to subsequent State practice close linkage no long can be sustained. Nordquist II p. 102 echoes the U.N. Group of Experts that it seems clear that internal waters must be in fairly close proximity to land represented by islands or promontories.

The next criterion set forth in the ICJ decision and incorporated in TSC Article 4(2) and LOSC Article 7(3) allows in the determination of particular baselines, "economic interests peculiar to the region concerned" to be taken in account. This will be addressed below.

6.2.1.6. Optional Regional Economic Interests

Under the ICJ's decision, TSC Article 4(2) and LOSC Article 7(3) where the conditions precedent of deep indentation or fringing islands is met and the method of straight baselines applicable, in determining particular baselines economic interests peculiar to the region concerned may be taken in account. The reality and the importance of these interests must be clearly evidenced by a long usage.

In all three sources the key words "may be taken into account" appear, indicating clearly the subordinate nature this criterion has to the others. Thus economic interests alone do not justify the use of straight baselines, only the geographic criteria do, but provided the latter are satisfied, economic factors in regions may be allowed to influence the way actual baselines are drawn.[56]

This again seems a relatively straightforward concept to apply. From the *Anglo-Norwegian Fisheries Case* the economic interests were related to fishing. The population of Northern Norway was for its livelihood dependent chiefly upon fishing, there was a historical usage, and the ICJ considered that traditional rights were reserved for the people of that region to certain fishing grounds, particularly Lopphavet.

However variations in the application of this criterion has included solely economic motivations by the State in establishing straight baselines rather than considerations to be taken into account in the juridical justification; and for most claims, lack of long usage to evidence their reality and importance.[57] All other doctrine notes divergent State practice.[58]

Having now presented these main criteria, others relevant to this work appearing in the TSC Article 4 and LOSC Article 7 will now be briefly presented. These include the instances involving low tide elevations (TSC Article 4(3) and LOSC Article 7(4)); foreign territorial seas (TSC Article

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56O'Connell pp. 216-217.

57Ibid.

58Churchill p. 30 has little comment to this optional criterion, other than that fishing is the most obvious economic interest. Prescott Marine p. 41 notes the vagueness of this phrase, but notes "there is no evidence that any country has determined the alignment of any section of its straight baseline according to this principle." Pharand Arctic p. 138 notes the supportive role the economic criterion plays together with historic use to add probative value particularly for the baselines over the Lopphavet, including a justification of their length (44 miles plus 18 miles on either side of a submerging rock). Reisman and Westerman pp. 100-101 concentrate on the limitations involved including the necessity of the geographic conditions precedent, regional use, past not potential economic interest, historic economic date as proof, and centuries as the length of time involved. Nordquist II p. 103 offers little comment other than the necessity of the geographic criterion being fulfilled first, and the ILC following this view when relying upon the ICJ's decision. Alexander p. 76 notes the vagueness of the criterion, and asks, "(H)ow...can one determine...when economic interest peculiar to a coastal region does not justify liberal baseline delimitations?."

4(5) and LOSC Article 7(6)); due publicity of baselines (TSC Article 4(6) and LOSC Article 16); deltas (LOSC Article 7(2)); and reefs lying off islands (LOSC Article 6).

6.2.1.7. Other Relevant Criteria under TSC Article 4 and LOSC Article 7

Under TSC Article 4(3) and LOSC Article 7(4) straight baselines must not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built upon them. "Low-tide elevations" are defined in TSC Article 11 and LOSC Article 13(1) to be, "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide," within the territorial sea of the mainland or an island, with artificial structures such as oil platforms being excluded.[59] These provisions were to limit using these so called drying rocks as basepoints which in turn was probably to prevent drawing baselines too far seawards from the coast, thus reinforcing the "general direction of the coast" criterion.[60] "Similar installations" can be towers or buildings warning navigators of low tide elevations yet without serving any specific purpose connected with navigation.[61] They can also include beacons, foghorns and radar reflectors and be visible at all tides.[62] LOSC Article 7(4) also makes an exception for instances where the drawing of baselines to and from such elevations, without lighthouses or similar installations, has received general international recognition, which is to allow the use of such a rock, as explicitly done in the *Anglo-Norwegian Fisheries Case* for fixing the baselines over Lopphavet.[63]

From the trend of the State practice, this condition has elicited minor compliance. Variations in application of this provision may include the use of the LOSC Article 7(4) exception, international recognition. States may use low tide elevations to establish baselines, and announce after a few years that due to the complete absence or low level of State protest, such basepoints are internationally recognized.[64] Additionally under TSC Article 4(3) and LOSC Article 7(4) the way is open for States to construct merely a small tower on a drying rock or a reef with a light, horn or radar reflector, without regard to the proximity of navigational routes. Other variations include initial and final basepoints not connected to the low-water line, abstract arbitrarily-selected basepoints, reefs lying off the mainland and mock lighthouses.[65] All doctrine addresses divergent State practice.[66]

59See O'Connell pp. 210-211.

60Churchill p. 30.

61U.N. Baselines p. 24 and Nordquist II p. 102.

62Ibid.

63Ibid. p. 103 notes that the same "internationally recognized" exception for basepoints was not included in a similar context in LOSC Article 47(4) on archipelagic baselines, lacking the *Anglo-Norwegian Fisheries Case*.

64Prescott Maritime p. 41. Reisman and Westerman pp. 92-94.

65Ibid.

66Other than those indicated most do not address basepoints to any great degree.

Under TSC Article 4(5) and LOSC Article 7(6) straight baselines may not be applied to cut off foreign territorial seas from the high seas or an exclusive economic zone. This deals with the situation where a smaller State is embedded within a larger State, or where small islands belonging to one State lie close to the coast of another State.[67] A boundary extension is not permitted while reserving servitudes for the cutoff State as under TSC Article 5(2) and LOSC Article 8(2).[68] This criterion, though seemingly clear, also has been ignored by various States. All doctrine notes variant State practice.[69]

Under TSC Article 4(6) and LOSC Article 16 the baselines established by a State must be shown on charts adequate for ascertaining their positions, or alternatively a list of geographical co ordinates of basepoints, specifying the geodetic datum, may be produced.[70] These must be given due publicity and deposited with the Secretary General of the U.N. The same requirement is not applied to "normal baselines" which under TSC Article 3 and LOSC Article 5 are to be marked on large scale charts officially recognised by the coastal State.[71] In spite of the obvious advantages to the coastal State, as well as to navigation, except possibly related to other States' protests, State practice has also been ambiguous concerning this requirement.[72]

Under LOSC Article 7(2) straight baselines across deltas and other unstable coastlines are permitted, even should the low water line regress. This provision is one of the vaguest, with questions surrounding its interface with the other criteria noted.[73] It is claimed that no States have apparently yet used this criterion, having established baselines enclosing deltas using the other criteria.[74] Questions concerning the provision's application include whether a third type of coastline is being permitted or whether deltas are allowed only where there exist deeply indented coasts or fringing islands;[75] whether "furthest seaward extent of the low water line" is subject to the low tide elevations as basepoints or whether it is an exception; and what is the scope of "other natural conditions related to deltas?"[76] Application may be made retrospective to cover erosion

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67Churchill p. 30. The author gives as examples Monaco in France for the former, and Southern Yemen's Karaman Island lying near the coast of North Yemen for the latter.

68See Section NEED.

69Few deal with this point to any great extent other than those indicated. Prescott Maritime p. 41 notes that this requirement is the only one related to baselines which is unambiguous. Nordquist II p. 103 notes that other situations may not be covered by these restrictions where important parts of a State's coastline or sole major port may be cutoff.

70See U.N. Baselines p. 40, and Nordquist II pp. 145-150 for more complete discussion.

71Ibid. p. 148 notes that most large-scale charts indicate the low-water line.

72Churchill pp. 32-33. Prescott Maritime pp. 45-46. Most doctrine does not address this point other than those indicated.

73For a brief overview of UNCLOS III developments see Nordquist II pp. 97-100.

74Churchill p. 31. Prescott Maritime p. 48. See however Section 6.2.4.5.

75Nordquist II p. 101 and Reisman and Westerman pp. 101-102 subscribe to the latter.

76Churchill p. 31. Nordquist II p. 101 notes that from the text of LOSC Article 7(2) no submerged basepoints may be used based upon Bangladesh's proposals in UNCLOS III being rejected.

over a long time period, deltas may be completely absent and "highly unstable" coasts argued to exist, including volcanic and tundra.[77] Beyond this most doctrine fails to address this point.

Finally under LOSC Article 6 for islands lying on atolls, or islands having fringing reefs, baselines are defined as the seawater low water line of the reef.[78] "'Reef' is a mass of rock or coral which either reaches close to the sea surface or is exposed at low tide;" "'fringing reef' is a reef attached directly to the shore or continental land mass, or located in their immediate vicinity;" "'atoll' is a ring-shaped reef with or without an island situated on it surrounded by the open sea, that encloses or nearly encloses a lagoon."[79] Submerged reefs are not included.[80] Though this does not specifically relate to straight baselines, however growing State practice is supported using straight baselines to connect gaps in baselines on the reef.[81] This situation is not dealt with in the provision, making it ambiguous how far from the island the fringing reef may lie.[82] "Fringing" as indicated is argued to lie in the proximity, yet Australia's Great Barrier Reef may also be argued to "fringe" Australia lying at places 150 miles from shore.[83] Whether reefs lying off the mainland would justify straight baselines also raises a question.[84] Australia is an island, but also a continent, and if the Great Barrier Reef qualifies to establish baselines and straight baselines, then arguably so would reefs lying along other continents. Most doctrine addresses State practice, but other than those indicated few address this point specifically .

With this said the juridical bay will be addressed.

6.2.1.8. Juridical Bay

77Ibid. p. 101. The author believes regression to be a rare phenomenon, "(M)ost deltas advance rather than retreat, unless heavy damming has taken place upstream), and even where storms cause severe erosion in the delta region, after a period of time the delta resumes its advance into the sea." O'Connell pp. 196, 211. offers no direct comment to this provision, but notes in relation to submerged fringing reefs, (A)n analogous situation is where the coastline is so unstable that no relevant baseline or basepoints can be identified...However, the problem (of Bangladesh) was accommodated by providing for stability of straight baselines as distinct from stability of the coastline.

78Ibid. p. 92 and Churchill p. 43 note the problem was discussed in TSC negotiations, but no provision on reefs was included in the TSC.

79U.N. Baselines Appendix I at p. 47. Nordquist II p. 93 notes similar systems include: "'almost atoll,' a small subsiding island surrounded by a circular reef with a lagoon in between;" "'horseshoe reefs,' reefs formed in a horseshoe shape;" and a "'faro' a small atoll-shaped or oblong reef, with the water in the lagoon less than 30 meters."

80Churchill p. 44. Nordquist II p. 94. O'Connell. 195 footnote 111 notes, "(T)he intention is to refer to drying reefs, but as some countries indicate submerged reefs on their charts, 'appropriate symbol' might refer to these as well." Additionally, "it cannot altogether be denied that non-parties (to the TSC) may take into account in determining the extent of their territorial waters unusual submerged natural frontiers to the sea." Parentheses added.

81Churchill p. 44. Nordquist II p. 94 believes closing lines between reefs surrounding lagoons, should correspond by analogy to the rules relating to mouths of rivers or bays.

82Churchill p. 44.

83Ibid. The author argues that the latter is probably not intended to fall under the scope of LOSC Article 6. The author also notes that since many atolls form part of archipelagos, it would often be simpler and more advantageous for the archipelagic State to use archipelagic baselines under LOSC Article 47 than under Article 6.

84Reisman and Westerman p. 94 believe not.

This regime interfaces closely with the above mentioned straight baseline regime. The interface has been controversial since under customary law neither the criteria for a bay nor the maximum closing line of a bay were clear, similar to the vagueness of the straight baselines regime.[85] This was somewhat clarified under TSC Article 7 and LOSC Article 10.[86] Briefly, under these provisions a indentation along a coast shall not be regarded as a bay unless its waters are landlocked and its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation. Where the presence of islands means that an indentation has more than one mouth, the diameter of the semicircle is a line as long as the sum total of the lengths of the lines across the different mouths. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.[87] These are not to apply where straight baselines are used or to historic bays or bays belonging to more than one State; however due to the vagueness of the straight baseline regime, it can be imagined that the interface between the two is less than certain.[88]

Difficulties with the application of these provisions include it not always being clear which are the natural entrances of an indentation; the extent rivers, lagoons, etc. should be taken into account in determination of the total area; and the case of bays with fringing islands.[89] Of more importance similar to the regime of straight baselines, or perhaps because of this regime, there has been divergent State practice, which is addressed by all doctrine.[90]

85Churchill p. 33.

86Prescott p. 60 notes, "(I)n a Convention where many of the articles mean all things to all men the rules about bays are fairly clear." Nordquist II p. 118 notes that TSC Article 7 and LOSC Article 10 can be considered customary law, citing *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), 1992 ICJ Reports 351, 607, para. 417 (411, 416, 419 and 420). O'Connell pp. 393-395, 416 does not agree and concludes, "(I)t is evident that geography will resist the effort of the Geneva Convention to provide a universally applicable method of characterizing indentations as bays by rote. The International Law Commission had only cursory direction from the Committee of Experts, and beyond this no obvious technical advice whatever. The result is a scheme too general and undiscriminating to be satisfactory, and hence apt to break down in controversial instances. Whereas the rules in Article 7 will demand strict interpretation where courts are required to apply them by law...it may be expected that Governments, when defining the seaward boundaries of their countries, will pay scant attention to them if the results would appear to be anomalous. In fact the imaginative uses of the straight baseline method by several countries portends a general exploitation of an escape device to avoid the often artificial framework into which a coastal complex would be forced by strict application of Article 7 (and LOSC Article 10)." Parentheses added. Ibid. p. 209 notes that customary law and convention law have theoretically diverged due to this inconsistent use of a mathematical distance, and while there may be cases of coincidence, "there will be situations where the twenty four mile rule would be anomalous, and hence binding only upon the parties to the Convention."

87The ICJ's reasoning against use of the ten mile rule in the *Anglo-Norwegian Fisheries Case* was obviously not followed regarding the twenty four mile closing rule for bays. See O'Connell p. 407.

88Prescott p. 51 writes it is doubtful any other subject than bays dealing with maritime boundaries has inspired more written commentary. Ibid. p. 60 notes that the clear language of TSC Article 7 and LOSC 10 are undermined by the disclaimer that the rules do not apply to historic bays. See Section 7 for historic theories.

89Churchill pp. 35-36. Reisman and Westerman pp. 102-103. Nordquist II p. 117. See generally O'Connell pp. 389-416.

90Churchill p. 36. Reisman and Westerman pp. 102-103. Reisman and Westerman also note that divergent application of the straight baselines regime is used to circumvent the rules for historic bays and the archipelagic regime under LOSC Article 46 *et seq.* Prescott p. 61 is more concerned with the effect historic bays has on the bays regime. It seems to be the same situation that Reisman and Westerman complain of however, since Prescott p. 61 notes that some States closing

The archipelagic State regime will be addressed briefly.

6.2.1.9. Archipelagic State Regime

This regime, LOSC Article 46-54 Part IV is not addressed due to its inapplicability to the Russian Arctic baselines. LOSC Article 46(a) defines an archipelagic State as one composed entirely of islands, thus excluding continental States with archipelagic territories. Some authors however suggest that this definition should be expanded to include also the latter.[91] Regardless the straight baselines established around the Russian Arctic island groups emanate from basepoints on the mainland and thus would necessarily be raised under the straight baseline regime with fringing islands.

Discussion will now move to the State practice of establishing straight baselines and delimiting bays.

6.2.2. State Practice

Taking the criteria outlined above from the *Anglo Norwegian Fisheries Case*, TSC Article 4 and LOSC Article 7 for establishing straight baselines and delimiting bays, the present Section will demonstrate State practice in their implementation. Somewhere between forty five and eighty States have either established straight baselines or have enabling legislation to do so.[92] As noted, State practice has developed along other lines than the conventional requirements. Some calculate that of the straight baselines established over half depart from the international rules.[93] Others

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alleged historic bays have done so without any reference to their historic status, and a larger number of States "have made no move to proclaim the bays listed against their name as historic bays." This is noted to have expanded into claims for "historic waters", initiated by India and Sri Lanka in 1974. See Section 5.3.3.1. for the Russian claims to "historic straits." Alexander p. 77 believes that claims to historic waters are likely to grow in number. Pharand Arctic pp. 139-144 concentrates more on "consolidation of title" related to claims for straight baselines consistent with the *Anglo-Norwegian Fisheries Case* and the *Grisbadarna Case*, 4 *American Journal of International Law* 226-236 (1910). In these decisions history is invoked to complement and add to jurisdictional claims rather than as original historical claims, with similar but more strict requirements.

91Prescott p. 72, 202-203, Churchill p. 100 and O'Connell pp. 256-258. Reisman and Westerman p. 156 as well as Prescott Maritime p. 45 believe these are currently invalid however due to LOSC Article 46(a). See also Nordquist II p. 412.

92Reisman and Westerman in 1992 put the figure of those establishing at eighty. Churchill p. 31 in 1988 puts the figure between forty-five and fifty-five with fourteen having enabling legislation, noting that it is difficult to arrive at a precise number, "as it is not always possible to tell if the use by a State of a straight line as the baseline is intended to be a straight baseline *stricto sensu* or as a bay or river closing line." Pharand Arctic pp. 148-149 (1988) lists sixty-six States, twelve with enabling legislation, but discounting those with closing lines across historic bays. See Appendix 6 for the author's list taken as an example due to its average figure. O'Connell (1982) p. 211 lists fifty and others with enabling legislation. Brownlie p. 187 puts the number at approximately forty-eight. Professor Pharand in his review of the paper, 7 February, 1996, notes that the figures quoted are too inexact and desires more precision. Though desirable it is however believed difficult to arrive at a more precise figure than those given for two reasons. Some of the States establishing straight baselines are also establishing closing lines over bays and rivers, and it is difficult to know if the use by a State is as a straight baseline or as a bay or river closing line. Secondly, some twelve to fourteen States have enabling legislation to establish straight baselines, but have yet to do so, casting uncertainty upon their status. Both of these arguments are as well supported by Churchill p. 47 and interview 12 February 1996.

93Churchill p. 32.

consider the non-compliance to be even more widespread.[94] State practice enclosing bays has included enclosing indentations not meeting the areal requirements or drawing a closing line exceeding 24 miles, often argued justified as an appropriate application of the straight baselines regime.[95] Various of these applications have involved *single coastal indentations*, failing to meet the semi-circle test or the 24 mile closing line limitation under TSC Article 7 and LOSC Article 10 and the customary rules for historic bays under customary law. As single indentations they also probably do not qualify under the straight baseline regime, failing the deeply indented or cut into test, yet through divergent State practice are used as an alternative basis for enclosure of failed bays. Though it is possible to find seemingly solid legal restrictions supporting narrower interpretations,[96] this is not the direction taken in general State practice, which is the formal source. Those relying exclusively upon narrow interpretations of these provisions appear in fact chiefly to be those with some contact with the U.S. State Department,[97] which as will be seen is supporting as narrow a interpretation as possible. The first criteria addressed will be "deeply indented and cut into," "fringing islands," "general direction of the coast," and "closely linked."

6.2.2.1. Deeply Indented and Cut Into - Fringing Islands - General Direction - Closely Linked

State practice in establishing baselines at variance with these threshold criteria under the *Anglo-Norwegian Fisheries Case*, TSC Article 4(1) and LOSC Article 7(1) is very common and may represent the majority of claims to date.[98] States including, Albania, Australia, Burma, Cambodia, China, Colombia, Cuba, Ecuador, Ethiopia, France, Gabon, Guinea, Guinea-Bissau, Haiti, Iceland, Ireland, Iran, Italy, Kenya, Mauritania, Mauritius, Mozambique, Portugal, Saudi Arabia, Senegal, Somalia, Spain, South Korea, Sudan, Sweden, Syria, Tanzania, Thailand, Venezuela, and Vietnam[99] appear to have established baselines along all or sections of their coastlines which are smooth or using islands which doubtfully can be considered fringing. Moreover cursory examination of the Scovazzi maps show in addition that Malta, Russia, Canada and Egypt, may

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94The statement in Prescott p. 64 has been noted wherein the violations are so commonplace that a State need not interpret the vague TSC Article 4 and LOSC Article 7 in creative new formulations, precedent already exists to establish any imaginable baseline. Smith and Roach p. 13 note, "(P)roperly drawn straight baselines do not push the limits of the territorial sea significantly seaward from the coast which would otherwise be measured from the low water line."

95See Prescott pp. 51-60.

96See Reisman and Westerman pp. 82-90

97See ibid. p. xvi.

98Prescott Maritime p. 41. Reisman and Westerman p. 118.

99Prescott Maritime p. 41., Churchill p. 56, Reisman and Westerman pp. 105-136, 168-172, 175-178, Prescott p. 64. The violations are listed cumulatively. Thus if one author lists a State as violating the criteria, that State is listed. Not all the authors however are in agreement as to violations by all the States listed. One of the most ardent advocates for strict interpretation of these provisions, Reisman and Westerman pp. 109-111, and 116, note that Ireland and Sweden have established their baselines in substantial compliance with TSC Article 4(1) and LOSC Article 7(1). O'Connell pp. 211-212 notes that Iceland set the pattern for loose application of the Norwegian precedent immediately following the ICJ decision.

probably be added to this list.[100] This may not greatly extend the outer limit of the territorial sea, but it weakens the requirement through State indifference and general non-compliance with the threshold criteria.[101]

While it would be beyond the scope of this work to examine the case of every State mentioned, some specific examples illustrate the point. Colombia has drawn a single straight baseline 131 miles in length along its Caribbean coast enclosing a smooth coast with no fringing islands.[102] It would be difficult to find smoother sections of coast than those of Senegal north and south of The Gambia, and it requires a vivid imagination to believe that the coast of Guinea is either deeply cut into or fringed with islands.[103] Only one section of Ecuador's coast may be considered indented, namely the Gulf of Guayaquil in the south.[104] Albania has established straight baselines along a relatively "uncomplicated coast."[105] Some of the Australian areas meet the "deeply indented" or "fringing islands" tests, yet many do not.[106] The northwest coast of the Cape York Peninsula fronting the Coral sea is a series of undulations in a relatively smooth coastline.[107] The Cuban straight baselines exhibit some compliance where the coast is legitimately fringed with islands along the Nicholas Channel, however the northwestern coast near Bahia de Habana is almost smooth.[108] While the western coasts of Scotland could be said to be "complicated and fringed with islands" the same could not be said of the coasts of France.[109]

100Respectively, Malta in establishing straight baselines under either the archipelagic regime or proximate fringing islands appears on the scale of the map used to have enclosed smooth coastlines on the island of Gozo as well as the southeast coast of Malta itself. Francalanci and Scovazzi p. 53. Russia has established baselines drawn along sections of the Kuril islands coastline which appears smooth. See Reisman and Westerman p. 152. This will be addressed in further detail in Section 6.2.4. Canada may have established baselines along relatively smooth coasts along parts of its Arctic coastlines also on the Queen Elizabeth Islands. Francalanci and Scovazzi p. 59 and Pharand Arctic pp. 156-157. Reisman and Westerman p. 111 believe the Canadian baselines in the Arctic to be in substantial compliance with the TSC Article 4(1) and LOSC Article 7(1) criteria, yet fail on subsequent criteria. Egypt appears to have largely a smooth Mediterranean coastline. Francalanci and Scovazzi p. 61.

101Prescott Maritime p. 43.

102Churchill p. 32.

103Prescott p. 64. See also Reisman and Westerman pp. 129 and 133.

104Prescott pp. 64-65.

105Ibid. pp. 67 and 68.

106Reisman and Westerman pp. 121-122.

107Ibid. The authors note a coastline like this cannot be characterized as deeply indented or cut into, as none of the indentations are deep nor do they occur so frequently that the coast has a "cut into" appearance; nor is the area fringed with islands in the immediate vicinity.

108Ibid. pp. 122 and 124. Baseline segments 17-18 and 25-26 enclose large, shallow bays which do not justify internalization. Ibid. pp. 125-136 take up additionally excesses taken with respect to the same criteria for Iceland, Senegal, France, Guinea, Italy, and Vietnam, complete with maps and references to basepoints.

109O'Connell p. 213. On the coasts of Normandy and Brittany, polygonal construction links promontories and offshore islands, including Ushant, by means of extended lines. Ibid. p. 214 notes Canada's system of straight baselines is described as certainly being consistent in parts to the Norwegian coast, but "the system is being progressively applied to the whole Canadian coastline, and not only to those parts which are geographically exceptional." The author concludes, "The notion of 'deeply indented' has thus been liberalized, and economic interests evidenced by long usage, while obviously relevant on some sections of the coast, are not so obviously relevant on others."

Those States drawing straight baselines of doubtful general direction relative to the coast, or enclosing sea areas doubtfully closely linked to the land areas of necessity include those listed above. As seen these criteria are dependent upon the conditions precedent yet add their own requirements. As such using non-fringing islands for basepoints necessarily increases the ratio of land to sea area, if not pulling the straight baseline in a non-general direction of the coast. Prominent States in this category include Burma and Ecuador.[110] Those States drawing straight baselines enclosing waters doubtfully closely linked to the land areas due to the large sea areas enclosed include Burma, with straight baselines in some places 60 degrees to the general direction of the coast, and with a ratio as a whole of 50:1 sea area to land area enclosed by the baselines.[111]

This trend is substantiated by the State practice of the other TSC Article 4 and LOSC Article 7 criteria which is cumulative to the results indicated in this Section. This State practice as well as that of TSC Article 7 and LOSC Article 10 will be addressed in the following Sections. However first the special case of islands enclosed by straight baselines at an acute angle to the coast will be addressed. This is included due to the special relevance it has to the Russian baselines system established in the Arctic.

6.2.2.1.1. Islands Enclosed by Straight Baselines at Acute Angles to the Coast

A look at the State claims made above with corresponding maps indicates several cases of relevance due to islands enclosed by straight baselines at acute angles to the coast. These include Canada's baselines along the Newfoundland and especially Baffin Island coasts along the Labrador Sea.[112] Respectively segments 10-13, 18-20, and 19-44, 151-152, 153-154, 158-160 deviate as much as 90 degrees from the general direction of the coast. Cambodia's baselines in the Gulf of Thailand, segments 1-4 deviate as much as 70 degrees.[113] Chile's straight baselines segments 58-60 and 64-66 deviate as much as 40 degrees. Colombia on its Pacific coast segments 1-8 and 9-10 encloses large bays by straight baselines deviating from the general direction of the coast as much as 65 degrees.[114] Vietnam's baseline segments A1 to A6 deviate as much as 55 degrees.[115] Italy's baseline segments out to the islands of the Tuscan Archipelago and the Pointine Islands in the Tyrrhenian Sea deviate as much as 45 degrees.[116] France with Ile d'yeu

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110Churchill p. 32, Prescott p. 64 and Reisman and Westerman pp. 154-156.

111Churchill p. 32.

112Reisman and Westerman p. 166-168. Only State practice exhibiting baselines with large deviations from the general direction of the coast noted by experts is addressed, since the experts are accustomed to making these geographic measurements. The angular measurements were performed by the present author, not a geographer, unless otherwise noted, and are meant sole as means to shown approximate comparisons.

113Reisman and Westerman pp. 172-174.

114Ibid. pp. 175 and 176.

115Ibid. pp. 133, 135.

116Ibid. pp. 131,133, 134.

and Belle Ile connecting its baselines has deviations as much as 55 degrees.[117] Iceland's baselines segments 19-30, include islands as basepoints, one of which varies 90 degrees to the coast.[118] Ecuador's and Burma's straight baselines deviate as much as 60 degrees to the general direction of the coast.[119]

Thus taking a conservative count of just those States mentioned specifically in the literature by independent experts as establishing straight baselines not following the general direction of the coast, ten States are included.[120] Thus roughly *13%* to *18%* of States establishing straight baselines depending upon the total used, have established straight baselines departing anywhere between *40* and *90* degrees from the general direction of the coast as compared to 15 degrees in the *Anglo-Norwegian Fisheries Case*.

With this said the discussion will now move to another common State practice at variance with the traditional criteria, namely the location of basepoints.

6.2.2.2. Basepoints on or above Low-Water Mark

States locating basepoints in the [illegible] than on or above the low-water mark is becoming increasingly common.[121] These include neighbouring countries creating common origins for straight baselines, with or without consulting their neighbours, and States terminating straight baselines in the sea in areas not involving adjacent States.[122] States exercising this practice include Bangladesh, Chile, Canada, Denmark, Egypt, Finland, Guinea Bissau, Iran, Norway, Saudi Arabia, Sweden, Syria, Venezuela, and West Germany.[123] Taking Venezuela as an example, this State has established a straight baseline in a single line of 98.9 miles to enclose the delta of the Orinoco River.[124] Basepoint B is located 26 miles east of the current Guyana Venezuela boundary, approximately 50 miles east of the natural entrance point at the eastern end of the river system. The Guyanan territorial sea is thus cut off from the high seas contrary to TSC Article 4(5) and LOSC Article 7(6). The Venezuelan explanation is that the point is consistent with the Venezuelan boundary claim currently under negotiation with Guyana. Guyana has given oil concessions in the disputed area.

117Ibid. pp. 129-130. O'Connell pp. 213 and 215.

118Reisman and Westerman pp. 125-126.

119Churchill p. 32. See also Prescott p. 64.

120The U.S. State Department includes in this category the straight baselines of Mexico along the coast of the Gulf of California, connecting the islands of Las Animas, San Idelfonso, Tortuga and San Pedro Nolasco, which are calculated to deviate from the general direction of the coast as much as 40 degrees. Smith and Roach pp. 67 and 69. For Cuba, segments 92-93 and 102-107, and straight baselines west of the Isle of Pines, are also viewed as not following the general direction of the coast though no map is provided.

121Prescott Maritime pp. 44-45.

122Ibid.

123Ibid. and Prescott p. 278. Churchill p. 32. Reisman and Westerman p. 166, 181-187.

124Ibid. pp. 187-188 from which this information is obtained.

The next area of divergent State practice concerns bays and archipelagos.

6.2.2.3. Bays and Archipelagos

States establishing straight baselines for indentations failing to meet the criteria for bays under TSC Article 7 and LOSC Article 10, historic bays under customary international law,[125] or archipelagos under LOSC Articles 46 and 47 are also common practice. States enclosing failed bays include Australia, Burma, Cameroon, Canada, Colombia (Caribbean Coast and Pacific Coast), Ecuador, Haiti, Iran, Italy, Madagascar, Senegal, Spain, and Russia.[126] An example of enclosing failed bays is given by Colombia. On the Caribbean Coast applying the semi-circle test using the entrance points near Punta de Gallinas and Cabo de la Vela, the total area of water enclosed does not equal or exceeds the area of a semi-circle drawn between those points.[127] Even more egregious is the enclosure between Cabo de la Vela and Cabo de la Aguja, such that, "(T)his one segment alone adds thousands of miles to the continental shelf and exclusive economic zone claimed by Colombia."[128]

6.2.2.4. Combined Practice of Non Complying States

From this practice it can thus be said that roughly *58% to 84%* of the States establishing straight baselines, depending upon the total used, depart from compliance with at least one if not more of the conditions for formation, including the condition precedents, "deeply indented and cut into" or proximate "fringing islands".[129] Some of these are substantial deviations, others less so. Since State practice with *opinio juris* as international custom is a formal source under international law, also indicating how provisions are interpreted under Article 31(3)(b) of the Vienna Convention on Treaties, this would indicate that new rules regarding the establishment of baselines are presently under formation.

6.2.2.5. State Protests - Consequences

Essential in the formation of new rules governing the establishment of baselines is the extent to which the above State practice is protested. General protests seem to be of unbelievably insignificant number, though adjacent States may protest if they feel their interests are affected.[130]

125See Section 7.NEED.

126Reisman and Westerman pp. 111, 121, 131, 133, 134, 144-152, 154-156, 158, 161, 166-167, 168-173, 175-177, 183-185, maps included. Ibid. pp. 150-151 list the non-Arctic areas of the Russian coastline, with arguably illegal bays include, along the Black Sea, the Kamchatka Peninsula, the Sea of Japan, the Tartar Strait, and the Sea of Okhotsk. Smith and Roach pp. 77-81, 122, 123, add Costa Rica, Cuba, Libya, Argentina and Mauritania to this list.

127Reisman and Westerman pp. 144-147.

128Ibid. Ibid. pp. 175, 177 note much the same on the Pacific coast, "(N)ot one of the gulfs or bays thus enclosed passes the semi-circle test of Article 7 (LOSC Article 10.)

129In this calculation the States were counted only once despite multiple infringements in some cases.

130Churchill p. 47 notes that few doubtful baselines have encountered active opposition or led to serious disputes, the Norwegian baselines and the Libyan Gulf of Sidra closing line being "notable exceptions."

The most expansive system of protests seems that forwarded by the U.S. The U.S. State Department indicates that most of the divergent State practice listed above, under all theories, has received a protest by the U.S.[131] For clarity in comparison these will be listed similar to above. Though not all of the total of seventy five appear as receiving a direct protest or assertion of right under the U.S. FON program,[132] a disclaimer states that absence of protest or assertion should not be inferred as acceptance or rejection by the U.S. of the State's straight baseline claim.[133] In the following where a protest or assertion of right has been delivered, the date of such, in that sequence, will be indicated.[134] The listed States include, Albania (1989); Algeria; Angola; Argentina (1967); Bangladesh (1978); Barbados; Brazil; Bulgaria; Burma (1982), (1985a); Cambodia ( ), (1986a); Cameroon (1963); Canada (Labrador & Newfoundland 1967, Arctic 1986a); Chile; China; Colombia (1988), (1988); Costa Rica (1989); Cote D'Ivoire, Cuba (1983a), 1985a); Cyprus, Denmark, Denmark (Faroe I. 1991, 1991), Denmark (Greenland); Djibouti (1989), (1992); Dominica; Dominican Republic ( ), (1987a); Ecuador (1986); Egypt (1991); Finland; France; French Dependencies; Germany; Guinea (1964) (1981); Guinea-Bissau ( ), (1989); Haiti (1973, (1986a); Iceland, Iran (1994), (1994a); Ireland; Italy (1986); Japan; Kenya, Korea South; Lithuania; Madagascar; Malta (1981a); Mauritania (1989), (1981a); Mauritius, Mexico (1969); Morocco; Mozambique; Netherlands; Norway; Norwegian Dependencies; Oman (1991), (1991a); Portugal (1986); Rumania, Saudi Arabia, Senegal (1989); Somalia, Soviet Union (1984a and 1985a Arctic), (1982a); Spain; Sudan (1989); Sweden; Syria; Tanzania, Thailand; Tunisia; Turkey; United Arab Emirates; United Kingdom; U.K. Dependencies; Venezuela (1956a); Vietnam (1982a); Yemen, Yugoslavia Former.[135]

This is the most extensive public list of protests found regarding establishment of straight baselines. The U.N. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs indicates generally that due to the delicacy of bilateral relationships, some States are very reluctant to publicize their protests, and there exists no U.N. registry to which States report their protests to straight baselines.[136]

131Smith and Roach pp. 44-48, Table 2, "Claims Made to Straight Baselines."

132See Section 5.2.4.2.2.2. Dependencies are counted as the same State in this figure.

133Smith and Roach p. 44. The authors state further, "(S)ince the FON Program is ongoing, many of the claims listed in Table 2 are, *or will be*, under review with possible diplomatic protests and/or operational assertions of right to follow." Italics added.

134This is similar to Smith and Roach pp. 44-48. "(a)" denotes multiple protests or assertions.

135Of interesting relevance are those States "rolling back" claims to excessive territorial seas to twelve miles, thereby somewhat alleviating the straight baseline claim. These States include, and as can be seen consist of the same receiving the U.S. protest, Albania, Argentina, Brazil, Cape Verde, Gabon, Ghana, Guinea, Guinea-Bissau, Haiti, Madagascar, Maldives, Mauritania, Senegal, Tanzania, and Tonga. Ibid. p. 96, Table 5, "Excessive Territorial Sea Claims Rolled Back."

136Correspondence Moritaka Hayashi, Principal Officer, U.N. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, 21 September, 1995. On the other hand States are not so reticent to indicate their claims to straight baselines, as can be seen in the U.N. publication, *The Law of the Sea, Baselines, National Legislation with Illustrative Maps*, (1989), Sales No. E.89.V.10.

At the same time there is some indication of other State protests than the U.S. made to some of the claims to straight baselines outlined above. Specifically these include the following. France, Singapore and Thailand have protested Vietnam's straight baselines; Iran has protested Oman's straight baselines; member States of the European Union have protested Canada's straight baselines in the Arctic; France, Germany, Norway, Spain have protested Libya's straight baseline.[137] The U.K. and the Netherlands have protested the Uruguayan and Argentinean straight baselines; India and Burma have protested the Bangladesh straight baselines.[138] Japan has protested both the Madagascan and the Mauritanian straight baselines, and Greece the Turkish straight baselines.[139] The U.K. has protested against a French straight baseline.[140] Guinea repealed its baseline in 1980, using the low-water mark baseline for its coast in its dispute with Guinea-Bissau.[141] Guyana has protested the Venezuelan baseline.[142] In addition to this smattering of protests collected it can be assumed that others exist which have been kept quiet. Unexpectedly no other States than the U.S. have been found objecting officially to the Russian Arctic straight baselines or sailing its vessels in these waters at variance with the Russian provisions.[143]

With this said concluding statements for the international regime of straight baselines will be presented.

6.2.2.6. Conclusions

Even taking into account the unpublished State protests, given the amount of deviation of State practice to the criteria set forth in the *Anglo-Norwegian Fisheries Case*, TSC Article 4 and LOSC Article 7, the general lack of State protest seems remarkable. Reisman and Westerman view this development as follows,[144]

> "These violations are not the result of ambiguity in the standards promulgated, but rather of lack of commitment to the strict interpretation and vigorous enforcement of those standards. A conspiracy of silence has permitted these claims to stand. Except in the most egregious cases

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137*The Law of the Sea - Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea.* (1994), Sales No. E.94.V.13, (U.N. Practice) pp. 65, 88, 122. See also Churchill p. 33.

138Smith and Roach pp. 73, 90-91. See also Churchill p. 33.

139O'Connell p. 212.

140O'Connell p. 213 citing the *Channel Continental Shelf Case*, 18 *International Legal Materials* 397.

141Reisman and Westerman p. 131.

142Ibid. p. 187.

143Professor Pharand in his review of February 7, 1996, expresses surprise at this, however of the relevant literature it is only Franckx pp. 192, 224 footnote 471 who states otherwise, yet refers only to the U.S. protests. Senior Lecturer in Law Robin Churchill, 16 June 1994, interview, notes lack of protest from the U.K. and the European Union; Assistant Director General Dag Mjaaland, Norwegian Foreign Ministry, 13 May 1994, interview, notes lack of protest by Norway; unanswered oral question to Officials of the French Defense and Foreign Ministries, INSROP Meeting, Paris, 23 November 1993; and Interview with Professor Kolodkin, 25 February, 1995, Moscow, Russia noting lack of protest from all but the U.S. See Section 6.2.3 and 6.3.

144Reisman and Westerman p. 190.

where claims infringe on the ocean rights of neighbouring states, the *modus operandi* of third states appears to have been, 'Don't oppose my straight baselines and I won't oppose yours.' This passive approach has led to the lodging of even more impermissible claims and to the progressive deterioration of inclusive rights to the oceans."

Over time toleration of much of the divergent State practice which is clearly contrary to the international provisions regarding straight baselines will lead to a moderation of these rules.[145] This may be especially true since this State practice appears to be particularly aberrant. Other TSC and LOSC provisions related to baselines generally have generated greater State compliance, including normal baselines, closing lines of bays, closing lines of river mouths, harbour works, low-tide elevations, islands, and fringing reefs.[146]

From the above it may be concluded that though initially the straight baselines established at variance with the criteria noted may have been legally invalid under international conventional and customary law, most appear to be on the way to being internationally recognized.[147] Some of the domestic legislation establishing straight baselines is between twenty and thirty years old, with some even older.[148]

What these "soft" results mean for the Russian Arctic Baselines probably speaks for itself. However an analysis in the next section will be carried out examining whether these baselines are consistent with international law. The first group examined will be the straight baselines enclosing large island groups.

6.2.3. Russian Arctic Baselines Enclosing Large Island Groups - Consistent with International Law?

6.2.3.1. Introduction

As noted above the traditional criteria for the establishment of straight baselines in the Russian Arctic necessarily include the conditions precedent a coast "deeply indented and cut into" or "fringing islands along the coast in the immediate vicinity." The baselines established along these

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145See Sections 2.2.2. and 2.3.2. and Churchill p. 47.

146Ibid. pp. 45-46. The author as well believes that the customary rules on baselines are identical with the conventional rules, based upon the relevant TSC Articles' unchanged incorporation *in toto* into the LOSC and other treaties with little opposition; and the legislation of non-Parties generally reflecting the TSC's provisions on baselines.

147This is however except with respect to the U.S., which has consistently objected, and the smattering of other objecting States.

148See Australia (1983); Canada (1972, 1985); Chile (1977); China (1958); Colombia (1984); Cuba (1985); Democratic Kampuchea (1982); Denmark Faroe Islands (1976) and Denmark Greenland (1963); Ecuador and Ecuador Galapagos (1971); Finland (1965); France 1967; German Federal Republic (1979); Haiti, (1972); Iceland (1979); Italy (1961); Malta (1983); Mauritania (1988); Mexico (1968); Portugal (1985); South Korea (1977); Senegal (1972); Spain (1977); Sweden (1966); Thailand (1959 and 1970); the Soviet Union (1984 and 1985); Venezuela (1956 and 1968); Vietnam (1982); and Yugoslavia (1979); U.N. Baselines respectively pp. 19, 69, 86, 101, 104, 107, 112, 119, 122, 154, 162, 168, 176, 182, 184, 201, 217, 219, 221, 260, 267, 274, 281, 299, 306, 315, 381, 384, 388.

coasts must also run in the general direction of the coast, there must be a close link between the enclosed waters and the land and regional economic interests may optionally be taken to add support to be baseline regime.[149] State practice of these criteria has been somewhat looser however.[150]

For the sake of clarity the baselines enclosing the three large Arctic island groups including the key straits are analyzed first. A brief description is as follows.[151]

Novaya Zemlya. Three straits are enclosed by baselines, the largest being the Kara Gates Strait, with baselines 29 miles long at the western entrance and 32 miles long at the eastern entrance.[152]

Severnaya Zemlya. Straight baselines enclose four straits. The main strait Vil'kitskii, is divided by islands, and is enclosed in the west by a 60.1 miles long straight baseline drawn from Bolshevik Island north of the strait to islands north of the mainland. The main baseline at the eastern entrance of Vil'kitskii is 42 miles long. The Shokal'ski Strait is enclosed at the western entrance by 27.2 and 26.8 miles long baselines, and in the east by a 27 miles long baseline.

Novosibirskiye Ostrova. Straight baselines enclose the Sannikov, Eterikan and Dmitrii Laptev Straits. Across the Sannikov, the baseline is 36 miles long in the west and 44 miles long in the east. Across the Dmitrii Laptev, the baseline is 32 miles long in the west and 30 miles long in east.

149See Section 6.2.1. Other specific provisions include the use of drying rocks as basepoints and the case of deltas. See Section 6.2.1.7.

150See Section 6.2.2.

151The descriptions are taken from Butler, William., "The Legal Regime of Soviet Marine Areas", *The Soviet Maritime Arctic*, ed. Lawson W. Brigham, 1991, (Butler Brigham), p. 217; Butler, William E., *Northeast Arctic Passage*, (1978), (Butler), pp. 18-21, 28-29, 33 and 39 and Butler, William E., *The USSR, Eastern Europe and the Development of the Law of the Sea*, 1987, (Butler Development Law), C.3. pp. 27, 38, 42, as well as Russian Charts obtained through INSROP through the cooperation of the Central Marine Research and Design Institute (CNIIMF), (in Russian). The latter will be referred to as "Russian Charts No." The scale is 1:700,000 unless otherwise noted. Maps also used include *Atlas of the Straight Baselines*, (Eds. Scovazzi Tullio, Giampiero Francalanci, Daniela Romano, Sergio Mongardini) (1989), (Scovazzi Atlas), pp. 203, 204, 205 and 206, scale 1:2,000,000, and Admiralty Maps, *North Cape to Uyedinyéniya Island* and *Dikson Harbour to Bering Strait*, scale, 1:2,4000,000 at Lat. 71 degrees 30. See also Franckx, Erik, *Maritime Claims in the Arctic - Canadian and Russian Perspectives*, (Franckx) p. 181. Some variations were noted between the various sources, and the Butler Brigham figures chosen due to the author's status and Soviet/Russian experience, until the Northern Sea Route Sailing Directions are received through INSROP, with precise descriptions. See Chapter 3 for a geographical description of the straits. Miles indicate nautical miles. Abbreviated reproductions of Russian Charts No. 696 showing the Kara Gates Strait, Russian Charts No. 949 showing the Vil'kitskii Strait and Russian Charts No. 952 showing the Dmitrii Laptev Strait appear as Attachments I, II and III in Appendix 6. These were chosen due to their relevance to the straight baselines enclosing the straits. Due to the general size of the Russian Charts No. reproduction of all the charts would be difficult.

152As seen in the 1964 exchange of notes between the Soviet Union and the U.S. the Kara Gates straits were already claimed as Soviet territorial waters. See Section 5.3.3.1.1. Franckx pp. 157 and 209 footnote 182 notes no U.S. vessel came even close to these straits.

Taking these in this order the baselines enclosing Novaya Zemlya will be discussed first.

6.2.3.2. Novaya Zemlya

In relation to the traditional criteria for establishing straight baselines, it is unclear whether the straight baselines tying Novaya Zemlya and Vaigach Island, the islands separating the Barents Sea and the Kara Sea, could be justified. It seems relatively clear that Novaya Zemlya does not consist of traditional fringing islands lying in the close vicinity along the coast.[153] It is made up of chiefly three large main islands, which hardly form a unity with the mainland nor do they form a screen which masks a large proportion of the coast from the sea. The initial basepoints from which the baselines enclosing the islands originate are situated on a relatively smooth coast, where the low water-line is used as the normal baseline.

Viewing on more complete charts however,[154] generally with the exception of Samoyedov Zemlya the mainland appears "deeply indented and cut into", and Novaya Zemlya arguably "fringing" since it is almost parallel, though not in the proximity of the coast. In addition these islands may lie along the general direction of the coast, if measured on the basis of the general direction of the peninsula on Samoyedov Zemlya, of which both Vaigach Island and Novaya Zemlya appear to be a geologic extension. Fifteen degrees deviation was seen to be the norm in the *Anglo-Norwegian Fisheries Case*, and the greatest angle of deviation between the baselines over the Kara Gates strait and the peninsula, western coast appears to be approximately 27 degrees.[155] Novaya Zemlya lies more parallel to the general direction of the larger coastline, though with the southern end lying parallel to Samoyedov Zemlya but perpendicular to the general coastline.[156]

Thus, though arguments may be made that Novaya Zemlya falls outside the traditional criteria for establishing baselines, this is not altogether clear. At the same time as seen State practice in establishing baselines along coastlines which are smooth and using islands which doubtfully can be considered fringing is anything but rare.[157] Australia, Cameroon, Cuba, Egypt, Iceland, Iran, Italy, Madagascar, Senegal and Vietnam provide good examples, where basepoints are located on relatively smooth coasts.[158] Likewise where islands are enclosed by baselines either with large degrees of deviation from the general direction of the coast, and/or lying large distances from the coast, Canada, Cambodia, Colombia, France, Iceland, and Italy provide good precedent.[159] For

153See Section 6.2.1.2. Scovazzi Atlas p. 203.

154See Russian Chart Nos. 650 (scale 1:200,000 at parallel 75 degrees), 695 (scale 1:250,000 at 75 degrees), 696 (scale 1:1,000,000 at 75 degrees) and 697, and Admiralty Map, *North Cape to Uyedinyéniya Island.*

155Measurements were carried out by the author and are approximate.

156See Russian Charts Nos. 696 and 697 and Admiralty Map, *North Cape to Uyedinyéniya Island.*

157See Section 6.2.2.1. This category represents the majority of claims to date with some thirty nine States listed.

158Reisman and Westerman pp. 123, 124, 126, 128, 134, 135, 145, 148, 149, 185; and Scovazzi Atlas, pp. 41, 51, 55, and 61. The U.S. State Department add Costa Rica, Colombia, and Oman. Smith and Roach respectively, pp. 49 and 78, 49 and 50.

159Ibid. The U.S. State Department adds Cuba and Mexico, Smith and Roach pp. 67 and 69.

the case of Novaya Zemlya the islands enclosed are large and the angle of deviation, small, 27 degrees, which is anywhere from one-half to one-third of the deviations in the examples given. The sea to land ratio of area enclosed is small.[160] Most of the examples given, with the exception of Canada, are States enclosing small islands with larger marine areas.

Thus since it appears that it is only the U.S. which has protested the Russian system of straight baselines in the Arctic,[161] the baselines binding Novaya Zemlya to the mainland emerging from a relatively smooth coast are consistent with a moderate largely unopposed State practice, and even arguably consistent with the traditional criteria liberally interpreted. Some of the straight baselines enclosing the islands themselves may fall however on other theories, including the use of questionable basepoints and the enclosure of bays failing to meet the TSC Article 7 and LOSC Article 10 criteria.[162]

The same is more difficult to maintain for the straight baselines binding the next island group to the mainland, Severnaya Zemlya, addressed below.

6.2.3.3. Severnaya Zemlya

This group of islands dividing the Kara Sea and the Laptev Sea stretches the arguments made above even further for the straight baselines to be acceptable under international law. Under the traditional criteria the coast comprising the Taymyrski Peninsula can probably be said to be "deeply indented and cut into," though not as much as the Norwegian "skjærgaard."[163] Along parts of the coast there also exist "fringing islands" under the traditional sense, small and in the relative vicinity of the coast, and either forming a unity with the coast or a screen masking a proportion of the coast from the sea. These small islands have been enclosed by the Russian straight baselines, from which the initial baseline in the west surrounding Severnaya Zemlya originates. In the east the initial straight baseline originates from a basepoint on a smooth coast where the low-water mark is used.

It seems difficult for several reasons to maintain that these islands may be bound by straight baselines even under a liberal interpretation of the traditional criteria. These islands consist generally of four large islands, hardly forming a unity with the coast nor forming a screen masking a large proportion of the coast from the sea. Though lying approximately the same distance from the mainland as Novaya Zemlya, the angle of deviation with the general direction of the coast is much greater. On the western side the angle is approximately 90 degrees; on the eastern side,

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160The ratio of water to land for the entire Russian Arctic area enclosed by straight baselines has been calculated by the INSROP Geographical Information System (GIS) system to be 3.8:1, nearly the same as the ratio from the *Anglo Norwegian Fisheries Case*. Work is continuing to calculate for each island group the water to land ratio.

161See Section 6.2.2.5.

162See Section 6.2.4. below.

163See Russian Charts Nos. 948 and 949, Admiralty Map, *North Cape to Uyedinyéniya Island* and Scovazzi Atlas pp. 204, 205.

approximately 56 degrees. Even on more complete charts Severnaya Zemlya cannot be said to curve around to lie parallel to the coastline.[164] The direction continues almost perpendicular to the mainland, the four large islands lying at greater distances from each other than those of Novaya Zemlya.

The more difficult question relates to whether State practice with corresponding little State protest noted could support the Russian application here. This may be a close question because while there is a moderate State practice using straight baselines based on smooth coasts and diverging from the coast at large angles of deviation as well as long distances, the islands enclosed are no where as large as those in Severnaya Zemlya. However, since under TSC Article 10 and LOSC Article 121 islands in themselves may generate maritime zones, baselines properly constructed around the islands might not be so very different than those connecting these islands to the mainland. In other words this application would clearly be less onerous than the application by States enclosing large bodies of water related to the land area enclosed, since the internal waters enclosed would be less.

Thus the conclusion for the Severnaya Islands is that binding these islands to the mainland by straight baselines mostly perpendicular to the arguably smooth coast is not in itself inconsistent with international law due to the moderate unopposed State practice doing the same over greater maritime distances. Some of the straight baselines enclosing the islands themselves may fall however on other theories, including the use of questionable basepoints and the enclosure of bays failing to meet the TSC Article 7 and LOSC Article 10 criteria.[165] The land-to-sea ratio reflects this.[166]

With this said the next island group is discussed dividing the Laptev Sea and the Siberian Seas, the Novosibirsk Islands.

6.2.3.4. Novosibirsk Islands

This group of islands dividing the Laptev Sea and the East Siberian Sea also stretches the arguments made above even further for the baselines to be acceptable under international law, perhaps more so even than for Severnaya Zemlya. The Russian coast in this area is relatively smooth, with a few bay-like features, a few deep indentations and a few areas with fringing islands.[167] Over various sections of the coastline straight baselines have not been established, including where the initial basepoints binding the Novosibirsk Islands to the mainland emerge.[168]

164See Russian Charts Nos. 948 and 949, Admiralty Map, *Dikson Harbour to Bering Strait*, and Scovazzi Atlas pp. 204, 205.

165See Section 6.2.4.4. below.

166In calculating this ratio on the GIS system, the nearest basepoints appearing on the mainland were taken due to the virtually indiscernible basepoints chosen off the coast of the Taymyr Peninsula.

167See Russian Charts No. 952, Admiralty Maps *Dikson Harbour to Bering Strait*, and Scovazzi Atlas pp. 206-208.

168There is one baseline to the west enclosing Ebelyakhskaya Bay.

As above it seems difficult to maintain that these islands may be bound by straight baselines for several reasons. The Novosibirsk Islands consist of four islands, two, Kotélny and Faddeyévski Islands connected by a glacier, so-called Bundé Land. They lie approximately the same distance from the mainland as Novaya Zemlya or Severnaya Zemlya, but similar to the latter hardly form a unity with the coast nor form a screen masking a large proportion of the coast for the sea. The angle of deviation with the general direction of the coast is approximately 58 degrees in the west and some 74 degrees in the east. The direction of the islands continues almost perpendicular to the mainland, Kotélny and Faddeyévski Islands and Bundé Land lying at greater distance from Bol'shoy Lyakhovskiy Island than the islands comprising Novaya Zemlya and Severnaya Zemlya.

As also above the question relates to whether State practice would support the Russian application. Similar to Severnaya Zemlya straight baselines established around the Novosibirsk Islands under TSC Article 10 and LOSC Article 121, might not be so very different than those presently established connecting these islands to the mainland. In terms of land area compared to sea area, the internal waters established by Russia through its straight baselines would be less onerous than the general application by States enclosing large bodies of water.

Thus the conclusion for the Novosibirsk Islands is the same as for Severnaya Zemlya. The binding by straight baselines closely perpendicular to a relatively smooth coast is not in itself inconsistent with international law due to the moderate unopposed State practice doing the same over greater maritime distances. Some of the individual straight baselines enclosing the islands however might fall on other theories, including the use of questionable basepoints and the enclosure of bays failing to meet the TSC Article 7 and LOSC Article 10 criteria.[169]

With this said the international practice related to the Russian enclosed bays and basepoints in the Arctic will now be discussed.

6.2.4. Russian Arctic Baselines Enclosing Bays, Basepoints on Drying Rocks, Etc. - Consistent with International Law?

6.2.4.1. Introduction

This Section deals with Russian enclosed bays and basepoints in the Arctic. These two types are included in the same Section due to the unclarity whether TSC Article 4 and LOSC Article 7 are being used or TSC Article 7 and LOSC Article 10 in enclosing some of these marine areas.

6.2.4.2. Prominent Bays, Basepoints and Other

169See Section 6.2.4.5.

Taking prominent bays first, those examined[170] include from west to east the White Sea, Bay of Cheshsk, Bay of Pechorska; Kostin Strait, Moller Bay, Inostrántsev Bay, (Novaya Zemlya); Gulf of Baidaratsk, Kruzenstern Bay, Gulf of Ob, Gulf of Yenisey, Gulf of Pyasinskiy; unknown bay, unknown bay, unknown bay, Akhmátov Fjord, Deryogina and Neodach Bays (Severnaya Zemlya, Komsomolets Island and Bol'shevik Island); Gulf of Kyatangskiy, Gulf of Olenëkskiy (landward side of baselines), Lenya River Delta,[171] Yanski Bay; Ebelyakhskaya Bay, Dragot-Syennaya Bay, (Novosibirsk Islands, Kotel'nyy Island, Zemlya Bunge,[172] Faddeyevski Island); Indirgírka River Delta, Kolymá River Delta, Chaunskaya Bay; Somnityelnaya Bay (Wrangel Island); and Kolyúchinskaya Bay. Although other indentures appear on the extensive coastline, they will not be covered specifically. A general analysis however follows for the coastline.

Of these twenty eight only five meet the traditional length criterion for the enclosure of bays under TSC Article 7 and LOSC Article 10 by a 24 mile closing line. These are Kruzenstern Bay (20.8 miles closing line); Akhmátov Fjord (11 mile closing line) (Severnaya Zemlya, Bol'shevik Island); Gulf of Olenëkskiy (landward side of baselines, 16.9 miles closing line); Ebelyakhskaya Bay (19.2 miles closing line with basepoint on sand assumed dry); Chaunskaya Bay (18.5 miles closing line). Of these using the semicircle of the length of the closing line formula set forth in TSC Article 7 and LOSC Article 10, all but possibly the Gulf of Olenëkskiy[173] meet the traditional criterion of having an area equalling, or greater than, the semi circle of the closing line(s). This means that of the twenty eight prominent bays examined, only four apparently meet the traditional criteria.

This means either that the enclosure must be justified under historic title or by straight baselines under TSC Article 4 or LOSC Article 7. Russian domestic legislation and other sources indicate that historic claims made include the White Sea (84.4 miles closing line), Gulf of Cheshskaia (44 miles closing line), Gulf of Pechorskii (59.9 miles closing lines); Gulf of Baidarskaia (62.5 miles closing line), Obskii Inlets (43 and 28.3 mile closing lines) and the Enisei Inlets (65.7 and 24.3 mile closing lines).[174]

Looking at the remaining prominent bays seen on the background of the traditional criteria for establishing straight baselines and basepoints, it is felt beneficial to also include a general analysis of the surrounding coastline. As will be seen there is a measure of Russian compliance with TSC Article 4 and LOSC Article 10 in the Arctic.[175]

170All numerical figures are approximate, measured and calculated by the author from the Russian Charts No. and compared to known distances.

171On the Russian Charts No. 951 the river deltas are specified as such.

172A basepoint is placed on the ice shelf Zemlya Bunge (Bunge Land).

173This area will be more closely examined by the GIS system when it becomes operative.

174See Section 7.NEED. These include the 1985 Decree and Kolodkin, A. and M. Volosov, "The legal regime of the Soviet Arctic," *Marine Policy*, March 1990, (Kolodkin) p. 160.

175Reisman and Westerman p. 150 also admit this for the entire Russian coastline.

6.2.4.3. General Analysis of Baselines and Basepoints - Samoyedov Zemlya, Novaya Zemlya, Yamal and Gydánski Peninsulas

West from Novaya Zemlya in addition to the closure lines for alleged historic waters, the low water mark is used along substantial sections of the coastline.[176] The only stretch which appears to be of doubtful validity is east of Kildin Island where straight baselines are established on a smooth coastline with some basepoints appearing to be at sea.

On Novaya Zemlya on the south western coast baselines are established along a deeply indented and cut into coast.[177] The basepoints are established on islands, drying rocks without navigational installations, and possibly at sea, and it would be the latter used as basepoints if substantiated which would be inconsistent with TSC Article 4(3) and LOSC Article 7(4).[178] The Kostin Strait (60.9 miles closing lines) also is characterized by a coastline deeply indented and cut into. Mezhdusharski Island is only one island but establishing baselines in this area is not so very different than the Norwegian baselines established on the outer edges of large islands. In addition since islands generate their own maritime zones under TSC Article 10 and LOSC Article 121 the effect is not so very much different than if the low water line were used. This is not the case for Moller Bay, (41.9 miles closing line) and some of the large shallow bays on the northwest coast of Novaya Zemlya including Inostrántsev Bay (51.6 miles closing line).[179] While some of these bays may fall under the 24 mile closing line, the area enclosed is less than the area of the semi circle of the closing line. All the deeper fjord indentations would qualify however under both TSC Articles 4 and 7 and LOSC Articles 7 and 10. These are both on a coastline deeply indented and cut into and have closing lines less than 24 miles and areas greater than the semi circle of the closing line.[180] The straight baselines established from Solúnski Point to Cape Nassau also arguably meet the traditional fringing island criterion. The straight baselines on both the northwest and northeast coasts of Novaya Zemlya seem however of questionable traditional validity, enclosing shallow bays not meeting the semi-circle of the closing line requirement or running through basepoints on single non-fringing islands, rocks without installations or at sea.[181] On a large segment of the northeastern coast the low water line is used. Further south where straight baselines are established much the same may be said as was stated characterizing the west coasts. Not a few shallow bays are enclosed failing either under the traditional length requirement or the area of the semicircle of the enclosure line. However the straight baselines across the deep fjord indentations would qualify under both regimes.[182] Where there are fringing islands such as in the Oza and

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176Russian Charts No. 600 and Scovazzi Atlas p. 202.

177Russian Charts Nos. 650 and 695 and Scovazzi Atlas p. 203.

178It is difficult to imagine how a drying rock without an installation will gain "international recognition" as the Norwegian example under the *Anglo-Norwegian Fisheries Case*, but the Russians may claim a similar application, accepted over time without substantial State protest.

179The information in this Section is taken from Russian Charts No. 696 unless stated otherwise.

180See Mityushikha Bay for example.

181The status of the latter is not clear, Russian Charts Nos. 696 and 697, nor Scovazzi Atlas p. 203.

182See Chékin Fjord for example.

Tsivólka Fjord region basepoints are established either on islands, rocks without installations or at sea. The latter would be of questionable traditional validity. On the southeastern coast of Novaya Zemlya as well as most of the coastline of the Yamal Peninsula over to the Taymyr Peninsula not claimed as closing lines of historic waters, or straits, the low water line is used.[183]

6.2.4.4. General Analysis of Baselines and Basepoints - Taymyr Peninsula, Severnaya Zemlya

On the western coast of Taymyr, the Kharíton Láptev coast, fringing islands are prevalent.[184] In the vicinity of Pysinskaya Bay and the Nordenskiöld Archipelago the islands are numerous enough as to mask a proportion of the coast from the sea if not form a unity with the mainland. The straight baselines appear to run through basepoints situated mostly on small islands and rocks though a few may be at sea. Most of the small islands or rocks appear on the other hand to have some sort of navigational installation nearby. Nevertheless, with the exception of the Pysinskaya Bay and Nordenskiöld Archipelago areas, the very small islands or rocks along the Kharíton Láptev coast hardly unite with the mainland or mask a large proportion of the smooth coastline and therefore are not fringing. Therefore the straight baselines in this area are of questionable traditional validity.

Moving on to Severnaya Zemlya, the Komsomolets, October Revolution and Bol'shevik Islands, and starting with the Shokal'skii Strait west, the straight baselines run through a basepoint established on what appears to be an isolated rock, Opásnye Island, certainly not fringing, which however appears to have a navigational installation on it.[185] Further the first bay arrived at on October Revolution Island, Obahnaya has a closing line of 20.1 miles but hardly the necessary semicircle of the closing line. Although the maps are rough for these purposes, the same general characteristics describe the remaining straight baselines on the west and the east side of Komsolets Island. Although fringing islands do exist and areas of the coast can be said to be deeply indented and cut into, isolated rocks are often chosen far to sea on which to establish the basepoints. Large shallow bays are also enclosed, with the closing lines respectively on the west side, unknown bay (42.7 miles closing lines), unknown bay (39.4 miles closing lines), and on the east, unknown bay (21.3 miles closing line). On the other hand a unknown fjord on eastern October Revolution Island is legitimately enclosed (11 miles closing line) with a greater area than the semi circle of the closing length, and the low water line is the baseline. On the eastern side of Bol'shevik Island, in addition to Akhmátov Fjord mentioned above, are Deryogina and Neodach Bays (closing lines 29.3 Severnaya Zemlya, Bol'shevik Island) and an area much less than the semicircle of the total length of the closing lines. The low water line is the baseline on part of Bol'shevik Island.

183See Section 7.NEED for the historic claims to the Gulf of Baidaratzkaya, the Gulfs of the Ob and the Gulf of Yensei; Section 6.2.3. for enclosure of the straits; and Section 6.2.4.2. for Kruzenstern Bay.

184See Russian Charts No. 948 and Scovazzi Atlas p. 204.

185See Russian Charts No. 949. These closing lines calculated are only an approximation since they were derived from Scovazzi Atlas p. 205 and not the Russian Charts No. which, with the exception of the Bol'shevik Island area, Russian Charts No. 949, were unavailable.

Back on the mainland, Simms Inlet and Faddey Bay are enclosed by the same baseline running out to Malyy Taymyr Island enclosing the Vil'kitskii Strait. While the coast line may be described both as deeply indented and cut into as well as having fringing islands, deviating a straight baseline some 60 degrees from the mainland to bind Malyy Taymyr Island is a liberal application. Further east along the Taymyr Peninsula baselines are established along small fringing islands close to the coast, arguably indented and cut into. Further along the low water mark is used. There seems little objection here.

6.2.4.5. General Analysis of Baselines and Basepoints - Gulf of Khatangskii to the Indirgírka River Delta, Novosibirisk Islands

The Gulf of Khatangskii (68.6 miles closing lines plus island) is one indentation and with two fringing islands, one large and one very small.[186] This is in excess of the traditional criteria, but would however easily qualify under the bay criteria if the closing line were moved landward. Again for the next section of the coast the low water line is used as the baseline. The next feature is the Gulf of Olenëkskiy (landward side of baselines, 16.1 miles closing lines over a bay bordering a delta).[187] The bay is easily of a greater area than the semicircle of the closing line, and the delta as well seems legitimate. It is not clear whether LOSC Article 7(2) or traditional criteria are intended applicable here, however it is clear that the coast is deeply indented and cut into with fringing islands, on which the basepoints are placed.[188] It is even more clear with the entire Lyena Delta including the Olenëkskya Sleeve. The small "Bay" Gulf appears legitimately enclosed by a closing line of 10.7 miles and an area greater than a semicircle of the closing line. The small delta of the Olenëkskya Sleeve seems legitimately enclosed under either LOSC Article 7(2) or under fringing islands criterion. Fringing islands are used further along the entire Yana River Delta which as well generally seems legitimate under both LOSC Article 7(2) and fringing islands criterion, though some of the islands are moderately distant from the coast. The low water line is used as a baseline in Borkháya Bay with the exception of straight baselines established on small islands questionably fringing the coast due to the angle of deviation. Yanski Bay has 64.2 miles of straight baselines, plus an island, with three basepoints established on sand. Though not meeting the bay criteria, since the Yana with several sleeves run in here, the delta criterion under LOSC Article 7(2) arguably apply. The basepoints appear established on the furthest seaward extent of the low water line, assuming the sand is drying. If the sand is not drying, the basepoints have been established at sea which is questionable. The low water line is used up to Ebelyakhskaya Bay. The enclosure of this bay has been noted which also has a basepoint located on sand, but which may be more difficult to justify not being a delta. If the sand is dry then the basepoint is justified and the bay proper. If the sand is drying, then it must have a navigation installation on it or be internationally recognized to be justified. Since no installation appears, and international

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186This is only an approximate figure based upon Scovazzi Atlas pp. 205 and 206, since the Russian Charts No. was not available.

187Russian Charts No. 951 and Scovazzi Atlas pp. 206-207.

188As seen in Section 6.2.1.7. several authors believed that States had not yet utilized LOSC Article 7(2) for enclosing deltas.

recognition seems doubtful traditionally due to the point's anonymity, if the sand is drying or constantly underwater, then the basepoint does not meet the traditional criteria. Had a closing line from the mainland been used, Ebelyakhskaya Bay would still probably qualify due to having a subsequent closing length of approximately 21.4 miles and an area approximately equal to a semicircle of this length.

The Novosibirisk Islands are enclosed by straight baselines, but the low water mark is used as the baseline along large sections of the coast on all the islands both on the west and the east. Generally on the west side of Kotel'nyy Island shallow bays are enclosed which probably fail to meet the traditional bay criteria.[189] There are four notable geographic formations on these islands, three on Kotel'nyy Island and one on Bol'shoi Lyaknovskiy Island. The first is Dragot-Syennaya Bay, where two straight baselines are established across the mouth using an island, a total of 37.5 miles out to sea as a mid point. These would fail both the straight baseline criteria, the one island or group of minute islands not fringing or not being deeply indented or cut into, as well as the bay criterion, the line not closing the bay. Had the bay merely been closed, the closing line would be approximately 19 miles and the area enclosed much greater than the semicircle of the length, and hence legitimate without question. The next is a unknown bay on the east side of Faddéyevski Island with a closing line of 12.9 miles and an area slightly less than a semicircle of this length, thus failing as a bay.[190] It would as well fail the straight baseline criteria not having fringing islands or being deeply indented or cut into. The next interesting formation is Zemlya Bunge (Bunge Land), which as noted is a glacier, with basepoint number 349 established on ice.[191] This is the northern end of the baseline enclosing the eastern side of the Sannikov Strait.[192] Finally following a section of the coastline of Bol'shov Lyaknovski Island where the low water line is used as a baseline a unknown bay is enclosed by a closing line of 9.8 miles, which would however fail due to its area being much less than the semicircle of the length. One of its basepoints is placed on sand, and hence is subject to the same comments made above.

Back to the mainland again, the low water line is used as the baseline for large sections of the coast. The Omylyákhskaya and Khrómskaya Lagoons are legitimately enclosed by a closing line of 5.8 miles, with an area greater than the semicircle of this length. The Indirgírka River Delta is enclosed by 56.5 miles of closing lines around Gusínaya Bay and the delta. While the bay would have easily qualified if a normal closing line had been used of approximately 7.9 miles and an area far in excess of the semi circle of this length, basepoints were chosen on rocks without installations and small islands of questionable traditional validly out to sea from the islands which are fringing. Though the farthest seaward extent of the low water line may be used for a delta, here the rocks and islands used appear beyond the delta.

189The Russian Charts No. were not available for the northerly parts of these areas, and approximations must be made from Scovazzi Atlas p. 207 unless otherwise noted.

190Russian Charts No. 952.

191Ibid. and Scovazzi Atlas p. 207.

192See Section 9.NEED.

6.2.4.6. General Analysis of Baselines and Basepoints - the Kolymá River Delta to the Bering Strait, Wrangel Island

Following the Indirgírka River Delta the low water line is used as the baseline along the entire coast until the Kolymá River Delta is reached with some 52.5 miles of closing lines of small bays and the delta.[193] One of the small bays resembling a fjord is legitimately enclosed, the other not, being too shallow for the semicircle test. The delta however seems properly enclosed under LOSC Article 7(2), with basepoints established on both small islands and sand, which appear to be the furthest seaward extent of the low water line and still part of the delta or on small islands arguably fringing. The low water mark is again used as the baseline along the coast to Chaúnskaya Bay noted to be legitimate above. Except for two small unknown bays appearing generally legitimately enclosed the low water mark is used as the baseline along the entire coastline eastward to Kolyúchinskaya Bay. This formation is enclosed by 35 miles of closing lines plus the small island. This enclosure would fail both the bays criteria and the straight baseline, the latter since there is only one island fringing and one indentation on an otherwise smooth coast. If the island were not used for the basepoint, and the closing line moved landward a short distance until it measured 24 miles, the semicircular test would be easily met due to the size of this bay. With the exception of a very small narrow-mouthed bay to the east of Kolyúchenskaya Bay legitimately enclosed on the rest of the coast to the Bering Strait the low water mark is used.

On Wrangel Island short baselines are established mostly on the northern coast enclosing small bays most of which appear legitimate due to the narrowness of the entrances. Small fringing islands also appear legitimately employed. The one large bay, Somnityelnaya Bay is not enclosed.[194]

6.3. Conclusions

In conclusion, it can be seen that rather large discrepancies exist relative to the traditional criteria for various sections of the coast. These include basepoints established on sand, which may be drying, without installations, on drying rocks without installations, possibly at sea, and on single or a few islands or rocks far to sea and at large angles to the general direction of the coast. These latter would have doubtful international recognition due to their anonymity. Straight baselines are established along relatively smooth coasts not deeply indented or cut into, or if so, by only one indentation or on one or a few more small islands doubtfully fringing. Looking at the bays, large shallow bays are enclosed by closing lines greater than 24 miles, and if the length is 24 miles or less, the areas are less than the semicircle of the length of the closing line.

193Russian Charts No. 954 and Scovazzi Atlas p. 208.

194While Somnityelnaya Bay on the southern coast of Wrangel Island is shown enclosed by a straight baseline on Scovazzi Atlas, p. 208, the Russian Charts No. 954 does not indicate any such baseline. This is substantiated by INSROP GIS which scanned in the Russian coordinates given by the 1985 Decree, Butler Development Law, C.3.

In spite of this there exist large sections of the coastline in complete compliance. These include using the low water line as a normal baseline for smooth coasts; various sections on which straight baselines are established are deeply indented and cut into; there are fringing islands along the coast in the immediate vicinity which appears to form a unity with the mainland or form a screen which masks a large proportion of the coast from the sea; some straight baselines do run in the general direction of the coast; not a few of the fjords would also qualify as bays; small deep bays amply meet the bay requirements of closing length and area; and straight baselines established around several of the deltas would arguably qualify both under the fringing islands as well as the delta regime. In short the straight baselines and closing lines established along segments of the Russian Arctic coast exhibit most of Reisman and Westerman's "pathologies" and at the same time in other segments exhibit complete compliance with the traditional criteria.[195]

More importantly however Russia has moderate support in State practising these discrepancies contrary to the traditional criteria. Briefly some twelve States have enclosed failed bays and some fourteen States have located basepoints at sea.[196] With regard to the latter the Russian practice may in fact be rather conservative since the Russian basepoints are located on drying rocks, albeit without installations, and very few at sea. Under this reasoning the use of sand for basepoints as long as it is drying seems also justifiable. The use of ice for establishing a basepoint is controversial, however seems at least as justifiable as placing them at sea. Some twelve States have established straight baselines at great angles of deviation from the coast.[197] Some thirty five States have established baselines along all or sections of their coastlines which are smooth or using islands doubtfully considered fringing.[198] Even where liberal application has occurred for enclosing deltas, such as using non-fringing islands and rocks on which to establish the basepoints, basepoints at sea have not been utilized as in the case of Bangladesh.[199]

Although the total numbers of claims at variance with the traditional criteria in themselves may be not be considerable when seen in terms of a total of forty five to eighty States establishing straight baselines, they have been largely unopposed.[200] This is applies also to the Russian Arctic straight baselines in that it appears it is only the U.S. which has protested.[201] Thus, though many of these enclosures by straight baselines and closing lines certainly fail the traditional criteria for establishing straight baselines and basepoints as well as the traditional criteria for enclosing bays, due to the moderate State practice which is largely unopposed by other States, Russian practice

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195Reisman and Westerman p. 150 in fact note, "(L)ike the claims of Canada, Australia, and other states with extensive areas of coastline, Soviet claims are illustrative of inappropriate claims along conforming coasts as well as many claims which are invalid *per se* because they are drawn along non-conforming coasts...It must also be said, however, that many claims are substantially conforming under Article 4 (LOSC Article 7)."

196See Sections 6.2.2.2. and 6.2.2.3.

197See Section 6.2.2.1.1.

198See Section 6.2.2.1.

199See Reisman and Westerman pp. 183, 186 and 187.

200See Section 6.2.2.5.

201Ibid.

with regard to the establishment of straight baselines and closing lines in the Arctic, opposed only by the U.S., cannot be said to be inconsistent with international law.

Although the waters enclosed by these straight baselines and closing lines can be claimed as internal waters under the *Anglo-Norwegian Fisheries Case*, TSC Article 5(1) and LOSC Article 8(1), they are still subject to TSC Article 5(2) and LOSC Article 8(2). Under these Articles if the waters enclosed could not previously have been considered as internal waters, the right of innocent passage exists. This question as well as the scope of the innocent passage regime within the territorial sea will now be addressed.

Appendix 6

TSC

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 4

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Article 7

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the law-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the law-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

Article 11

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high-tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

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Article 5
Normal Baselines

Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 6
Reefs

In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the the appropriate symbol on charts officially recognized by the coastal State.

Article 7
Straight baselines

1. In 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, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

5. Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.

6. The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone.

Article 8
Internal Waters

1. Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. 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, a right of innocent passage as provided in this Convention shall exist in those waters.

Article 9
Mouths of rivers

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.

Article 10
Bays

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of this Convention, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semicircle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 nautical miles, a straight baseline of 24 nautical miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions do not apply to so-called 'historic' bays, or in any case where the system of straight baselines provided for in article 7 is applied.

Article 13

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water a low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea form the mainland or an island, it has no territorial sea of its own.

Article 16

1. The baselines for measuring the breadth of the territorial sea determined in accordance with articles 7, 9 and 10, or the limits derived therefrom, and the lines of delimitation drawn in accordance with articles 123 and 15 shall be shown on charts of a scale of scales adequate for ascertaining their position. Alternatively, a list of geographical co-ordinates of points, specifying the geodetic datum, may be substituted.

2. The coastal State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Article 46

For the purposes of this Convention:

(a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;

(b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features from an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

Article 47

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are

included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situation wholly or partly at a distance not exceeding the breadth of the territorial sea form the nearest island.

5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interest which the latter State has traditionally exercised in such waters and all right stipulated by agreement between those Stats shall continue and be respected.

7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical co-ordinates of points, specifying the geodetic datum, may be substituted.

9. The archipelagic State shall give due publicity to such charts or lists of geographical co-ordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

States Establishing Straight Baselines[1]

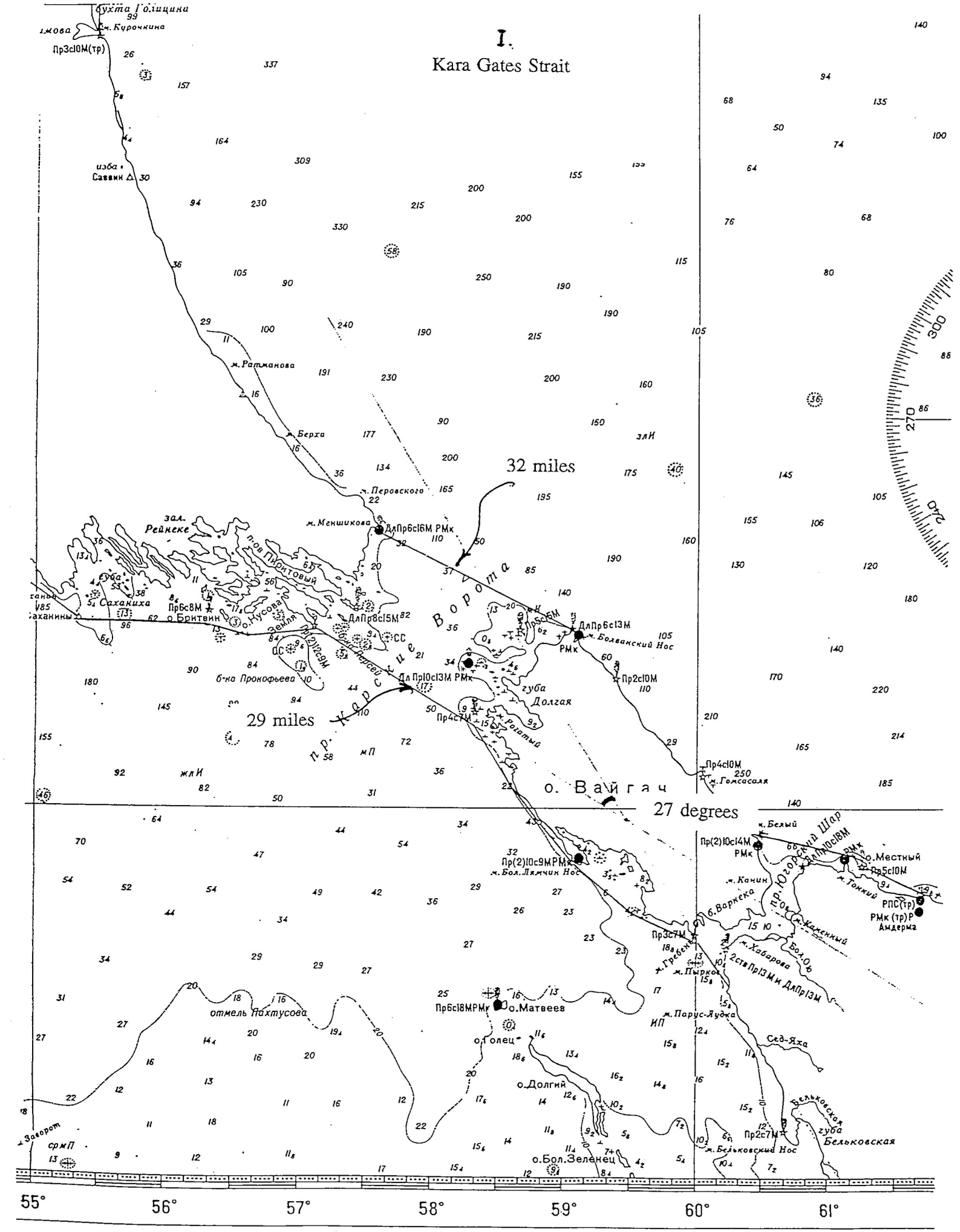
State	Length (nautical miles)
Burma	222.3
Bangladesh	220
Vietnam	161.8
Philippines	140
Cape Verde	137
Ecuador (mainland)	136
Colombia	130.5
Fiji	125
Ecuador (Galapagos)	124
Indonesia	124
Solomon Islands	124
Madagascar	123
Malaysia (delimitation of cont. shelf)	123
Papua New Guinea	121
Guinea	120
Argentina/Uruguay (agreement)	118
Soviet Union (Pacific Ocean)	103.8
Sao Tomé and Principe	101
Canada	99.5
Venezuela	98.9
Vanuatu	93
Iceland	92
Haiti	89
Mauritania	89
Denmark (Greenland)	75
Australia	71.6
Cuba	69
Chile	65
Denmark (Faeros)	60.7
Mozambique	60.4
Soviet Union (Arctic Ocean)	60.1
Korea, Democratic People's Republic	60
Ethiopia	57.5
Spain	50.5

1Pharand pp. 148-149. This chart shows sixty six States and the longest straight baseline established by each. Four of the States, Ecuador, Soviets, Denmark and Norway have several maximum lengths shown. Of the Arctic States Norway, Denmark, Canada and Soviet Union have drawn straight baselines. The U.S. has not established straight baselines and has no enabling legislation, but has recognized applicability of straight baseline system to highly irregular coasts. Drawn by John Cooper, formerly Territorial Waters Officer with Canadian Government.

Tunisia	44.7
Norway	44
Tanzania	44
United Kingdom	40.2
Mexico	39.4
Italy	37.5
France	34.5
Thailand	33.7
Cambodia	33
Poland	30
Sweden	30
Guinea-Bissau	29
Ireland	25.2
Morocco	24.5
Kenya	24
Turkey	23.5
New Zealand	23
Dominican Republic	22.7
Germany, Democratic Republic	22.7
Yugoslavia	22.5
Senegal	22
Denmark	21.8
Germany, Federal Republic	21.5
Albania	21.2
Angola	20.3
Norway (Svalbard)	18.5
Norway (Jan Mayen)	18
Cameroon	17.5
South Africa	17.3
Gabon	16.5
Oman	12
Finland	8

States with enabling legislation

Brazil	Malta	Somalia
China	Sri Lanka	Sudan
Egypt	Mauritius	Syria
Iran	Saudi Arabia	Maldives



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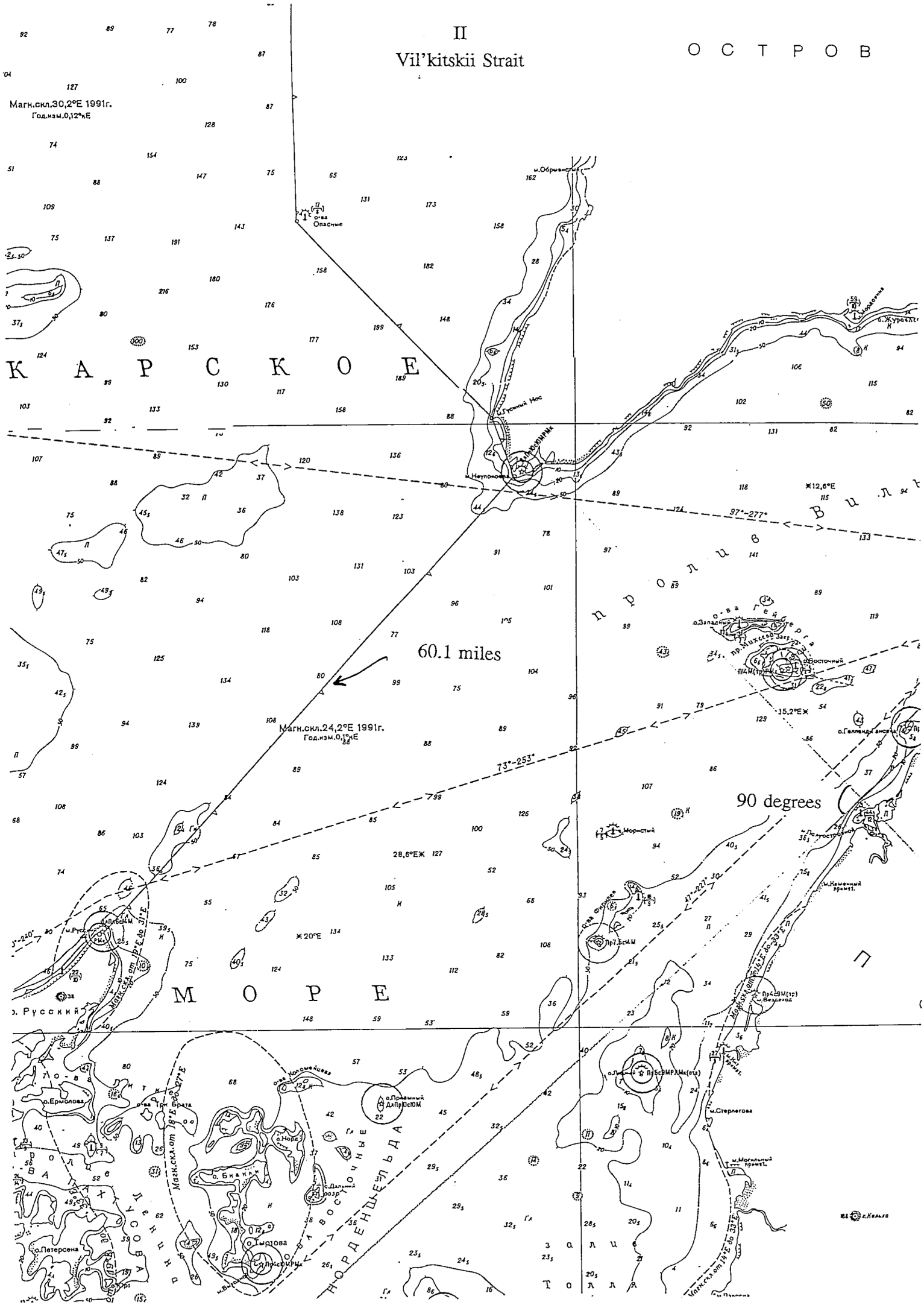
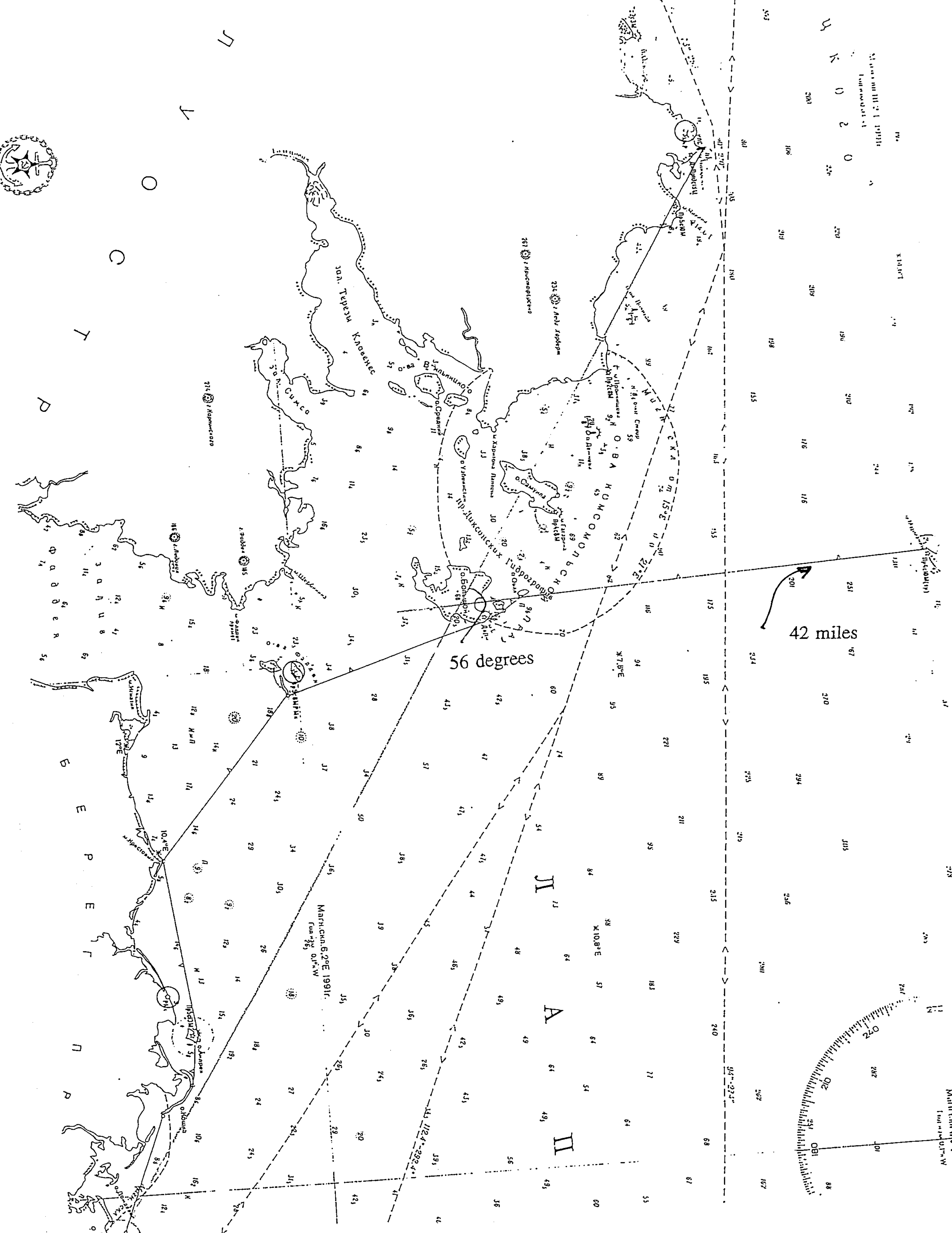
Министерства обороны СССР

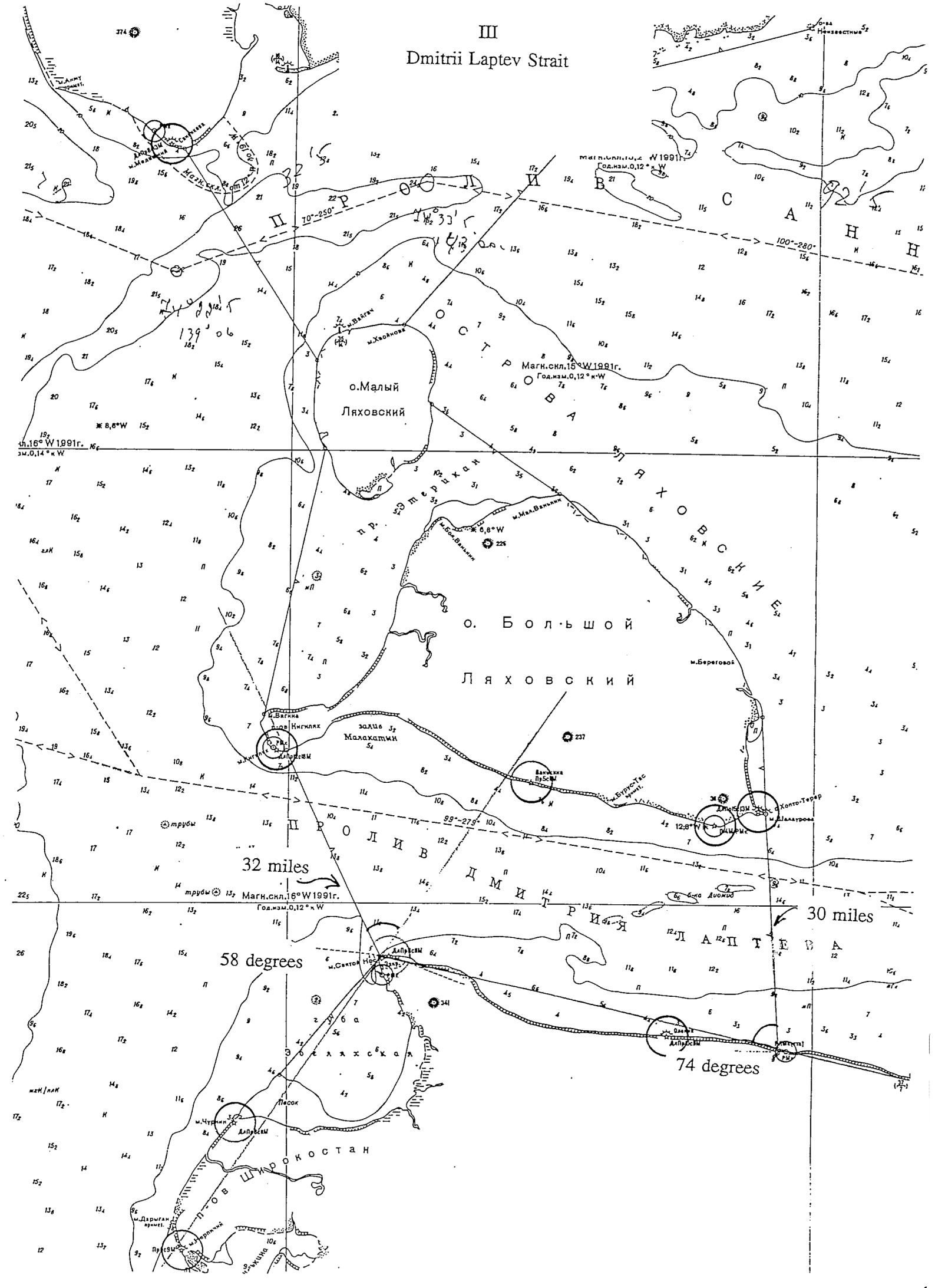

К А Р С К О Е
М О Р Е
О С Т Р О В
п р о л и в
В и л ь к
Магн.скл.30,2°E 1991г.
Год.изм.0,12°кE
Магн.скл.24,2°E 1991г.
Год.изм.0,1°кE
60.1 miles
90 degrees
73°-253°
97°-277°
47°-227°
15,2°E
28,6°E
20°E
12,6°E
Опасные
м.Обрывистый
м.Тонкий Нос
м.Неприметный
о.Западный
о.Восточный
о.Моржовый
о.Русский
о.Ермолова
о.Петерсена
о.Тирлова
о.Дальний
о.Правый
о.Стерлегова
о.Гвоздева
о.Фирсова
м.Каменный
м.Могильный
Магн.скл. от 18°E до 27°E
Магн.скл. от 14°E до 33°E
Л А П Т Е В А
Т о л л я

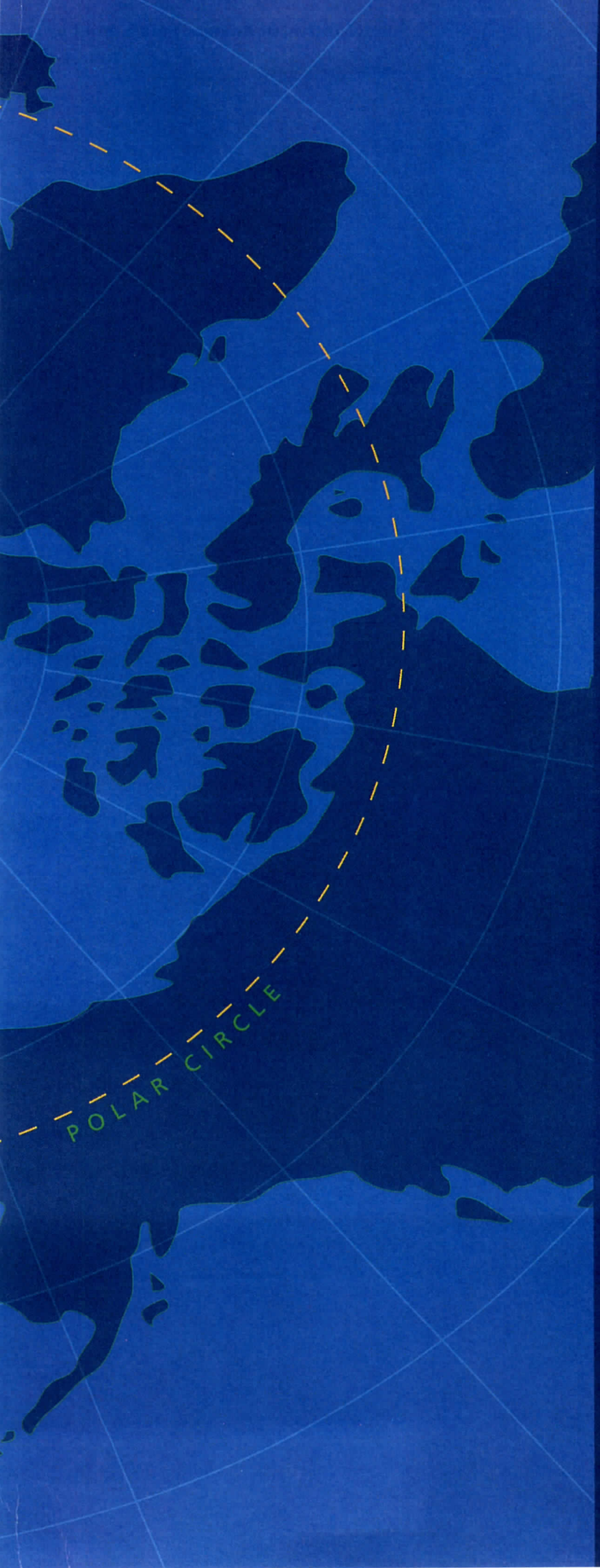
II
Vil'kitskii Strait



III

Dmitrii Laptev Strait





The three main cooperating institutions of INSROP

Ship & Ocean Foundation (SOF), Tokyo, Japan.
SOF was established in 1975 as a non-profit organization to advance modernization and rationalization of Japan's shipbuilding and related industries, and to give assistance to non-profit organizations associated with these industries. SOF is provided with operation funds by the Sasakawa Foundation, the world's largest foundation operated with revenue from motorboat racing. An integral part of SOF, the Tsukuba Institute, carries out experimental research into ocean environment protection and ocean development.

Central Marine Research & Design Institute (CNIIMF), St. Petersburg, Russia.
CNIIMF was founded in 1929. The institute's research focus is applied and technological with four main goals: the improvment of merchant fleet efficiency; shipping safety; technical development of the merchant fleet; and design support for future fleet development. CNIIMF was a Russian state institution up to 1993, when it was converted into a stock-holding company.

The Fridtjof Nansen Institute (FNI), Lysaker, Norway.
FNI was founded in 1958 and is based at Polhøgda, the home of Fridtjof Nansen, famous Norwegian polar explorer, scientist, humanist and statesman. The institute spesializes in applied social science research, with special focus on international resource and environmental management. In addition to INSROP, the research is organized in six integrated programmes. Typical of FNI research is a multi-disciplinary approach, entailing extensive cooperation with other research institutions both at home and abroad. The INSROP Secretariat is located at FNI.