TERRITORIAL SEA BASELINES

by Commander P.B. BEAZLEY, R.N.
Hydrographic Department, British Admiralty

In 1969 the Geneva Convention on the Territorial Sea and Contiguous Zone [1] became open for revision should such a step be requested by any Contracting Party. The Convention has served the international community well, and it is certainly arguable that further work might well result in a less generally acceptable document. If a review takes place, however, and if an attempt is made to remedy defects in Section II [2], some consideration should be given to the technical questions involved, since when all is said and done the matter is as much a technical as a legal problem involving hydrographers or cartographers in deciding exactly where the baselines or the limits lie.

In this article the author looks particularly at articles 4 and 7 of the existing Convention. The views expressed are his own, and are not intended in any way to reflect the policies of the British Government. He does not claim to be putting forward any particularly original ideas, but rather to provide a basis for discussion of the practical problems involved about which many people are unaware.

Articles 4 and 7 are those which permit a coastal state to depart — sometimes radically — from the low-water line as a baseline, and can therefore be effective in considerably extending a state's internal waters without increasing the breadth of the territorial sea. Whilst article 7 provides some objective criteria for determining the applicability of a bay closing line, it must be observed that it can be nullified by resort to paragraph 6 which excuses "Historic Bays" from the otherwise clear rules; it is of course just those bays the entrances of which are too large to conform to the 24-mile rule that are most likely to be claimed as "historic". Article 4 gives a series of subjective criteria for deciding on the applicability of straight baselines, but gives practically no objective criterion of any sort. Furthermore, by apparently excluding oceanic (detached) archipelagoes from its provisions this article leaves untouched a geographical condition which many would deem to be the most appropriate for the application of some sort of straight baseline system. Such a state of affairs has of course led to a variety of claims some of which are intended to reflect the

(1) U.N. Treaty Series, Vol. 516, p. 205.
(2) See Appendix.

provisions of the article, but which are based on quite different interpretations of it. There is, in other words, a great lack of certainty stemming from a lack of objective criteria.

When the articles were first conceived it was expected by many that article 4 would permit the use of straight baselines limited in length, which would of course have placed some concrete limit on their application. Thus there would have been some safeguard against too great enclosures with the attendant threat to freedom of navigation. For the same reason a limit was placed not only on how long a line could be drawn across a bay, but also on what constituted a bay. Yet this last approach was perhaps illogical, because if the length of a bay closing line, or of a straight baseline, is limited it will have its most radical effect — i.e. it will enclose most water — when the indentation it is closing is most pronounced. On the other hand a line of strictly limited length will enclose virtually no water at all if the coastline is only very slightly concave. Thus inevitably one is drawn to ask whether, if a suitable maximum permissible length could be decided, article 7 could not be dispensed with, and article 4 — suitably amended — allowed to serve for all conditions of coastline. In other words, if no straight baseline may exceed a certain length, might it not be possible to permit the use of straight baselines anywhere, regardless of the nature of the coastline or of the general direction of the coast ?

The advantages of such a solution are obvious. It disposes of all those subjective criteria like "deeply indented and cut into", "general direction of the coast", "where, because of the presence of islands a bay has more than one mouth", or "sea areas sufficiently closely linked to the land domain to be subject to the regime of internal waters". The disadvantages may be less clear since they must to some extent depend upon the maximum length that is chosen. It will be found however, that, given the various conditions to be discussed later, and on the assumption of a uniform breadth of territorial sea of twelve miles, the major effect is not to extend the overall area of a state's territorial waters but rather, in the more extreme examples, to increase the proportion of those waters deemed to be internal. Such a result adds emphasis to the importance of observing article 5 (2) of the Convention.

The assumption of a standard breadth of territorial sea of twelve miles for the purpose of this article is obvious, since of 114 countries (3) the claims of which are known nearly 60 % claim a breadth of 12 miles or more.

Reverting to the concept of a maximum length of straight baseline one must ask what such a maximum should be. Clearly if the limits were great enough there would be no further need for baseline rules. Certainly it is difficult to arrive at an obviously logical figure. As already stated though, in considering this whole problem it was clearly unrealistic to work in the context of anything but a twelve mile territorial sea breadth, especially as the existing 24-mile bay closing line was apparently based on the concept

(3) Mainly from F.A.O. Legislative Series No. 8.

of a bay lying entirely within the territorial waters of a state with a twelve mile territorial sea.

An analysis of existing baseline claims under article 4 (and therefore excluding closing lines across historic bays) is given in the following table in which the longest single baseline claimed by each country is listed. It will be seen that the average longest length for all 24 countries is 61 miles but that four countries exceed double that figure. If those four countries are omitted the average of the remaining 20 is only 41 miles and only 8 of the 20 countries exceed that length. A distance of 48 miles was actually chosen as embracing the majority of existing claims. The fact that it is double 24 miles has some significance, and it is thought that there would be great resistance to any length significantly greater.

Table of Maximum Straight Baselines

This table covers only those countries whose claims are known.

Country	Length (miles)
1- Albania	26
2- Burma	222
3- Canada	50
4- Denmark	17
5- Ecuador	147
6- Faeroes	62
7- Finland	8
8- France	30
9- Greenland	36
10- Iceland	73
11- Indonesia	123
12- Ireland	25
13- Malagasy	89(*)
14- Mauritania	79
15- Mexico	34
16- Mozambique	60
17- Norway	45
18- Philippines	140
19- Portuguese Guinea	30
20- Sweden	30
21- Tanzania	44
22- Turkey	22
23- United Kingdom	40
24- Yugoslavia	23
	1455

(*) Malagasy claims longer baselines but as they cut other portions of the coastline they have been considered as more than one baseline. 89 miles is the longest uninterrupted distance between any two linked headlands.

The average longest baseline is :

$$\frac{1455}{24} = 61 \text{ miles}$$

Only four countries claim more than double the above average. If those four countries are omitted the average of longest lines for the remainder is :

$$\frac{823}{20} = 41 \text{ miles}$$

In considering the application of a rule such as that suggested one is immediately faced with an incongruity. Suppose that an islet lies exactly 48 miles from a promontory or from another islet. Is it possible to link the promontory and the islet, or the two islets, by single baselines enclosing no water ? It seems that such a possibility would produce absurdities, and would be departing altogether, and needlessly, from the general idea expressed at present by the "general direction of the coast" criterion. Several elaborate rules to overcome this difficulty were considered. The author eventually decided that a simple criterion, which would also reflect the notion of "sea areas ... subject to the regime of internal waters", should be adopted : *that a straight baseline could not be drawn from the mainland to an island, or from one island to another, unless they were enclosed within the same continuous or overlapping belt of territorial sea.* The application of this rule is illustrated in diagrams Ia, b and c.

Diagram Ia illustrates an unbroken length of coastline which must, therefore, be fronted by a continuous belt of territorial sea, and it is of course permissible to link the two headlands by a straight baseline not exceeding 48 miles in length. Diagram Ib illustrates a similar situation but with a small island less than 24 miles from one of the headlands. Here the island too is enclosed within the same continuous 12 mile belt,

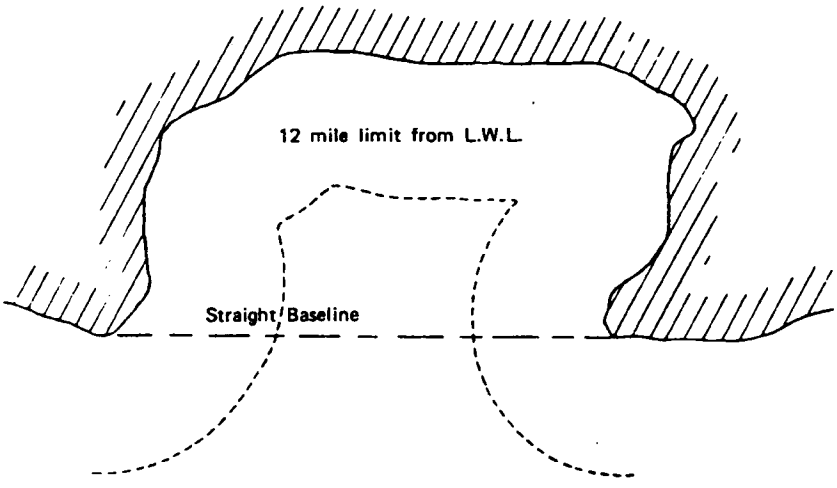

DIAGRAM 1a. — Straight Baseline permitted.

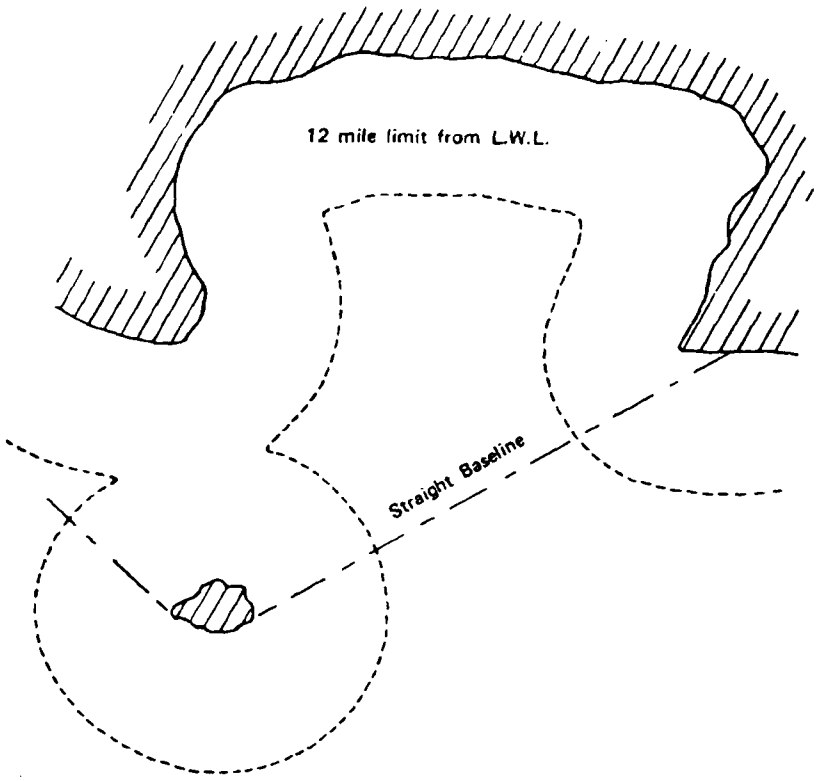

DIAGRAM 1b. — Straight Baseline permitted.

and the straight baseline may be drawn to it, and thence to another suitable point. In diagram Ic, however, the island is more than 24 miles from any part of the mainland and is not therefore enclosed within the same continuous 12 mile belt. Whilst a straight baseline may be drawn from headland to headland, it may not be drawn so as to link the island with the mainland.

Where no limit is placed upon the length of a baseline there is no particular advantage to be gained from interpreting the rules as permitting overlapping of lines. With the introduction of a maximum length of line, however, there might be advantage to be gained by selecting base-points which cause lines to intersect as illustrated in diagram 2. Such an interpretation would tend to defeat the object of the length limitation. Any text should be drafted in a way that will exclude such an interpretation.

Paragraph 3 of the existing article 4 recognised that the use of straight baselines could make it difficult for vessels to determine their position in relation to territorial water limits, and that this situation would be aggravated if basepoints were to lie in positions where nothing was visible at many states of the tide. Although the advent of modern electronic fixing devices, and the widespread use of radar, has made this provision of less importance there are still many parts of the world where there are no

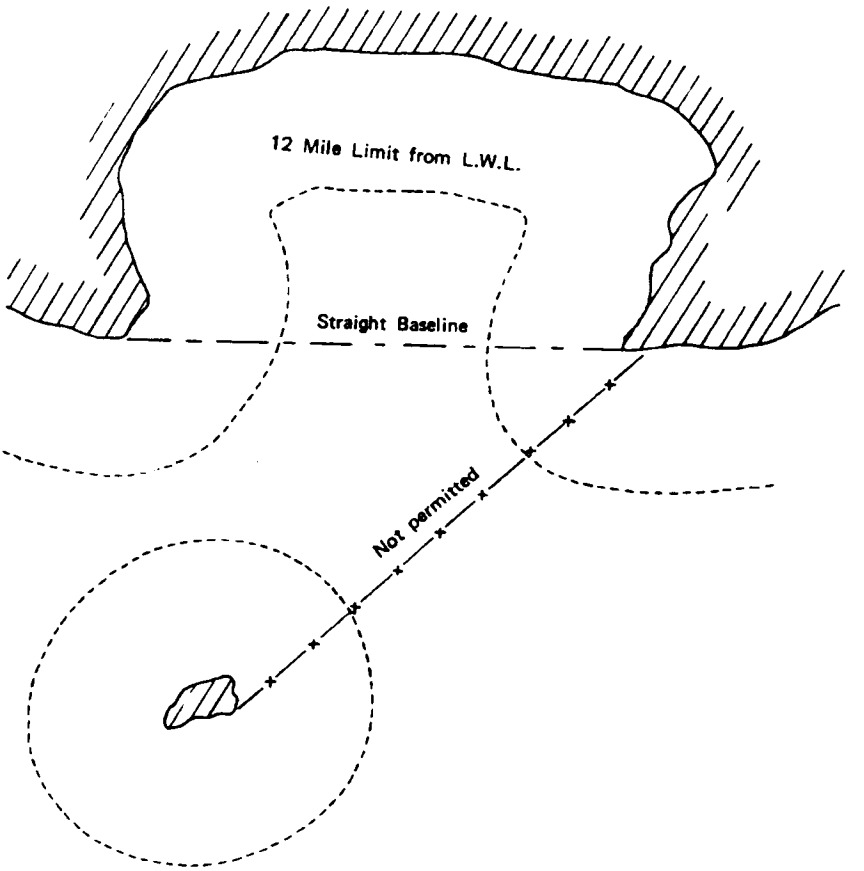

DIAGRAM 1c. — Straight Baseline to or from island not permitted.

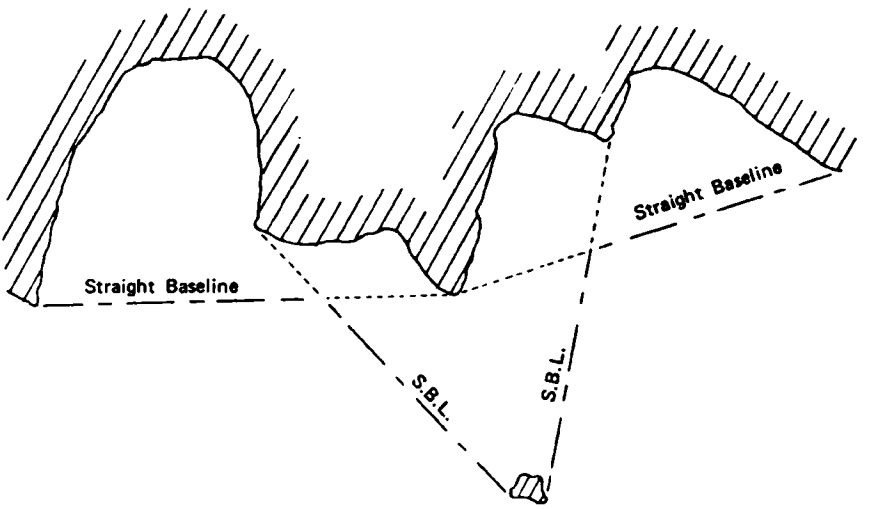

DIAGRAM 2.

accurate electronic aids and where radar may not be widely used by vessels fishing off another state's coast. Furthermore there are many areas where low-tide elevations are unstable mud or sand banks. Previously such areas were unlikely to be enclosed by straight baselines (although in fact several have subsequently been so enclosed), but under the proposed ruling such areas would be as eligible as any others, and it would be unsatisfactory to have basepoints on low-tide elevations which may move considerable distances or disappear entirely as drying features. Even the low-water line of the mainland is liable to large changes in such areas, but in general the effect is unlikely to be so great as with a low-tide elevation which actually ceases to exists. It is therefore proposed that the provision of paragraph 3 should be retained. Happily the adoption of 48 mile straight baselines to be used anywhere regardless of the general nature of the coast will serve to considerably reduce the number of areas where low-tide elevations would be of any importance, and there could well be an argument for withdrawing article 11 of the Convention.

If such a rule for straight baselines as that here proposed were to be introduced, I believe that there should be no further provision for such exceptions to the rule as "economic interests" or "historic bays", both of which can only serve to perpetuate uncertainty and lead to further cause for dispute. The adoption of such baselines should also dispose of the need for either article 9 or article 13.

Perhaps, however, historic bays cannot so easily be dismissed. To be "historic", however, presupposes some long-standing claim that must by this time have become generally known and accepted. If therefore seems reasonable to ask that no further historic claims should be accepted beyond a fixed time limit and that all those claims presently registered should be examined by the International Law Commission (ILC) which should report on their validity.

Article 7 includes a reference to "natural entrance points" of a bay, which is presumably a contraction of the phrase "natural geographic entrance points" used in the United Kingdom submission before the International Court of Justice in the Anglo-Norwegian Fisheries case [4]. It was added to the original ILC text of article 7 [5] presumably with the intent to preclude the use of artifical structures to produce the conditions for a juridical bay where nature had failed to do so. If that is so it has not materially affected the situation envisaged, but has produced uncertainty. What, for instance, is the natural entrance point of a bay where one of the entrance points is an artificial esplanade or a harbour wall ? Is it not to be considered as a bay at all ? Certainly it is seldom possible to determine any longer where exactly the "natural" entrance point was. Furthermore, if the question of the existence or not of a juridical bay hinges on a matter of a few hundred feet is the question of so much importance, or alternatively is it likely that a state will spend the vast sums necessary to build a projection of sufficient size materially to affect the situation merely for

(4) I.C.J. Reports 1951, p. 120.
(5) U.N. General Assembly Official Records, 11th Session, Supplement No. 9 (A/3159), p. 5.

that reason ? It is difficult to see that there is any real need for the retention of such a safeguard, especially as it would, taken literally, utterly preclude from consideration any coastal reclamation whatsoever. Therefore, in considering the adoption of any new concept of straight baselines this writer would retain the special provisions of article 8, but would not otherwise limit the choice of baseline points solely to natural features of the coastline. Having stated this is must be added that none of the above proposals are intended to apply to the rather separate case of artificial islands, which are dealt with later, except in so far as detached breakwaters are already covered by article 8.

No specific mention is made in article 4 whether or not straight baselines may be drawn only between points situated on the territory of a single state, although it is implicit that only that part of a baseline lying on the state's own side of any boundary can be considered to affect its territorial waters. The ILC specifically considered a situation where two states might agree on a joint overlapping baseline, but thought that such a line should not be enforceable against other states [6]. In practice several states unilaterally decided upon a basepoint in the territory of the adjacent state whilst claiming only that part of the baseline lying on their own side of the boundary; in several cases the two adjacent states have chosen different baselines so that they do not meet at the boundary. This presents no problems if the boundary is clearly defined. So long as the basepoints chosen conform to those requirements already postulated there should be no reasonable objection to the practice.

Even when discussing pure technicalities one ignores other results of one's action only at peril. For that reason I hasten to suggest that these proposals could only be acceptable if paragraph 5 of article 4 were not only retained, but were strengthened to ensure unrestricted access to or from an enclosed sea which itself contains an area of high seas. Thus I would suggest some such wording as :

> "The system of straight baselines may not be applied by a state in such a manner as to cut off from or prevent freedom of navigation for all vessels to or from any part of the high seas or the territorial seas of another state."

Article 5 (2) must also be insisted upon.

In discussing the present Convention I have concentrated on the most obvious difficulties, but an important point which does not concern the problem of straight baselines directly is that of artificial islands constructed for mineral extraction, for deep-water terminals, or for habitation, and that of single-point moorings (mono-buoys) and tanker transfer berths.

Article 9 if retained might have been thought adequate to cover the last two points. An essential feature of these cases is that deep water is an invariable requirement and so the chosen area may be far from shore, although with a 12 mile territorial sea limit it is unlikely that there will often be a need to site them beyond that limit. However, the type of control required for such

(6) U.N. General Assembly Official Records, 11th Session, Supplement No. 9 (A/3159), p. 15.

cases is not territorial sovereignty but navigational. It would thus be inappropriate to assimilate such areas to territorial waters if they otherwise lay outside them. If special control is required the problem could best be handled by a body such as the Intergovernmental Maritime Consultative Organisation which could consider the various safety factors involved and draw up a separate convention to cover the requirements. Such a solution should dispose of the need for unilateral decisions to prohibit to navigation large areas of the sea.

The case of artificial islands is more difficult, neither will it always be possible to distinguish between an island used, say, for mineral extraction, and one used as a loading terminal. Both may be virtually permanent structures and may be of the nature of reclaimed land. Some may in future be the sites of townships. In the latter case these will certainly require some sort of customs and sanitation control. Nonetheless the objections to permitting a state to claim territorial sea around an artificial island constructed many miles off-shore are obvious and need no stating. The author would suggest that artificial islands used for mineral extraction or as loading terminals be treated as, or in the same way as, installations under article 5 of the 1958 Geneva Convention on the Continental Shelf.

Should artificial islands be constructed for permanent habitation, or become adapted to that use, a distinction should be made between those permanently linked to a natural island or a mainland by a causeway or bridge, and those not so linked. The former could be considered as "reclaimed land", whereas the latter which might be far from land — even if not in very deep water — should be considered as a special case. They might be permitted to carry a prohibited zone of 500 metres all around, and to have a "contiguous zone" out to a total of 12 miles within which they could exercise control as in article 24 of the Territorial Sea Convention. There seems no justification for requiring territorial sea or fishing jurisdiction.

It seems to me unlikely that, if such islands were constructed, there would be need for special provisions on roadsteads since all necessary harbour facilities would almost certainly be constructed at the same time. Such off-shore loading or transfer facilities as might be necessary could be covered by the special provisions already briefly discussed above.

In this article a brief attempt has been made to suggest a way of providing firm and unequivocal rules for drawing straight baselines which are simple to apply. Although the main elements of this proposal have been propounded before I do not believe that they have been put forward in this way. The system must be examined, of course, on the basis of its effect on a territorial sea of 12 miles, and not on one of three miles, and the essence of the proposal is that it should be subject to no exceptions — for the minute exceptions are permitted certainty disappears; in such matters as this perhaps the aphorism 'hard cases make bad law' could be as applicable in international law as it is in municipal law. It has not here been my intention to develop a rationale based on past judgements or political or legal theories. For those who have the task of translating legal definitions into lines and limits on charts or maps it is thought that a firm set of measurable criteria will be a sufficient justification.

No attempt has been made to consider all the possible shortcomings of Section II of the Convention, but only those aspects affecting straight baselines. Nonetheless the author thought it necessary briefly to draw attention to the problem of artificial islands which was not of great moment in 1958 — although it was by no means ignored — but which is becoming more and more important with the increase in draft of ships, the increase in importance of the mineral wealth of the sea bed and subsoil, and the increasing pressure of population on land.

APPENDIX

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

U.N. DOC. A/CONF 13/L 52, April 28, 1958

Section II. — LIMITS OF THE TERRITORIAL SEA

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 régime 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 5

1. 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 article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.

Article 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

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 land-locked 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 a 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 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 area 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 low-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 8

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

Article 9

Roadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea. are included in the territorial sea. The coastal State must clearly demarcate such roadsteads and indicate them on charts together with their boundaries, to which due publicity must be given.

Article 10

1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

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.

Article 12

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

2. The line of delimitation between the territorial seas of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States.

Article 13

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-tide line of its banks.