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DELIMITATION OF MARITIME BOUNDARY
BETWEEN VIETNAM AND CHINA
IN THE GULF OF TONKIN

Dissertation for the LL. D. degree
at Faculty of Law, University of Ottawa

Under the Supervision of
Emeritus Professor Donat PHARAND, Q.C.

Dongdong HUANG



Dongdong Huang, Ottawa, Canada, 1992



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UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

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"DELIMITATION OF MARITIME BOUNDARY BETWEEN
VIETNAM AND CHINA IN THE GULF OF TONKIN"

LL.D. Thesis submitted by
Mr. Dongdong Huang

The thesis attempts to draw a single maritime boundary in the Gulf of Tonkin between Vietnam and China in light of the growing international jurisprudence in this area.

After a full description of the delimitation area and the dispute, the thesis analyzes the applicable law on maritime delimitation and applies these principles, criteria, circumstances, and methods to the dispute. The major conclusions are (i) the 1887 Sino-French treaty, the conduct of the parties, and the historic title claim have not established a maritime boundary in the Gulf; (ii) the principal criterion applicable is the equal division of the delimitation area on the basis of an approximate equal ratio of coastal lengths between Vietnam and China: 1:1.006 (Archipelago des Fai Tsi Long accounts 5.6% of the Vietnamese coastal length); (iii) the methods used to effect the delimitation are (a) an adjusted bisector line from the land boundary terminus to the point where the respective coasts change to opposite, (b) a median line from that point to the closing line, and (c) semi and partial enclaves for Dao Bach Long Vi; and (iv) Îles Kao Tao, and Weizhou Dao and Xieyang Dao are the primary factors to make the adjustments in the bisector line.

ABSTRACT

This dissertation begins with a general description of facts, both physical and non-physical, on the dispute in the Gulf of Tonkin. The context in which the dispute arose is given first so that the reader can understand the background of the dispute in terms of both its regional setting (the South China Sea region) and its place in the overall bilateral disputes between Vietnam and China. Next, the physical aspects of the dispute, including coastal configuration, islands, resources, and geomorphological and geological conditions, are described. Then the development of the dispute and the positions of the parties are outlined.

The second and third parts of the thesis attempt to answer three questions: (1) What rules and principles of international law are applicable to the delimitation of the territorial seas, exclusive economic zone, and continental shelf in the Gulf of Tonkin? (2) Did the 1887 Sino-French Convention establish the maritime boundary between Vietnam and China in the Gulf of Tonkin? (3) What is the course of the single maritime boundary between Vietnam and China in the Gulf of Tonkin from the eastern point of Tra Co to the closing line of the Gulf?

In the examination of the applicable law, the rules on maritime delimitation are classified into legal principles, equitable criteria, relevant circumstances, and practical methods. Those subjects are treated extensively.

After an analysis of the applicable rules, a boundary line is drawn in the Gulf of Tonkin to illustrate the equitableness of the result reached in the research. The 1887 Convention did not establish a general maritime boundary, nor has the Convention line been subsequently accepted and recognized either expressly or implicitly as having such an effect by the Parties. The delimitation line was divided into three segments.

In the first segment (from the land boundary terminus to the mid-point of oppositeness of coastal relationship), the basic criterion of equal division of the overlapping area requires the adoption of the bisector method based on the general direction of the coasts. Given the roughly equal lengths of the respective coasts of the Parties, the bisector line satisfies the equitable requirements. Because the location and size of the Iles Kao Tao, the bisector line is adjusted accordingly. However, a mitigating factor is the position and size of Weizhou Dao and Xieyang Dao and their relationship with the surrounding Chinese coasts (being surrounded on three sides by Chinese coasts).

In the second segment, a median line is drawn from the end-

point of the bisector line to the closing line of the Gulf of Tonkin so as to reflect the prevailing oppositeness of the coastal relationship. The practical method adopted is the simplified equidistance method from selected base points.

Finally, the presence and size of the Archipelago des Fai Tsi Long are taken into account in the same way as the Bijago Archipelago was in the Guinea--Guinea-Bissau case, that is, as a certain percentage of the length of the coast of Vietnam. Iles Kao Tao is given 1/4 effect (12^0) due to its proximity to the bisector line, especially in view of the concavity of Chinchou Wan on the Chinese coast, and the position of Weizhou Dao and Xieyang Dao (surrounded on three sides by Chinese opposite coasts). For the same reason, Weizhou Dao and Xieyang Dao are treated with half effect by transposing the bisector line by 13^0 . Because of its proximity to the median line, Dao Bach Long Vi is enclosed by a bulge line on the median line. This result is achieved by adopting the techniques of semienclave and partial enclave (12-mile zone plus 1 mile as continental shelf and EEZ).

The complete line so obtained then goes through the proportionality test and satisfies its requirements.

ACKNOWLEDGEMENTS

This dissertation is a product of research in my doctoral studies at the Faculty of Law, University of Ottawa. After the Gulf of Maine, Libya-Malta, and Guinea--Guinea-Bissau cases in 1984-1985, a study which could touch on most of the major problems in maritime delimitation became very desirable. The Gulf of Tonkin, with all its geographical features, and the non-geographical circumstances, presents a very interesting area for this purpose.

The first person to whom I have a deep gratitude is my supervisor, Professor Donat Pharand. I have had the honour to work with Professor Pharand from 1985 to 1988 as a research assistant at the University of Ottawa. I have learned three things from this great scholar in my doctoral study. First, I have become a sort of specialist on the law of the sea, in particular, on maritime delimitation. Also, I benefitted a great deal from his rich experience and style in scholarly research. Finally, his invaluable guidance and strict requirements have made it possible for me to undertake a high-quality academic research. I am also very grateful for his understanding and continued support in my pursuit of other objectives.

The thesis was thoroughly revised and edited by Miss Pearl Rombis, Mr. Craig Penney, and Mr. Dave Simpson, law students at Osgoode Hall Law School. I am deeply indebted to them for taking the time to read and make most useful comments and suggestions.

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My wife Daoshan Lee deserves a very special word of thanks. During my long and intermittent work on the dissertation, she took much family responsibility, in particular, looking after my infant daughter. In part, this dissertation is a gift to my new-born daughter, Sinica S.H. Huang.

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INTRODUCTION

After centuries of gradual evolution since the founding of the cardinal principles of the freedom of the high seas, the law of the sea has reached a new height in its history of development. Many novel concepts and regimes, unheard of a few decades ago, have now entered the domain of the present-day international law of the sea, among which are archipelagic State, transit passage, exclusive economic zone, common heritage of mankind - to name but a few. National control and jurisdiction have replaced the nearly uncontained freedom of the high seas - a product of the dominance of maritime powers and colonialism. With the sharp demand for resources to stimulate economic development, oceans have become one of the primary targets in nations' fervent search. As a result, a coastal State, in normal circumstances (not geographically disadvantaged), may, within its baselines, have internal waters, archipelagic waters, and sometimes historic waters (including historic bays); and may, outside the same baselines, have an exclusive economic zone up to a maximum of 200 nautical miles, and continental shelf which could extend much further.

This expansion has brought States separated by vast ocean spaces closer, facing the brand-new problem of defining the extent of their respective jurisdictions. If, however, the coastal State is abutting on an open sea - for instance, Newfoundland of Canada, or the west coast of Taiwan of China - the limits of national jurisdiction will be fixed with the international deep sea-bed (common heritage of mankind),¹ or the water column of the high seas. Delimitation of maritime boundaries is used more often in the former context, that is, delimitation between neighbouring States, though it is occasionally employed to refer to the seaward limits of the national jurisdictions of coastal States.²

¹For a recent study on the common heritage of mankind, see Schmidt, Markus G., COMMON HERITAGE OR COMMON BURDEN? -- The United States Position on the Development of a Regime for Deep Sea-Bed Mining in the Law of the Sea Convention, Oxford, Clarendon Press, 1989.

²Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 3.

In a recent survey by Robert W. Smith, as of July 15, 1988, there are 412 potential boundaries in the oceans of the world.³ In the marginal waters, such as the enclosed and semi-enclosed seas, the problem of drawing the line to separate national jurisdictions becomes even more serious.⁴

South China Sea is, by any calculation, a classical example of semi-enclosed sea. 90 percent of its periphery is composed of land, surrounded by 9 coastal States and three dependent territories. There are a number of openings to the Pacific Ocean and the Indian Ocean or their marginal seas. No point in the South China Sea will be excluded from the extension of 200-mile jurisdictions from the littoral States. Furthermore, the situation is exacerbated by the political antagonism, military confrontation, and disputes of sovereignty over several groups of scattered islands and rocks. Perhaps, it can be said that there is hardly any other place around the world like the South China Sea.⁵

It is predicted that "with increasing pressures being placed on developing offshore resources it can be expected that maritime boundaries will be actively pursued world-wide in the coming years."⁶ The settlement of maritime boundaries has already proved and will continue to prove that it is one of the most intractable problems in our time. First, geographical circumstances are varied with different localities and regions. Factors such as configurations of the relevant coasts, geographical relationship between the relevant coasts, general directions of the coasts, presence and location of islands, and deposit of natural resources in the delimitation area, have a great bearing on the course of the boundaries. Secondly, the issue of maritime boundaries touches the central nerve of the coastal States since the extent of the rights they can enjoy will be dependent on the lines to be drawn. It is

³Office of Ocean Law and Policy of U.S. Dept. of State, LIMITS IN THE SEA, Maritime Boundaries of the World, No. 108, July 20, 1988, analysis by Robert W. Smith.

⁴Professor Alexander listed 25 semi-enclosed seas with the criteria of size and percentage of circumference occupied by land. About 80 coastal States border on them, more than half of the total of coastal States, see Alexander, Lewis M., "Regionalism and the Law of the Sea: the Case of Semi-Enclosed Seas", 2 Ocean Development and International Law 151-186(1974).

⁵See Marsh, James Barney, "Multinational Marine Resource Development in Disputed Boundary Areas: Southeast Asian Examples", 12 The Journal of Energy and Development 245-268(1987).

⁶Smith, Robert W., "A Geographical Primer to Maritime Boundary-Making", 12 Ocean Development and International Law 1-22(1982-83), at 2.

put by Dr. Jagota in this way:

"Maritime boundary, like territorial or land boundary, is a politically sensitive subject, because it affects the coastal State's jurisdiction concerning the fishery, petroleum and other resources of the sea as well as concerning the other uses of the sea."⁷

With such vital interests involved, it cannot be expected that States will agree on a maritime boundary easily. Thirdly, the legal rules applicable to delimiting ocean boundaries are still in their embryonic stage of development.⁸ Tremendous efforts have to be made in order to ascertain the law applicable, which is often difficult.⁹

This dissertation attempts to apply the legal rules on maritime delimitation to the marine area of the Gulf of Tonkin. The physical features of the Gulf are very complex with several variants, such as, the presence of islands along the coast and near the middle of the Gulf, the marked change in the general direction of the coastal configuration, the determination of the closing line of the Gulf and the land boundary terminus.

⁷Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 4.

⁸For important recent studies on maritime delimitation, see Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989; Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988; Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989; Kapoor, I.N. and Kerr, Adam J., A GUIDE TO MARITIME BOUNDARY DELIMITATION, Toronto, Carswell, 1986; and Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985.

⁹There are nine international judicial or arbitral decisions directly on maritime delimitation. There are more than 100 bilateral boundary agreements on maritime space. These agreements constitute the primary source of indication of State practice. These agreements have been published or analyzed primarily in the following sources: Office of the Special Representative of the Secretary-General for the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, New York, United Nations, 1987; Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989; Bureau of Intelligence and Research, of U.S. Department of State, LIMITS IN THE SEAS, Series, No. 1-108; Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA: Maritime Boundary Agreements (1970-1984), New York, United Nations, 1987; Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985; Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985.

Facing the Red River Delta, on which the economic centre of the Vietnamese north rests, including capital Hanoi and port Haiphong, the Gulf is vital to the economy and security of Vietnam. Waters in the Gulf wash the coast of China's Hainan Island which has recently been turned into a province from an administrative region under Guangdong Province, the west flank of the Leizhou Peninsula, and the coast of Guangxi Autonomous Region of China.

This part of China has acquired a new status due to China's open-door policy and economic reform, acting as a model for the rest of the country. Its proximity to Hong Kong, Macao and Taiwan, as well as its traditional role as the southern gate of China, have made it the economic centre of China's south. The coastal areas of China along the Gulf have been recently designated as open area for foreign investment. By way of Qiongzhou Strait between Leizhou Peninsula and Hainan Island, shipping can go through from the Gulf to Hong Kong, Macao, Guangzhou and Zhanjiang or any other ports of China. Both economically and strategically the Gulf plays a very important role.

With the findings of several geologically valuable basins with a high potential of hydrocarbon resources and with the discovery of actual oil and gas,¹⁰ great interests are involved for both Vietnam and China. It will take painstaking effort to find a solution based on law and acceptable to both disputants.

To complicate things further, Vietnam claims a line mentioned in the 1887 Sino-French Treaty as the maritime boundary in the Gulf and regards the entire Gulf as having the status of historic waters. China does not accept this argument and contends that the 1887 Treaty decided merely the ownership of islands, not the ocean space as such, and there is no defensible evidence to back the historic waters claim. Since 1979, both Vietnam and China have been actively inviting and cooperating with foreign oil companies to explore and exploit petroleum resources in the Gulf. The waters in the Gulf are fished extensively by the two countries. It seems that this case contains all the complicating factors and circumstances, both physical and legal, that have appeared in maritime delimitation.

After World War II, States started to extend their jurisdiction to continental shelf. A development of more than forty years has contributed to the multiplicity of the sources of the law on maritime delimitation. First, there are three multilateral conventions which contain provisions on delimitation of sea areas. They are the 1958 Geneva Convention on Territorial Sea and

¹⁰Wu, Jin-min, "A history of Oil and Gas Exploration in the Central and Northern Parts of the South China Sea", 10 Energy 413-419 (1985).

Contiguous Zone, the 1958 Geneva Convention on Continental Shelf, and the 1982 United Nations Convention on the Law of the Sea. Secondly, more than a hundred or so agreements and treaties have been concluded between neighbouring States to delimit their respective maritime possessions and jurisdictions.¹¹ Thirdly, there are six leading international judicial and arbitral decisions, three by International Court of Justice, one by International Court of Justice's Special Chamber, and two by special arbitral tribunals. The cases are chronologically presented as follows:

1. 1909 Grisbardarna Arbitration;
2. 1969 North Sea Continental Shelf cases by ICJ (hereinafter North Sea cases);
3. 1977 Beagle Channel Arbitration (hereinafter Beagle Channel case);
4. 1977 Anglo-French Continental Shelf Arbitration (hereinafter Anglo-French case);
5. 1982 Tunisia-Libya Continental Shelf case by ICJ (hereinafter Tunisia-Libya case);
6. 1984 Gulf of Maine case by ICJ's Special Chamber;
7. 1985 Guinea/Guinea-Bissau Maritime Boundary Arbitration (hereinafter Guinea--Guinea-Bissau case);
8. 1985 Libya-Malta Continental Shelf case by ICJ (hereinafter Libya-Malta case);
9. 1989 Guinea-Bissau--Senegal Arbitration; confirmed in 1991 by the ICJ.

The dispute between Norway and Iceland over the maritime areas around Jan Mayen has been settled by a conciliation commission¹² and the two governments have accepted the recommendations of the

¹¹Office of the Special Representative of the Secretary-General for the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, New York, United Nations, 1987; Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989; Bureau of Intelligence and Research, of U.S. Department of State, LIMITS IN THE SEAS, Series, No. 1-108; Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA: Maritime Boundary Agreements (1970-1984), New York, United Nations, 1987; Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985; Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985.

¹²Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen by Elliot L. Richardson, Hans G. Andersen, and Jens Evensen. May 1981. 20 International Legal Materials 797-842(1981).

commission.¹³ In 1976, the dispute between Turkey and Greece in the Aegean Sea ended without a decision on the delimitation line because of jurisdictional difficulty.¹⁴

Legal literature on maritime delimitation seems flourishing, the examination of which will be an integral part of any search for the applicable rules of international law.

With the expansion of coastal States' jurisdictions over the continental shelf and the exclusive economic zone, there is an increasing need to draw boundary lines in the oceans. This dissertation attempts to explore the rules on maritime delimitation and then apply them to the particular situation in the Gulf of Tonkin.

Almost all major problems typical to maritime delimitation, are present in the Gulf of Tonkin: land boundary terminus, general direction of the coastline, length of the coasts, adjacent and opposite coasts, islands, and offshore exploration activities. Other problems, such as, historic title claim, existing convention line, closing lines of the Gulf, the treatment of Qongzhou Strait, prospect of joint regime, are to a certain extent unique to the Gulf of Tonkin. There have been six international judicial and arbitral decisions directly on maritime delimitation since the 1969 North Sea cases. The Law of the Sea Convention has been signed by 159 States and entities and ratified by 43 States so far. Legal and technical literatures on the subject are flourishing. Several works of major importance have been published within the last five years. It is opportune time to examine the case in the Gulf of Tonkin with its complexity and the rules on maritime delimitation with their confusion and uncertainty. To apply legal rules to the delimitation in the Gulf of Tonkin is to bridge the huge gap between the law and the facts with legal reasoning.

Part 1 of the thesis tries to give the reader a solid grasp of the facts, geographical, maritime, political and others. Chapter I describes the general setting of the Gulf of Tonkin and the dispute in the context of the South China Sea region. Chapter II gives a physical description of the Gulf of Tonkin. Chapter III traces the origin and development of the dispute between Vietnam and China in the Gulf of Tonkin. Part 2 has three chapters. They explore the applicable rules on maritime delimitation with the Gulf of Tonkin dispute in mind. Chapter 4 sets out a general review of the development of the law in this area. Chapter 5 examines the concept of equity with a view to clarifying the issues by examining

¹³Iceland and Norway: Agreement on the Continental Shelf between Iceland and Jan Mayen (entered into force on June 2, 1982) 21 International Legal Material 1222-1226(1982).

¹⁴Aegean Sea Continental Shelf case, ICJ Reports 1976, at 3.

them at several different levels. Chapter 6 presents a review of the relevant circumstances as applied or proposed in maritime delimitation. Part 3 deals with the application of the rules to the dispute in the Gulf of Tonkin. Chapter 7 defines the closing lines and the relevant coasts. Chapter 8 assesses the Vietnamese argument based on the 1887 Sino-French Convention. Chapter 9 evaluates the strength of the argument on State conduct. Chapter 10 tries to clarify relevant circumstances of coastal geography: lengths, general directions, and concavity and convexity. Chapter 11 tries to solve the problems created by the presence and location of islands in the Gulf. Chapter 12 reviews and applies the practical methods to the Gulf of Tonkin. Chapter 13 undertakes the proportionality test of the lines thus established.

The thesis tries to answer three questions: (1) What rules and principles of international law are applicable to the delimitation of the territorial seas, exclusive economic zone, and continental shelf in the Gulf of Tonkin? (2) Did the 1887 Sino-French Convention establish the maritime boundary between Vietnam and China in the Gulf of Tonkin? (3) What is the course of the single maritime boundary between Vietnam and China in the Gulf of Tonkin from the eastern point of Tra Co to the closing line of the Gulf? By applying the rules on maritime delimitation, a boundary line is finally drawn in the Gulf of Tonkin to illustrate the equitableness of the result. The hierarchical structure and normative character of the rules on maritime delimitation are also explored.

PART I

DESCRIPTION OF THE GULF OF TONKIN AND THE DISPUTE

South China Sea, lying in the centre of southeast Asia, has become the site of intensive disputes on maritime boundaries, territorial sovereignty over islands, and ownership of the living and non-living resources among the littoral States. Under the definition of marine region,¹ South China Sea would be qualified as a marine region geographically. Within this context, it is possible to divide it further into subregions, such as the Malacca-Singapore Strait, the Gulf of Thailand, and the Gulf of Tonkin within South China Sea. Since the area under study (the Gulf of Tonkin) falls within the wider context of the South China Sea, it would be appropriate and necessary, as a first step, to depict some aspects of the South China Sea, such as, physical, political and maritime characteristics. In this way, it is hoped that the real issue, the maritime boundary delimitation in the Gulf of Tonkin, can be put into perspective.

This part consists of three chapters. The first two chapters set the physical as well as non-physical stage for late legal treatment of the subject. Chapter III presents an account of the origin and development of disputes in the Gulf of Tonkin.

¹The criteria to delineate a marine region is based on the problem to be solved. See Morgan, Joseph, "Marine Regions and Regionalism in South-east Asia", 8 Marine Policy 299-310(1984), at 300.

CHAPTER I

GENERAL SETTING

1 - General Remarks on the South China Sea Region

South China Sea occupies a central position in this region and is manifestly qualified as a semi-enclosed sea under geographical and legal definitions.² Professor Alexander proposed a set of geographical criteria to delineate the semi-enclosed seas from the vast oceans. They include:

1. the area should be at least 50,000 square nautical miles;
2. be a 'primary' sea, rather than an arm of a larger semi-enclosed water body;
3. at least 50 percent of its circumference be taken up by land;
4. the width of opening to the open ocean not exceeding 20 percent of its total circumference.³

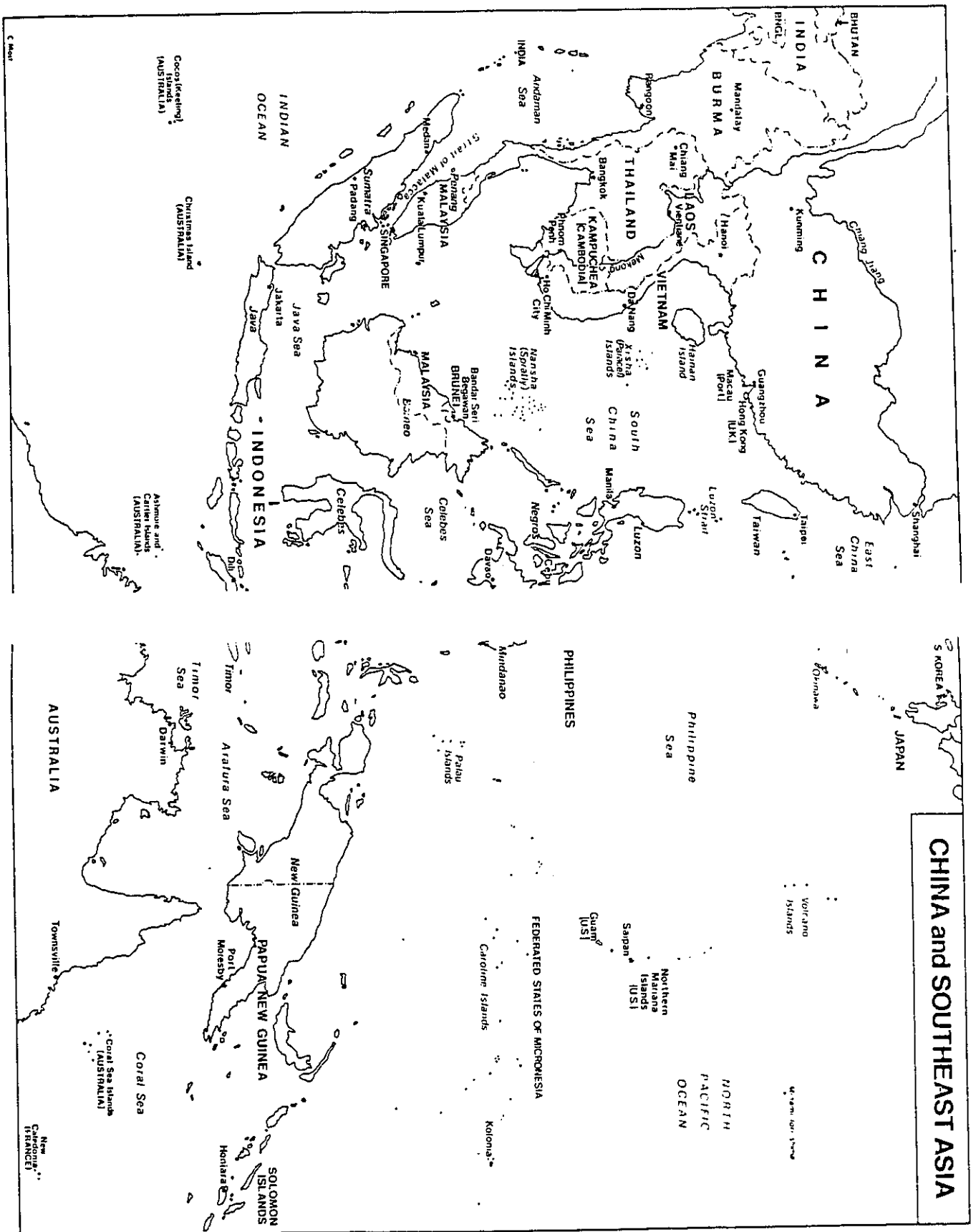
The South China Sea is among the 25 semi-enclosed seas listed by the author. However, Canada's Hudson Bay, the Gulf of St. Lawrence, and the Soviet Union's Kara Sea are also included. The Gulf of Thailand and the Gulf of Tonkin are regarded as arms of the water body of the South China Sea. Ninety percent of its circumference is occupied by land, by mainland China, Taiwan and Hainan Islands, Indo-China Peninsula, Malay Peninsula, Indonesia Archipelago, and the Philippine Archipelago. No strait linking with other bodies of seas or oceans has a width of more than 20 percent of its total circumference (see Map 1).

In accordance with the definition of "enclosed or semi-enclosed seas" provided in Article 122 of the 1982 UN Law of the Sea Convention,⁴ the South China Sea is clearly qualified. Because Part IX of the Convention dealing with enclosed or

²Articles 122, 123 of the UN LAW of the Sea Convention.

³Alexander, Lewis M., "Regionalism and the Law of the Sea: The Case of Semi-Enclosed Seas", 2 Ocean Development and International Law 151-186(1974), at 155.

⁴"'Enclosed or semi-enclosed sea' means a gulf, basin, or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."



Map 1: China and Southeast Asia

Source: Ross, Roberts, THE INDOCHINA TANGLE -- China's Vietnam Policy (1975-1979), New York, Columbia University Press, 1988.

semi-enclosed seas is composed of only two articles, article 122 on the definition and Article 123 on the duty to cooperate in such enclosed or semi-enclosed seas, the importance of this concept has diminished somewhat.⁵ The duty to cooperate,⁶ as spelled out in Article 123, covers three aspects:

1. management, conservation, exploration and exploitation of the living resources;
2. implementation on the protection and preservation of marine environment;
3. scientific research.⁷

The South China Sea is surrounded by nine States and three entities,⁸ connected to the East China Sea by Taiwan Strait, to the Pacific Ocean by Luzon Strait (including Bashi Channel, Balintang Channel and Babuyan Channel), to the Sulu Sea by Mindoro and Balabac Straits, to the Java Sea by Karimata and Gaspar Straits, and to the Andaman Sea by Malacca-Singapore Straits. Furthermore, the entire South China Sea will fall into the 200-mile jurisdiction of its littoral States. It has met the requirements to be a legal semi-enclosed sea.

The northern part of the South China Sea is enclosed by mainland China and Hainan Island, with Taiwan Island on the northeast. The Indo-China peninsula forms a large intrusion with the two bodies of embayments on its northeastern flank and southwestern flank: the Gulf of Tonkin and the Gulf of Thailand. Between Indo-China Peninsula and Malay Peninsula lies the Gulf of Thailand, washing the shores of Malaysia, Thailand, Kampuchea and Vietnam. The extreme southwestern edge of the South China Sea ends at the Malacca-Singapore Straits. The Indonesia Archipelago takes up the whole southern periphery and the Philippine Archipelago

⁵But see Johnston, Douglas M. and Saunders Phillip M., eds., OCEAN BOUNDARY MAKING: Regional Issues and Developments, London, Croom Helm, 1988.

⁶For a recent study of the duty of cooperation see Pinto, M.C.W., "The Duty of Co-Operation and the United Nations Convention on the Law of the Sea", in Bos, Adriaan and Siblesz, Hugo, eds., REALISM IN LAW-MAKING -- Essays on International Law in Honour of Willem Riphagen, Dordrecht, Martinus Nijhoff Publishers, 1986, 131-154.

⁷These obligations to cooperate also appear in the provisions on the regime of EEZ (Article 56).

⁸The States are the Philippines, Malaysia, Brunei, Indonesia, Singapore, Thailand, Kampuchea, Vietnam and China. The entities are Hong Kong, Macao and Taiwan.

constitutes the western limit.⁹

Bathometrically, two distinctive parts are discernible: the deep China Sea Basin in the northeast and central covers an area of 1,745,000 square kilometers (52 percent of the total area), and the extensive continental shelf lies off China's mainland and in the Gulf of Thailand on the southwestern section with an area of 1,755,000 (48 percent of the total area)(see Map 2)¹⁰.

The sea floor runs flat with a very broad continental shelf, slope and rise at depths between 2000 meters and 4000 meters. The Mainland Shelf stretches between Taiwan and Hainan a breadth of 150 nautical miles with a gentle slope to the outer edge. A few islands, banks, and shoals appear on the outer edge: Penghu Islands and Formosa Banks at the southern opening of the Taiwan Strait, and St. Esprit Shoal to the east of Hainan. Taiwan Strait has a depth of water 60-80 metres and the Hainan Strait is between 20-40 metres. South of Hainan, the shelf becomes steep and narrows to 50 nautical miles. The Mainland Shelf comes almost to an end close to the north of Can Ramh Bay and then begins to merge with the huge Sunda Shelf. The continental margin supports a broad bench south of Hainan between 200 and 1500 metres deep, where the Paracel Islands Group rest. Pratas Island and Reefs, Vereker Banks, and Helen Shoal are on the bench between 200-1000 metres of the Mainland Shelf. Further seaward, it gradually descends to the slope and rise and finally to the deep abyssal plain. Southeast of the Paracels is the submerged Macclesfield Bank sitting on the southwest end of a 2500-metre bench. South, east, and southwest of the Bank, the margin falls abruptly to the deep ocean floor. From the east of Paracels to the north of the Macclesfield Bank, there is a normal transition from shelf to slope and from slope to rise.¹¹

The Dangerous Ground marked on the navigational charts is an area of hilly bench after the southeastern rim of the Sunda Shelf. The 200-metre bench stretches over 284 nautical miles wide and 559 nautical miles long with numerous irregular shoals, hills, and benches that support many islands, banks, reefs, rocks, atolls, and islets..

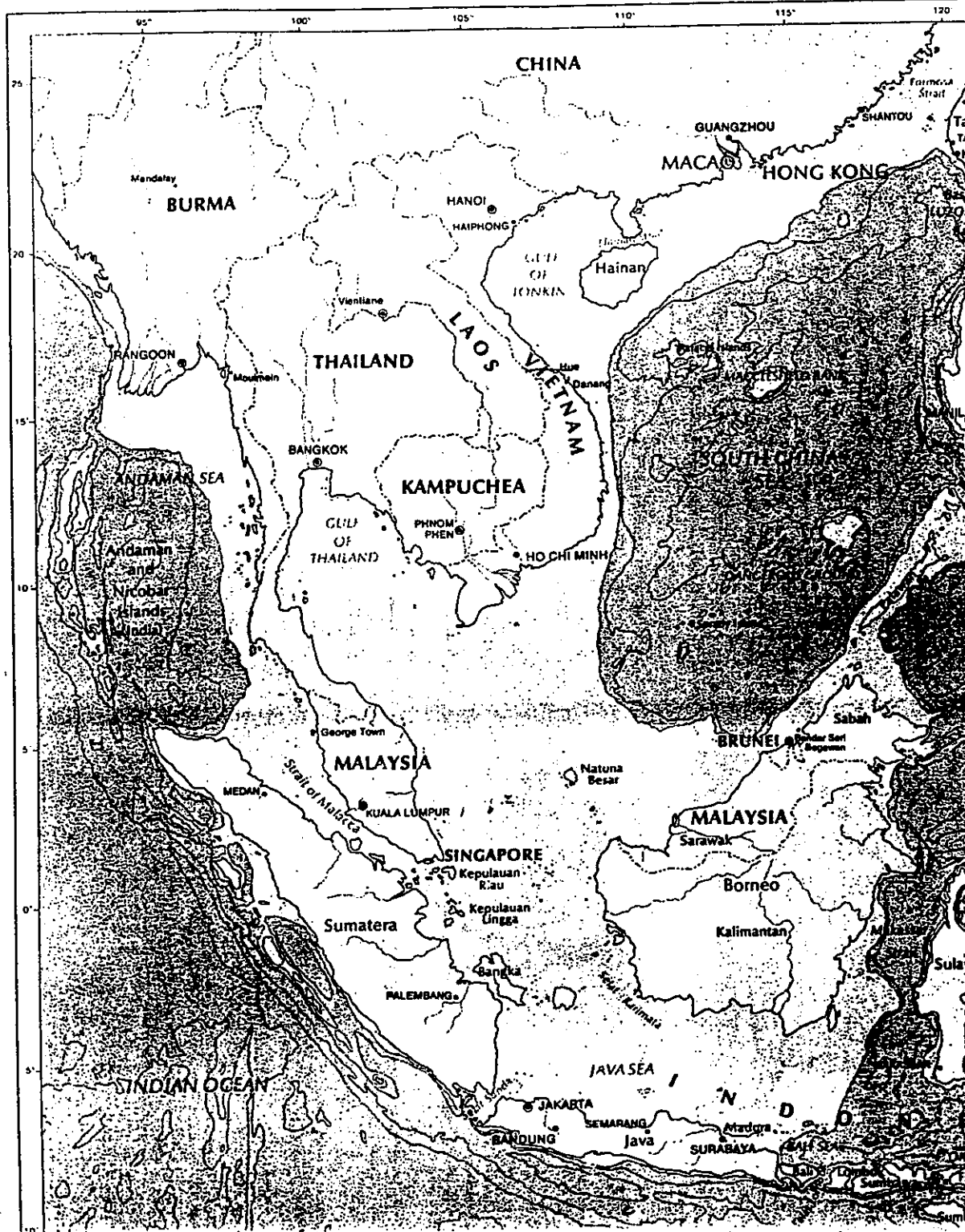
⁹For precise hydrographic delineation of the South China Sea, see International Hydrographic Bureau, LIMITS OF OCEANS AND SEAS, 3rd ed., Imprimerie Monegasque, Monte-Carlo, 1953, at 30-31.

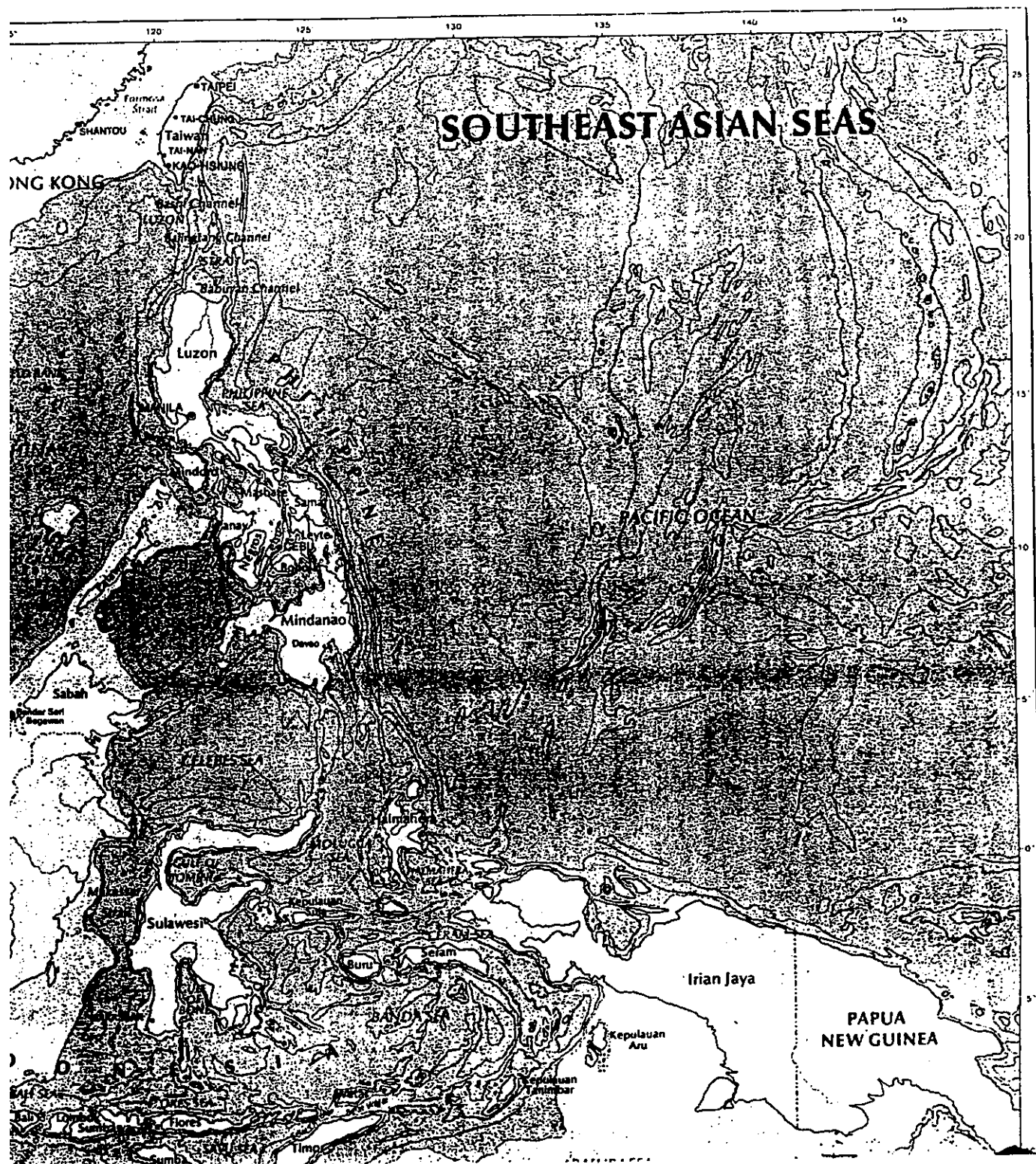
¹⁰Morgan, Joseph R. and Valencia, Mark J., ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, University of California Press, 1983, at 3.

¹¹Morgan, Joseph R. and Valencia, Mark J., ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, University of California Press, 1983, at 6.

Source: Morgan, Joseph R. and Valencia, Mark J., ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, University of California Press, 1983, at 3.

Map 2: Southeast Asia Seas,





The South China Sea area is one of the most geologically complex in the world, being the locus of the junction of three major plates, namely, the Asian continental plate, the Pacific Oceanic Plate, and the Indo-Australian Plate.¹² It is a marginal sea basin of Cenozoic age, whose formation occurs in various time periods. Regional slip-off in Cenozoic age constitutes the main source of the wide spread deposition of sediments especially along the borders of the faulted blocks.¹³

2 - Maritime Boundaries in the Region

Four treaties created during the colonial time have or are alleged to have relevance to maritime boundaries in the region. Britain allocated the islands to either Singapore or Malaysia in the Johore Strait by drawing a boundary line on 3 August 1924.¹⁴ The channel has been surveyed to locate the line precisely. Between the American Philippines and the British Sabah, a boundary line was established to delimit their respective claims and possessions on 2 January 1930.¹⁵ A continental shelf boundary separating Sarawak and Sabah from Brunei was decided by Britain in 1958.¹⁶

In these cases, the boundaries defined are either purported to establish maritime limits as in the Sabah-Sarawak and Brunei boundary, or have been accepted as such notwithstanding the original intention of the treaty as in the Johore Strait or Malaysia-Philippines case.

Finally, there is the treaty of 1887 between France and China delimiting the land frontier as well as islands in the Gulf of Tonkin. Since this treaty forms the basis of the main arguments put forward by Vietnam, it seems appropriate to give it a full analysis later in this study. It would be sufficient at this moment to point out that whether it intended to establish a maritime

¹²Wu, Jin-min, "The Characteristics of the Geological Structures of the Tertiary Basins on the Continental margin in the Northern Part of the South China Sea", 10 Energy 359-372(1985), at 371.

¹³Luo, Zhetan & others, "Tectonics and deposits of the Cenozoic Era in the South China Sea", 6 Energy 1093-1098(1981), at 1098.

¹⁴Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 214.

¹⁵Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 214.

¹⁶Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 214.

boundary or not has not been resolved yet while Vietnam strongly insists that the treaty had done so. China is vehemently opposed to the arguments and does not accept that it has such effect.¹⁷

A total of five ocean boundaries have been resolved since the end of the colonial period. The first was the continental shelf boundary drawn in the Strait of Malacca between Indonesia and Malaysia, in the area between Peninsular Malaysia and Natuna Islands and between Indonesia and Sarawak on the Kalimantan Island on 7 November 1969.¹⁸ A 1970 treaty between the same two States separated their respective territorial waters in the Strait of Malacca.¹⁹ Not long after, Singapore and Indonesia defined their territorial sea boundary in the Strait of Singapore on 29 August 1974.²⁰ In 1982, a memorandum of understanding was reached between Malaysia and Thailand concerning the setup of a joint development zone encompassing an area of 2100 square miles in the Gulf of Thailand.²¹ After the Vietnam War, a common historic waters area in the Gulf of Thailand has been agreed upon by Vietnam and Kampuchea.²² Apart from these agreed boundaries, most maritime boundaries remain unresolved to this day. The following is a brief account of these unsettled maritime boundaries in the region (see Map 3).²³

¹⁷Office of the Geographer, Department of State, INTERNATIONAL BOUNDARY STUDY, No. 38, China-Vietnam, 1978.

¹⁸LIMITS IN THE SEAS, No. 1, 1970.

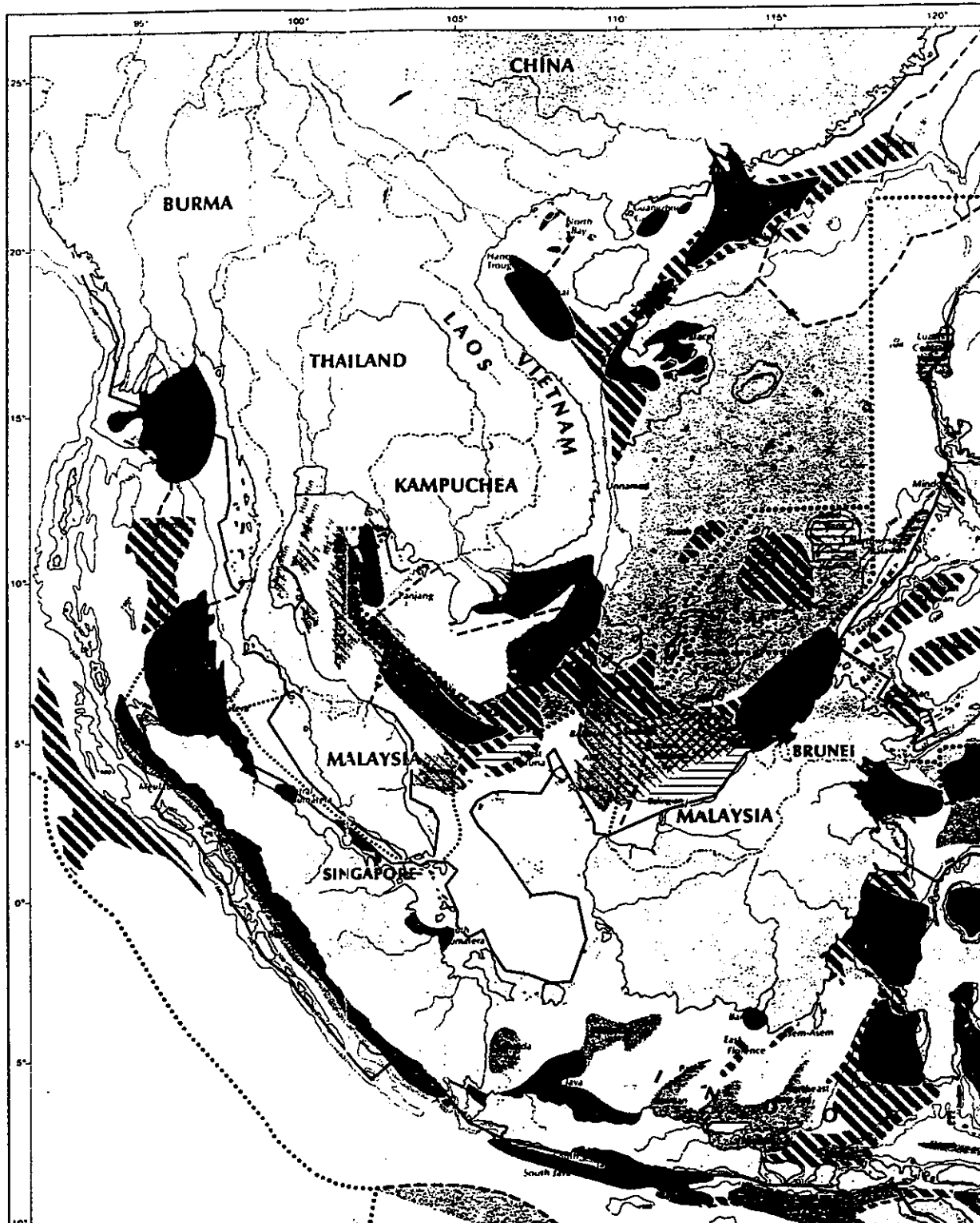
¹⁹LIMITS IN THE SEAS, No. 50, 1973.

²⁰LIMITS IN THE SEAS, No. 60, 1974.

²¹Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 84-86.

²²LIMITS IN THE SEAS, No.106, 1983.

²³Generally see Kittichaisaree, Kriangsak, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA, Singapore, Oxford University Press, 1987; Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, 209-233; Rhee, Sang-Myon and MacAulay, James, "Ocean Boundary Issues in East Asia: the Need for Practical Solution", in Johnston, Douglas M. and Saunders, Phillip M., eds., OCEAN BOUNDARY MAKING: Regional Issues and Developments, London, Croom Helm, 1988, 74-101; Morgan, Joseph R. and Valencia, Mark J., ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, University of California Press, 1983; Park, Choon-ho, "Offshore Oil Development in the China Seas: Some Legal and Territorial Issues", 2 Ocean Yearbook 302-316(1980); Dzurek, Daniel J., "Boundary and Resource Disputes in the South China Sea", 7 Ocean Yearbook 254-284(1985); Park, Choon-ho and



Map 3: Maritime Jurisdiction and Oil and Gas Potential

Source: Morgan, Joseph B. and Valencia, Mark J., ATLAS FOR MARINE POLICY IN SOUTH-EAST ASIAN SEAS, Berkeley, University of California Press, 1983.

MARITIME JURISDICTION AND OIL AND GAS POTENTIAL

OIL POTENTIAL

	High	10 - 100
	Fair	1 - 10
	Poor	0.1 - 1.0

GAS POTENTIAL

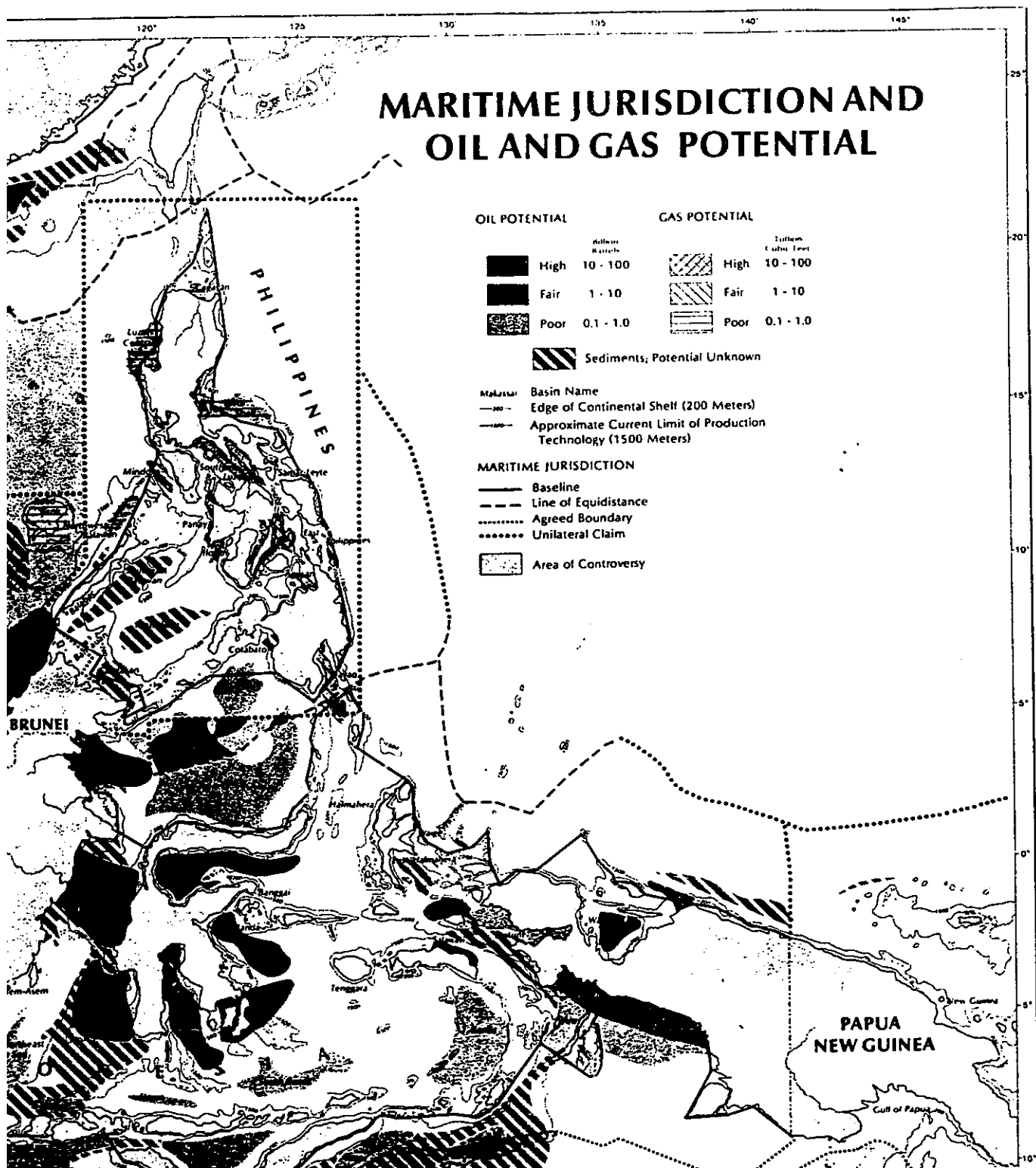
	High	10 - 100
	Fair	1 - 10
	Poor	0.1 - 1.0

 Sediments; Potential Unknown

Malaysia Basin Name
 --- Edge of Continental Shelf (200 Meters)
 --- Approximate Current Limit of Production Technology (1500 Meters)

MARITIME JURISDICTION

— Baseline
 --- Line of Equidistance
 Agreed Boundary
 Unilateral Claim
 Area of Controversy



1. Malaysia - the Philippines. There is an overlapping between the two countries in the Spratly area. The Commodore Reef, located in the Malaysian claimed area, is occupied by the Philippines. Claim over continental shelf by Malaysia covers the southern portion of the Philippines claimed Kalayaan in the Spratly.
2. Brunei - Malaysia. There is no agreement on their common maritime boundaries yet.
3. Kampuchea - Thailand. At the beginning of the 1970s conflicting claims were made in the Gulf of Thailand. No settlement has been reached between Kampuchea and Thailand. Kampuchea laid its claim by discounting completely the Thai islands of Ko Kra and Ko Losin. Thailand drew an equidistance line by ignoring both its own islands and those of Kampuchean called Ko Way.
4. Vietnam - Thailand. In the Gulf of Thailand, a situation of oppositeness of Vietnamese and Thai coast exists which is under dispute.
5. Vietnam - Malaysia. Two areas are disputed between Vietnam and Malaysia. One is the spratly area and the other is a wedge-shaped area of overlap near the mouth of the Gulf of Thailand.
6. Vietnam - Indonesia. To the north of Natuna Islands, a small portion of overlap exists and as yet is unresolved.
7. Vietnam - Brunei. If the extensive Vietnamese claim to the Spratly area is sustained, there might be a dispute between Brunei and Vietnam.
8. Vietnam - The Philippines. Because their respective claims to the Spratly area, a serious dispute has developed between Vietnam and the Philippines. Vietnam-occupied islands stand side-by-side with those by the Philippines. A potential of military conflict may follow.
9. Vietnam - Kampuchea. There is an overlap of claim by Vietnam and Kampuchea in the Gulf of Thailand. In 1982, an agreement was reached on the status of waters in the Gulf pertaining to Vietnam and Kampuchea as historic waters. But the delimitation line has not been drawn yet.
10. China - the Philippines. Two areas of dispute exist between China and the Philippines. One is in the Luzon Strait where a fringe of Philippine Islands and Taiwan Island sit opposite

Park, Jae Kyu, THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE, Proceedings, Law of the Sea Institute, Honolulu, 1984; and Prescott, J.R.V., MARITIME JURISDICTION IN SOUTHEAST ASIA: A Commentary and Map, East-West Environmental and Policy Institute, Honolulu, 1981.

and no boundary agreement has been made yet.³⁴ The second area is the overlap between the Philippines claim of Kalayaan and China's claim of the whole Spratly area.

11. China - Malaysia. Malaysia's claim from Sarawak and Sabah extends to the southern portion of Chinese claim over the Spratly area.
12. China - Brunei. The same situation exists here as with the dispute between China and Malaysia.
13. China - Indonesia. Extension of maritime claim from Natuna Islands may overlap with the southwestern part of the Chinese claim from the Spratly group.
14. China - Vietnam. Three areas are disputed: the Gulf of Tonkin, the Paracels Islands, and the Spratly Islands.

Perhaps nowhere on the surface of the Earth is there a comparable degree of contest and dispute than in the South China Sea. Vietnam plays a key role in almost of all these disputes because of its geographical location and extensive maritime frontage. All countries bordering the South China Sea, except Singapore, are involved in disputes with Vietnam. China has maritime disputes with all but Singapore, Kampuchea and Thailand.

3 - Maritime Claims of Vietnam and China

3(a) - Vietnam's claim

The basic documents of Vietnam's claims are the 1977 Statement and the 1982 Declaration.³⁵ A straight baselines system was adopted with ten segments between eleven points. Areas adjacent to Kampuchea in the Gulf of Thailand and to China in the Gulf of Tonkin were left incomplete for future settlement. The length of segments range from 2 to 161.8 nautical miles. All but two of the basepoints are on islands. It is an average of 39.4 nautical miles of the island basepoints from the nearest mainland points. The area of internal waters enclosed reaches roughly 27,000 square nautical miles.

The areas around the Paracels and Spratlys are left for future negotiation. As pointed out in the analysis by Dr. Daniel J. Dzurek, basepoint 0 which is located in the Gulf of Thailand is neither a high tide elevation, nor a low-tide elevation and the use of the term "high seas" to describe the precise location of

³⁴Chiu, Hung-dah, "Some Problems Concerning the Delimitation of Maritime Boundary between the Republic of China (Taiwan) and the Philippines", 14 Ocean Development and International Law 79-105(1984).

³⁵LIMITS IN THE SEAS, No. 99, 1983. See *infra* Appendix I.

basepoint 0 appears to overthrow the claim of historic waters.²⁶

In the Gulf of Tonkin, no basepoint was defined and no line was drawn. However, the Treaty of 1887 between France and China was claimed as the basis for future settlement of the issue.

In the 1977 Statement, a 12-mile territorial sea, a 24-mile contiguous zone, a 200-mile exclusive economic zone and a continental shelf of 200-miles or outer edge of the continental margin were declared by Vietnam.²⁷ These zones are also applied to offshore islands outside the territorial sea. However, in the semi-enclosed sea, like the South China Sea, these sea zones cannot extend to their maximum permissible limit under international law.

3(b) - China's claim

China issued a territorial sea declaration in 1958.²⁸ A 12-mile territorial sea was established by adopting the system of straight baselines. However, thirty years after this declaration, one still has to speculate where and how these baselines are drawn since no basepoints or baselines were given. The analysis, with the accompanying map, in the LIMITS IN THE SEAS on China's straight baselines made its own version of the speculative points and lines.

The straight baselines extend to the offshore islands and archipelagos. Section(4) states that the Paracels, the Macclesfield Bank, and the Spratlys will be surrounded by straight baselines. Pohai Bay and Hainan Strait were both declared as historic internal waters of China. But navigation through the Strait is allowed under specific conditions.²⁹ China states expressly that it is entitled to continental shelf throughout the whole natural prolongation of the margin.³⁰ This claim was made in the intensive disputes in the

²⁶LIMITS IN THE SEAS, No. 99, 1983, at 78. See *infra* Appendix I.

²⁷LIMITS IN THE SEAS, No. 99, 1983, at 78. See *infra* Appendix I.

²⁸Beijing Review, No. 28, 1958, at 21. See *infra* Appendix I.

²⁹Regulations Governing the Passage of Non-Military Foreign Vessels through the Chiungchow Strait, in Lay, S.H., Churchill, R., and Nordquist, M., eds., NEW DIRECTIONS IN THE LAW OF THE SEA, Vol. II, at 549.

³⁰"U.S. & Japanese Reactionaries out to plunder Chinese and Korean Seabed Resources", 50 Peking Review, (Dec. 11, 1970) at 15.

East China Sea amongst Japan, South Korea, and China in the 1970s.³¹ China participated actively in the UNCLOS III proceedings but had played a role disproportionate to the magnitude of her marine interests.³²

As to the exclusive economic zone, in the speech by the head of the Chinese Delegation to negotiate a settlement of the disputes with Vietnam, Mr. Han Nianlong stated the following:

"As to the division of the sea area in the Beibu Gulf, it is natural and indispensable that the two countries should define their respective economic zones and continental shelf in the Beibu Gulf in a fair and reasonable way, in accordance with relevant principles of present-day international law of the sea."³³

4 - Disputes Between Vietnam and China

Intensive disputes exist with respect to three maritime areas between Vietnam and China - namely, in the Gulf of Tonkin, off the Paracels Islands, and around the Spratly Group. In addition, three areas of land and territorial sovereignty are in active dispute: the land boundary between the two countries, the sovereignty over the Paracels and the Spratly Islands.

Detailed treatment of each of these disputes would be out of the scope of the present dissertation. Instead each of them, except the Gulf of Tonkin, will be outlined briefly below.

³¹Rhode Island Law of the Sea Institute Occasional Paper, No.5, Sept. 1972, at 23; December 4, 1970, New China News Agency, Dec. 3, 24, 29, 31, 1970; 2 Peking Review 15-16 (January 8, 1971), "China possesses Sovereign rights over Continental Shelf in the East China Sea".

³²Diplomacy of China in UNCLOS III was shaped more by political incentives than by legal consideration and this is further worsened by China's pretension to be the leader of the Third World. For instance, her strong support of the 200-mile exclusive economic zone would undermine her claim of continental shelf through the entire prolongation in the East China Sea and could give Japan an advantageous position. Perhaps China was diplomatically naive to think that the continental shelf would be separated from the exclusive economic zone in terms of their delimitation between neighbouring States.

³³"Letter dated 14 May 1979 from the representative of China to the Secretary-General", UN Doc. A/34/235-S/13318.

4(a) - Land boundary

The Sino-Vietnamese land boundary runs approximately 1,281 kilometres long between the tripoint with Laos and the northern estuary of Pei-Lun Ho on the Gulf of Tonkin crossing the upper courses of a number of rivers flowing from China into Vietnam.³⁴ This boundary was originally settled between France and China by the 1887 Treaty, supplemented by the 1895 Treaty.

Between 1957 and 1958, letters were exchanged between the Central Committees of the Chinese and Vietnamese Parties to the effect that *status quo* of the border should be maintained and that the boundary question should be settled by the two central governments not by the local authorities.³⁵ After the deterioration of Sino-Vietnamese relations in the wake of Vietnam War in 1975, border incidents increased so dramatically that in February 1979, a major border war broke out between Vietnam and China.

4(b) - Sovereignty over Paracel and Spratly Archipelagos

In addition to the land boundary disputes, there are the disputes on the territorial sovereignty over Paracels and Spratlys.³⁶ Both sides claim the two islands group on historical ground and China has firm control over the Paracels after its victory in the 1974 naval battle with South Vietnam.³⁷ On the

³⁴International Boundary Study, No. 38, China-Vietnam, 1978.

³⁵Memorandum Outlining Vice-Premier Li Xiannian's Talk With Premier Phan Van Dong on 10 June 1977, UN Doc. A/34/189-S/13255, para. 6.

³⁶For detailed studies of the South China Sea islands, see Samuels, Marwyn S., CONTEST FOR THE SOUTH CHINA SEA, New York, Methuen, 1982; Heinzig, Dieter, DISPUTED ISLANDS IN THE SOUTH CHINA SEA -- Paracels -- Spratlys -- Pratas -- Macclesfield Bank, Otto Harrassowitz, Wiesbaden, Institute of Asian Affairs in Hamburg, 1976; Lo, Chi-Kin, CHINA'S POLICY TOWARDS TERRITORIAL DISPUTES -- The Case of the South China Sea Islands, London, Routledge, 1989.

³⁷For a complete history of the disputes, see Vietnamese Ministry of Foreign Affairs, White Book on Hoang Sa and Truong Sa Islands, Hanoi, September 28, 1979; Ministry of Foreign Affairs, Vietnam, "Vietnam's Sovereignty over the Hoang Sa and Truong Sa Archipelagos", UN Doc. A/34/54; Ministry of Foreign Affairs, China, "CHINA'S INDISPUTABLE SOVEREIGNTY OVER THE XISHA AND NANSHA ISLANDS", Beijing, Foreign Languages Press, January 30, 1980; "Some Documentary Evidence Showing that the Vietnamese Government Recognized the Xisha and Nansha Islands as Chinese Territory", UN Doc. A/34/712-S/13640; "The Hoang Sa and Truong Sa Archipelagos, Vietnamese Territories", UN Doc. A/37/83-S/14861.

much-spread Spratly group, Vietnam now stations personnel on six islands, the Philippines on seven, Taiwan on one, and Malaysia on two.³⁸ China has most recently occupied seven and built military bases on two of the seven islands.³⁹ Tension continues around those islands. When construction was being undertaken on one of the islands by China, an armed attack from Vietnamese gunboat took place.⁴⁰ China has set up Hainan Province, covering Hainan Island and the South China Sea Island groups.⁴¹ This decision was protested by Vietnam.⁴²

4(c) - Maritime delimitation around Spratlys and Paracels

Associated with the territorial sovereignty disputes over the two groups of islands, is the question of maritime sovereignty over the offshore areas of the islands. Prior to the solution of the former, there is little sign of solution to the maritime delimitation problem.

³⁸See Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, Chapter 8. "South China Sea", London, Methuen, 1985, at 209-233; Dzurek, Daniel J., "Boundary and Resource Disputes in the South China Sea," 2 Ocean Yearbook 254-284(1985); Chiu, Hungdah and Park, Choon-ho, "Legal Status of the Paracel and Spratly Islands", 3 Ocean Development and International Law 1-28(1976).

³⁹"An Observation Station Built on Yongshu Rock", People's Daily (Overseas Edition), 14 April 1988, in Chinese; Valencia, Mark J., "The Spratly Islands: Dangerous Ground in the South China Sea", 1 The Pacific Review 438-443(1988); Chang, Pao-Min, "A New Scramble for the South China Sea Islands", 12 Contemporary Southeast Asia 20-39(1990).

⁴⁰"A team of scientific researchers was attacked by Vietnam gunboat", People's Daily (overseas edition), 15 March 1988, in Chinese.

⁴¹Decision concerning the establishment of Hainan Province after the Seventh Session of the National People's Congress had examined and discussed the proposal by the State Council concerning the establishment of Hainan Province (People's Daily (overseas edition) 4 April 1988). The decisions are that:

1. "Approval is granted of establishing Hainan Province, and cancelling Hainan Administrative Region. People's Government of Hainan Province shall reside in the city of Haikou.
2. Hainan Province administers Xisha Qundao, Nansha Qundao, Zhongsha Qundao, their islands and rocks, and the adjacent sea areas."

⁴²On 13 April 1988, Vietnam protested the inclusion of Paracels and Spratlys in the newly-founded Hainan Province of China. See People's Daily (overseas edition), 15 April 1988, in Chinese.

4(d) - Maritime delimitation in the Gulf of Tonkin

The dispute in the Gulf of Tonkin dates back in 1973 when Vietnam was about to undertake exploration in cooperation with foreign oil companies. Unlike on the land boundary and the Paracels and Spratlys, no questions of territorial sovereignty is involved in the Gulf of Tonkin dispute. The only issue is how to divide the maritime space in the Gulf between the two countries. A more detailed account of the dispute history will be given in Chapter III.

5 - Summary

The South China Sea is a vast marginal sea surrounded by nine States and three entities. Under the regimes of continental shelf and EEZ, all areas of the South China Sea will be subject to coastal States' jurisdiction. The South China Sea falls under the definition of enclosed or semi-enclosed seas. But the significance of this concept in maritime delimitation has not been seriously explored.

Five maritime boundaries were settled in the colonial period, four in post colonial period, and fourteen are still unresolved. In all of these disputes, Vietnam and China play a pivotal role because of their geographical location and extensive claims.

Vietnam claimed in 1977 a 12-mile territorial seas, a 24-mile contiguous zone, a 200-mile EEZ, and a 200-mile or continental margin continental shelf. The straight baselines have not been drawn in the Gulf of Tonkin because Vietnam considers that the 1887 Convention has established the maritime boundary between Vietnam and China in the Gulf of Tonkin. China declared a 12-mile territorial seas in 1958 measured by straight baselines. But there is no indication as to how the straight baselines might be drawn in the Gulf of Tonkin by China. Apparently, China has made claims over the continental shelf and EEZ through non-legislative documents and actions.

Among the six disputes of land boundary, territorial sovereignty or maritime areas between Vietnam and China, the dispute in the Gulf of Tonkin is devoid of any question on territorial sovereignty so that the treatment of the subject is purely within the law on maritime delimitation.

CHAPTER II

PHYSICAL DESCRIPTION OF

THE GULF OF TONKIN¹

1 - General Setting of the Gulf of Tonkin

The Gulf of Tonkin (as it is generally known to the West), also called Bac Bo Gulf by Vietnam and Beibu Gulf by China, is located on the northwestern corner of the South China Sea and is surrounded by Vietnamese coast on the northwest, west and southwest, by China's Guangxi Autonomous Region on the north, and by Leizhou Peninsula and Hainan Island on the east. The Gulf has two openings: the main opening is directed southeasterly with a width of 99.68 (narrowest) and 117.35 (widest) nautical miles. On the east, between Leizhou Peninsula and Hainan Island, is the Hainan Strait (Qongzhou Strait in Chinese), forming a secondary opening of the Gulf. The Strait is about 50 miles long, from 9.8 to 19 miles wide, linking the Gulf with the open waters of South China Sea. The Gulf has an area of 46,961 square nautical miles with a perimeter of 1,050 nautical miles and a length of 268 nautical miles.² Under the legal regime of EEZ and continental shelf, the whole Gulf would be subject to the jurisdiction of the two littoral States - China and Vietnam.

¹The main references in this Chapter are, Morgan, J.R. and Valencia, M.J., eds., ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, University of California Press, 1983; Valencia, Mark J., SOUTH-EAST ASIAN SEAS: OIL UNDER TROUBLED WATERS -- Hydrocarbon Potential, Jurisdictional Issues, and International Relations, Singapore, Oxford University Press, 1985; Li, C.Y. and Valencia, M.J., Workshop Report, SECOND WORKSHOP ON THE GEOLOGY AND HYDROCARBON POTENTIAL OF THE SOUTH CHINA SEA AND POSSIBILITIES OF JOINT DEVELOPMENT, Honolulu, East-West Center, 1983; Wu Jin-Min, "The Characteristics of the Geological Structures of the Tertiary Basins on the Continental Margin in the Northern Part of the South China Sea", 10 Energy 359-372(1985).

²Morgan, J.R. and Valencia, M.J., eds., ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, University of California Press, 1983, at 4.

2 - Configuration of the Relevant Coasts

With the shape of a new Moon, a fan-arc, and half of a diamond, the Gulf generally runs northwestward and then turns northeastward up to the west coast of Leizhou Peninsula. Hainan Island, with an area of 33,556 square kilometres,³ takes up the centre of the envisioned fan-arc. On the west, from Cap Lay of Vietnam to Baie du Brandon (Vung Thu Dien), the coast consists of sand with a very gentle coastline tilting toward northwest. Only on the north of Dong Hoi, the areas of Hon Gio, Mui Ron, Hon En appears to protrude a bit into the Gulf. From Baie du Brandon further north, the coast runs north northeast until Cap Chao where it changes more to a right northeast direction. From Hon Dau northbound, there is a fringe of coastal islands called Archipelago des Fai Tsi Long and a group of islands called Iles Kao Tao. These islands spread over an elongated space till the land boundary terminus at Tra Co (see Map 4).

From Tra Co eastward, there is an indentation called Chinchou Wan with Wulei Chiao scattered over. The coastal area becomes quite irregular with many water bodies cutting into the land. Pai-lung Wei is an small peninsula east northeast of Tra Co. Further eastward is the Kuantou Chiao on which the busy port of Beihai rests. Actually, Kuantou Chiao and Mainlands coasts together surround a bay-like body of water (Chinchou Wan). Between Kuantou Chiao and Yinglo Chiang, the general direction of the coasts extends easterly. The coast from Yinglo Chiang to Chiaowei Chiao which is on the southeastern tip of Leizhou Peninsula, follows, with a slight convexity in the middle, in a north-south direction.

On Hainan Island, the coast takes a west southwest course from Linkao Chiao to Tachiao Tou where it bends down to pursue a steady south-north path until Yingge Tsu. Between Yingge Tsu and Chinmu Chiao on the south of Hainan Island, the coast turns east southeastward.

Hainan Strait with the closing line between Chiaowei Chiao and Linkao Chiao, similar to the Bay of Fundy in the Gulf of Maine, should be used for the construction of geometric lines but may not be excluded from the calculation of coastline length and ratio. The east-west Hainan Strait runs about 80 kilometres with a width of 20-40 kilometres and an area of 2,370 square kilometres. The depth of the waters on average is 44 metres with the maximum of 114 metres.⁴ According to the Qongzhou Strait Regulation, the Strait comprises the area linking the line between Mulan Tou 20°9'37"N,

³Sun, Xiangpin, WOGUO DE HAIYANG (Seas of Our Country), Commercial Press, Beijing, 1985, at 39, in Chinese.

⁴Sun, Xiangpin, WOGUO DE HAIYANG (Seas of Our Country), Commercial Press, Beijing, 1985, at 44, in Chinese.

Map 14: Coastal Configurations and Islands in the Gulf of Tonkin

Source: LIMITS IN THE SEAS, No. 99, Straight Baselines: Vietnam, 1983.

Source: LIMITS IN THE SEAS,
No. 99, Straight Baselines:
Vietnam, 1983.

Source: LIMITS IN THE SEAS,
No. 99, Straight Baselines:
Vietnam, 1983.

110°41'E) and Shengkouhou Sha (20°26'N, 110°30'22"E) and the line on the east between Chiaowei Chiao (20°13'30"N, 109°55'30"E) and Linkao Chiao (20°0'22"N, 109°42'6"E).⁵

A roughly parallel opposite relationship exists between the coast of Vietnam and that of Hainan Island, except in the vicinity of the land boundary terminus where an adjacent situation prevails. The segments of lines indicating the general direction of the Hainan coast corresponds in parallel more or less to the segments of lines indicating the general direction of the Vietnamese coast.

3 - Islands

Six groups of islands appear in the Gulf of Tonkin: Hainan Island, Archipelago des Fai Tsi Long, Iles Kao Tao, Weizhou Dao and Xieyang Dao, Dao Bach Long Vi, and scattered individual islands close to the coasts (see Map 4 at page 26).

3(a) - Hainan Island (No. 1 on the map)

The largest island in the Gulf is Hainan Island with an area of 33,556 square kilometers. About 30 small islands are scattered around it. Hainan Island has a population of 6 million and economically is very important. By its size, population, and economic importance, there is little doubt that Hainan Island would be taken into account entirely.⁶

3(b) - Archipelago des Fai Tsi Long⁷ (No. 2 on the map)

The Archipelago fringes along the Vietnamese coast from Tra-co to Hon Dau for 70.4 nautical miles in a southwestern direction. The width of the Archipelago varies. From Vinh Thuc to Ile aux Sangliers for 22.4 nautical miles, the width is 9 miles. From Ile aux Sangliers to Dao Cat Ba, it extends to a maximum of 19.6 miles wide for a distance of 47.5 miles. There are approximately 200 islands, islets, and other insular features. Some of the islands are fairly large in size, such as Vinh Thuc, Ile Ba Mun, Ile de la

⁵Lay, S.H., and Nordquist N., NEW DIRECTIONS IN THE LAW OF THE SEA, Vol. II, Documents, 1973, at 549.

⁶Sun, Xiangpin, WOGUO DE HAIYANG (Seas of Our Country), Commercial Press, Beijing, 1985, at, 39, in Chinese.

⁷The following figures are calculated by the author based on the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hainan Island), Iles Kao Tao and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

Table, Dao Cai Ban, Ile Dan Do La, Dao Cai Bau (largest), and Dao Cat Ba.

These islands are separated by sea channels no wider than 5.6 miles. The closest distance to the mainland coast is no more than 0.5 miles. The distance from the most outlying island Dao Lai Tao to the nearest mainland coast is 17.3 miles. At Ile aux Sangliers the Archipelago takes a 40° bearing of the general direction of the coast from Tra-co to Hon Dau. At its southern parts, they join the mouth of the Red River. The large and medium-size islands have inhabitants year-round. The main economic activities are fishing and agriculture.

3(c) - Iles Kao Tao⁸ (No. 3 on the map)

This group of islands lies south southwest of Tra-co (land boundary termini between Vietnam and China). It consists of three large islands (Dao Cu Xu, Dao Ching Lan Xan, and Dao Lo Chuc San), and 14 small islands. Iles Kao Tao are separated from Archipelago Fai Tsi Long by a 6.2-6.7 mile sea-lane. The islands have a width of 7.8 miles and a length of 22.4 miles. The minimum distance from the mainland coast is 9.5 miles and the maximum is 19.6 miles. The 17 islands are separated by up to 6.7 mile-wide sea lanes.

3(d) - Dao Bach Long Vi⁹ (No. 4 on the map)

Dao Bach Long Vi, also called Nightingale Island, is situated at parallel 20°01'N and meridian 107°42'E. It has an area of 2.7 square miles, and 0.3 square kilometers of cultivated land. It has a height of 53 metres above the sea level. The island is inhabited year-round.¹⁰ The shortest distance from Vietnamese mainland coast is 55.9 miles and 38 miles from Dao Lai Tao is the shortest distance from the Archipelago des Fai Tsi Long. It is 69.9 miles from Tachiao Tou on Hainan Island and 17.9 miles from meridian

⁸The following figures are calculated by the author based on the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

⁹The following figures are calculated by the author based on the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

¹⁰Private correspondence with a Chinese law of the sea specialist, December 15, 1988.

108°3'E.

If the outmost islands of Archipelago des Fai Tsi Long are taken as the basepoints to draw the equidistance line to effect a median line, Dao Bach Long Vi is 15.1 miles from the median line. If equidistance lines are drawn by taking the Vietnamese mainland coast as basepoints, Dao Bach Long Vi is 5.5 miles from the median line.

3(e) - Weizhou Dao and Xieyang Dao¹¹ (No. 5 on the map)

The two Chinese islands of Weizhou Dao and Xieyang Dao lie on the northeastern corner of the Gulf. Weizhou Dao has an area of 14 square miles, with 15,000 inhabitants.¹² The shortest distance between Weizhou and the Chinese coast is 19.6 miles (northward). Weizhou Dao is 64.3 miles from the nearest Vietnamese coast (Tra-co). The main economic activities are agriculture, mariculture, fishery, and offshore petroleum.

The island of Xieyang Dao lies 8.4 miles south southeast of Weizhou Dao, with an area of 3 square miles and is inhabited year-round. The distance between Xieyang and the Chinese mainland coast on Leizhou Peninsula measures 24.6 miles.

3(f) - Individual coastal islands¹³

Southward from Hon Dau, the first main coastal island is Hon Ne, lying 2.8 miles off Vietnamese coast. Lying off and between Cap Bang and Dao Bien Son, Hon Me is 6.2 miles from the coast. Further south, 11.2 miles off Mui Ga lies Hon Matt. Hon Gio is 8.4 miles off Mui Ong. Hon Co is 13.4 miles from Cap Lay. Cu Lao Cham is 7.3 miles from the mainland coast.

On the coast of Hainan facing the Vietnamese coast, the only

¹¹The following figures are calculated by the author based on the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

¹²"Tour to Weizhou Dao", People's Daily (Overseas Edition), 20 July 1989, at 1.

¹³The following figures are calculated by the author based on the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

relevant island is Hsiku Tao, 2.8 miles from the coast.

4 - Non-Geographical Facts

Most of the Gulf is less than 50 meters deep with a gradual increase in depth toward the southern opening where it reaches 80 meters and up to 100 meters at the outer part of the opening.¹⁴ Four major rivers empty themselves into the Gulf: the Red, Ma, Ca of Vietnam and Nanling Jiang of China. The Red River carries with it lots of terrain materials and forms a quite extensive marine drainage basin, bringing materials from the Red River Delta to the transverse range in southwestern Hainan Island.¹⁵

The ocean surface currents flow from east to west through Hainan Strait and swirl counterclockwise in the Gulf till they move to the southern opening of the Gulf.¹⁶

The floor of the Gulf exhibits a central valley 70 meters deep with axis parallels approximately the curvature of the Gulf but it draws considerably closer to Hainan than to the Vietnamese coast. The valley opens southward at the mouth of the Gulf where it joins the wider basin of the South China Sea.¹⁷

The outcrops of various time periods, from palaeozoic to recent times, have been found.¹⁸ There are widespread Jurassic marine deposits in the Gulf. Bach Long Vi Island is composed of

¹⁴Marine Geological Brigade No. 2, Bureau of Marine Geological Investigation. GEOLOGICAL MAP OF CHINA SEAS AND ADJACENT REGIONS, Beijing, Chinese Geological Maps Printing Press(1:3,000,000)(in Chinese), 1975.

¹⁵Fan, Pow-Foong, "Geology and Bouguer Gravity Anomalies of the Gulf of Tonkin and Its Vicinity", 6 Energy 1099-1111(1981), at 1099.

¹⁶Fan, Pow-Foong, "Geology and Bouguer Gravity Anomalies of the Gulf of Tonkin and Its Vicinity", 6 Energy 1099-1111(1981), at 1099; also see Morgen, J.R. & Valencia, M.J.eds. ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, Univ. of California Press, 1983, at 14-15.

¹⁷ Morgen, J.R. & Valencia, M.J. eds. ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, Univ. of California Press, 1983, at 6.

¹⁸Marine Geological Brigade No. 2, Bureau of Marine Geological Investigation. GEOLOGICAL MAP OF CHINA SEAS AND ADJACENT REGIONS, Beijing, Chinese Geological Maps Printing Press(1:3,000,000)(in Chinese), 1975.

Neogene deposits and is probably formed by the local uplift.¹⁹ There are two sedimentary cones deposited by the Red River drainage system. One extends northeast and the other runs southwest with a thickness of 5 kilometres. The latter cone merges with the Pearl River deposits and forms an apron around Hainan Island.²⁰

Carbonates and Lower Palaeozoic metamorphic rocks cover the northern part of the Gulf and Lower Palaeozoic metamorphic rocks lie in the central and southern part.²¹ It has been found that the stratigraphy of the Gulf of Tonkin is composed of:

1. Quaternary (Q) --- shallow marine silts, clays, and basalts;
2. Upper Tertiary (N2) --- Coastal shallow marine, sand-shale, dark colored mudstone, and oil shale (2000m);
3. Lower Tertiary (N1) --- Lacustrine detritals, dark-colored mudstone, oil shale (2000m);
4. Mesozoic (M2) --- Red colored detritals;
5. Palaeozoic (P2) --- Shallow marine carbonates and metamorphic rocks.²²

Tectonically, three tectonic units interact in the Gulf of Tonkin, namely, (1) the South China--North Vietnam Foldbelt; (2) the Southeastern Maritime Foldbelt of Central Hainan Island, and (3) the Indonesian Foldbelt of Vietnam.²³

Three kilometers of non-marine Oligocene and older sediments and two kilometers of marine Miocene and younger sediments are deposited in the Gulf of Tonkin. Also, three sets of faults

¹⁹Fan, Pow-Foong, "Geology and Bouguer Gravity Anomalies of the Gulf of Tonkin and Its Vicinity", 6 Energy 1099-1111(1981), at 1101.

²⁰Fan, Pow-Foong, "Geology and Bouguer Gravity Anomalies of the Gulf of Tonkin and Its Vicinity", 6 Energy 1099-1111(1981), at 1101; Chen, Enmin and Huang, Yongyin, "Preliminary Discussion on the 1605 Qingzhou Earthquake and Its Seismogenetic Structure", 1 Seismology and Geology 37(1979), in Chinese.

²¹Marine Geological Brigade No. 2, Bureau of Marine Geological Investigation. GEOLOGICAL MAP OF CHINA SEAS AND ADJACENT REGIONS, Beijing, Chinese Geological Maps Printing Press(1:3,000,000)(in Chinese), 1975.

²²Fan, Pow-Foong, "Geology and Bouguer Gravity Anomalies of the Gulf of Tonkin and Its Vicinity", 6 Energy 1099-1111(1981), at 1102.

²³Huang, T.K., "An Outline of the Tectonic Characteristics of China", 71 Eclogae Geologicae Helvetiae 611(1978), cited from Fan, Pow-Foong, "Geology and Bouguer Gravity Anomalies of the Gulf of Tonkin and Its Vicinity", 6 Energy 1099-1111(1981), at 1103.

extending northeast, east-west, and northwest meet in the Gulf of Tonkin.²⁴

Three sedimentary deposits are identifiable in the Gulf: the North Bay Basin on the northeast, the Red River Trough on the west, and the Yinggehai Basin on the southwest. To the east are the Guangzhou Gulf Basin and the elongated Southeast Hainan, the Pearl River, and the Southern Basins. The North Bay Basin contains hydrocarbon deposits in Upper Palaeozoic strata.²⁵ The four kilometer-thick North Bay Basin has an area of 20,000 square kilometres in scattered pods.²⁶ The Yinggehai sedimentary basin is characterized by the intersection of Indo-China faulted block and South China faulted block. The basin is developed on the Ailan palaeo-structure, trending in a northwestward graben belt known as the Red River -- Yinggehai fault. The thickness of sediments reaches as deep as 10 kilometers with a semi-graben shape. These sedimentary deposits are of mainly Cenozoic Marine clastic.²⁷ The 6,000 square kilometer Yinggehai Basin is filled with Tertiary, and, possibly, Late Cretaceous continental clastics.²⁸

5 - Resources

5(a) - Living resources

The Gulf of Tonkin, characterized by nutrient-rich discharges from numerous large river systems, and year-round warm water temperatures, as well as the full coverage of continental shelf in the marine area, supports very profitable marine fisheries.

There exists a variety of demersal (bottom-living fishes) and invertebrates, including snappers, groupers, pony fishes,

²⁴Fan, Pow-Foong, "Geology and Bouguer Gravity Anomalies of the Gulf of Tonkin and Its Vicinity", 6 Energy 1099-1111(1981), at 1110.

²⁵Morgen, J.R. & Valencia, M.J.eds. ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, Univ. of California Press, 1983, at 100.

²⁶Morgen, J.R. & Valencia, M.J.eds. ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, Univ. of California Press, 1983, at 115.

²⁷Luo, Zhetan and others, "Tectonic and Deposits of the Cenozoic Era in the South China Sea", 6 Energy 1093-1098(1981).

²⁸Morgen, J.R. & Valencia, M.J. eds. ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, Univ. of California Press, 1983, at 115.

catfishes, croakers, shrimps, and lobsters. The shallow, soft-bottom areas near the mangrove concentrations along the southwest coast of Hainan, from Baie du Brandon to Hue on the Vietnamese coast and on both sides of the land boundary terminus, provide the richest shrimping grounds. These waters abound in shallow-water demersal fishes, such as catfish, croakers, seaperch and flounders, and invertebrates. There are also abundant shrimps, and numerous small fishes collectively referred to as "miscellaneous fish", "duck fish" or "trash fish".

Fusiliers, ponyfish, goatfish, emperor brems, and spiny lobsters, and many others are found in the shallow-water hard-bottom and sandy-bottom areas, particularly the areas adjacent to the Red River Delta and Vietnamese coasts. Near the central valley in the Gulf, snappers, groupers, higeyes, lizardfish, and shreadfin bream make up a high percentage of the population.²⁹

Pelagic fishery (or mid- and upper-water species) such as silver pomfrets, nairtails, and sharks, frequent the shallow, nutrient-rich waters in the north of the Gulf. Chub mackerels dominate the south of the Gulf. Mackerels are a highly-migrant species so that it is a shared stock between Vietnam and China.³⁰ In general, the geographical distribution of demersal fishery in the Gulf indicates that the north of the Gulf is populated by shrimps and crabs and the south by flounders, with snappers inhabiting the whole Gulf.

Demersal, coastal pelagic and crustacean fish landings in the Gulf of Tonkin are very substantial by both Vietnam and China.³¹ It has been estimated that the total demersal catch in the Gulf reaches 370,000 metric tons, among them about 20,000 metric tons are caught by distant-water fishing fleets from Hong Kong, Macao and Taiwan. The coastal pelagic catch in the Gulf by Vietnam and China is as high as 190,000 metric tons annually with negligible catch by fishermen from Hong Kong. In comparison with demersal and coastal pelagic catches, the oceanic catch is only 6,100 metric tons.

Intensive fishing in the Gulf has become a serious concern to

²⁹Morgen, J.R. & Valencia, M.J. eds. ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, Univ. of California Press, 1983, at 56-57.

³⁰Morgen, J.R. & Valencia, M.J. eds. ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, Univ. of California Press, 1983, at 57.

³¹Morgen, J.R. & Valencia, M.J. eds. ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, Univ. of California Press, 1983, at 59.

Vietnam and China with the danger of damaging the conservation and rational utilization and management of the resources. Joint efforts to enhance the management of fishery resources with foreign participants outside the Gulf have been actively pursued by both Vietnam and China.³²

In 1957, Vietnam and China reached an agreement on fisheries in the Gulf of Tonkin. It stipulated that the near offshore fishing grounds should be preserved for each country respectively. Fishing grounds in the middle could be operated by fishermen from both countries.³³

5(b) - Hydrocarbon resources

The Gulf of Tonkin, with its entire bed covered by continental deposits of different geological periods, contains extremely rich hydrocarbon structures and deposits. Investigation into the marine areas in the Gulf began in the 1950s when China launched a local survey with the view of delineating oil and gas deposits. A study of oil and gas seepage was undertaken in the Yinggehai Basin off Hainan from 1956-1957. In 1960, crude oil was found with the drilling of two shallow wells on the offshore bank of Yinggehai. A structural ridge separating the North Bay Basin from the Yinggehai Basin was identified.³⁴ Yinggehai and the upper parts of Huangliu formations are composed of very thick mudstone and calcareous mudstone. There is a strong expectation that oil and gas may be discovered in the biological reefs on the margin of the northern slope in fault or lithologic traps.³⁵

5(b)(i) - Exploration by China

China started its offshore oil exploration and exploitation in the 1970s, partly in response to the offshore claims by its

³²In 1979, a joint venture to develop shrimp trawling was set up in Beihai port between Japan and China and another one on fisheries development in Guangdong including Hainan. Vietnam formed three joint ventures to develop shrimp trawling, fishing and cold storage in the mid 70s.

³³Ministry of Foreign Affairs, China, ZHONGHUA RENMIN GONGHEGUO TIAOYUE JI (Treaty Series of People's Republic of China), Vol.6, Beijing, Law Press, 1958, in Chinese.

³⁴Wu, Jin-min, "A History of Oil and Gas Exploration in the Central and Northern Parts of the South China Sea", 10 Energy 413-419(1985), at 414.

³⁵Wu, Jin-min, "A History of Oil and Gas Exploration in the Central and Northern Parts of the South China Sea", 10 Energy 413-419(1985), at 417.

neighbouring countries.³⁶ In 1979, in cooperation with foreign oil companies, China initiated to explore oil in the China seas, including the Gulf of Tonkin. A group of oil companies led by TOTAL was involved in the Gulf of Tonkin exploration. Several successful wells have been drilled by TOTAL in the Gulf (see Map 5).³⁷

After the 1979 Sino-Vietnamese border conflict, China intensified its search for oil off Hainan Island, around the Paracels and in the Gulf of Tonkin, perhaps with a view to strengthening China's position vis-a-vis Vietnam in the maritime dispute.³⁸ U.S. oil companies such as ARCO and Occidental have been in cooperation with China National Offshore Oil Company in the Gulf for some time. Other oil companies include Atlantic Richfield, Santa Fe International, Mobil, Amoco, Cities Service, Penzoil, Union Oil of California, AGIP, and British Petroleum.

Some experts predict that full exploitation of the petroleum resources in the Gulf is still some time away given the current stage of exploration and the not so promising testing results.³⁹ In spite of disappointments, none of the major oil companies have left China. Having spent as much as a combined \$2 billion US, these companies are reluctant to quit. In 1987, oil discoveries were made for the first time by Agip-Chevron-Texaco (ACT), Amoco-Orient, Japex Huanan, and Philips in offshore China.⁴⁰ To reduce the worries of the foreign oil companies, China improved its terms for bidding and also issued a regulation to govern the prospecting, exploration, and exploitation of offshore oil.⁴¹ The third round of bidding started in the summer of 1988. It is reported that Oilfield Wei

³⁶Dzurek, Daniel J., "Boundary and Resource Disputes in the South China Sea", 2 Ocean Yearbook 254-284(1985), at 262.

³⁷Wu, Jin-min, "A History of Oil and Gas Exploration in the Central and Northern Parts of the South China Sea", 10 Energy 413-419(1985), at 417-418.

³⁸Samuels, Marwyn, CONTEST FOR THE SOUTH CHINA SEA, New York, Methuen, 1982, at 161.

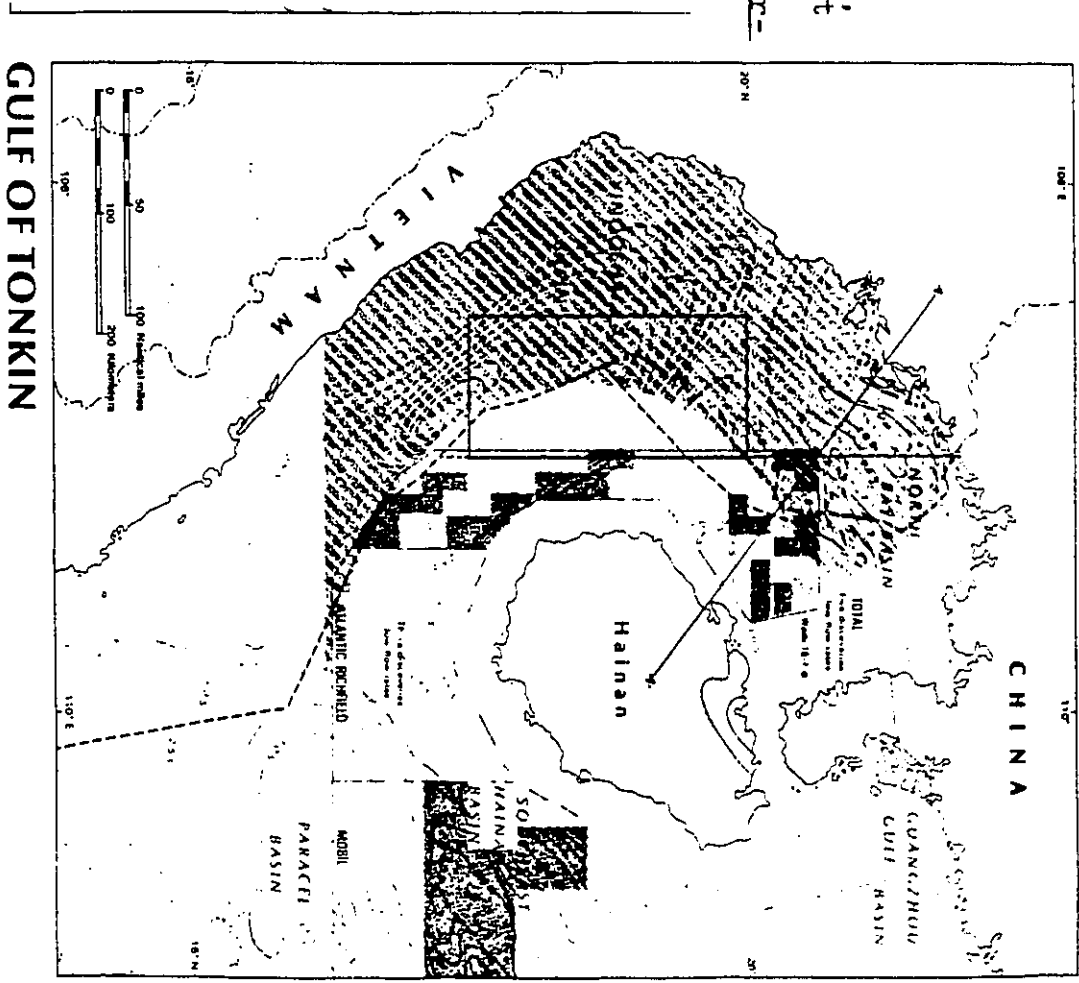
³⁹Dzurek, Daniel J., "Boundary and Resource Disputes in the South China Sea", 2 Ocean Yearbook 254-284(1985), at 262.

⁴⁰China 88, Far Eastern Economic Review Vol. 139, No. 12, at 71-72.

⁴¹People's Daily, Feb. 11, 1982, at 4 in Chinese; for an analysis of this legislation, see Yuan, Paul C., "China's Sovereignty over Its Offshore Oil and the New Law of the Sea", 10 Energy 525-532(1985); Yuan, Paul C., "China's Jurisdiction over Its Offshore Petroleum Resources", 12 Ocean Development and International Law 191-208(1982-1983).

Map 5: Activities of the Parties in the Gulf of Tonkin

Source: Valencia, M.J. and Miyoshi, M.; "Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas?", 16 Ocean Development and International Law 211-254(1986), at 245.



GULF OF TONKIN BLOCK STATUS

GULF OF TONKIN BOUNDARIES

Legend:
 China: Sino-French Exploration Area
 China: Blocks Opened for Bidding in 1982
 Approximate former U.S. Survey Area

Legend:
 108° 01' 13" 1887 Sino-French Boundary Agreement
 Line of Equidistance - Taking Account of All Features
 and Peak Seng Kong Pan
 "Neutral Zone" Boundary

(10-3) is now completely operated by Chinese oil companies after several years of cooperation with French companies. The well is located about 50 kilometers southwest of Weizhou Island, in the northeast of the Gulf of Tonkin. So far, 676,000 tons of crude oil were extracted - 378,000 tons of which were exported. Exploration started in 1980 and in 1986 production began.⁴²

There are four oilfields and gasfields operated by China in the Gulf. The Wei 10-3 oilfield has come into production by the cooperation of China and France. Two oilfields (W11-4), in the vicinity of Weizhou Dao are expected to produce oil in 1991. In cooperation with ARCO, China will develop Ya 13-1 gasfield.⁴³ It is noticeable, however, that none of the exploration and exploitation takes place beyond the Convention line or median line.

5(b)(ii) - Exploration by Vietnam

Between 1971 and 1973, the Soviets assisted Vietnam in its exploration in the Gulf of Tonkin.⁴⁴ In April 1973, an agreement was signed by the state petroleum company of Italy, ENI, to explore the submarine area in the Gulf.⁴⁵ After the Sino-Vietnamese border conflict in 1979, Vietnam has intensified its oil-finding efforts in the Gulf of Tonkin since the Gulf area represents the most promising submarine area offshore Vietnam. In economically difficult times, the incentive to have a domestic oil supply remains strong (see Map 5 at page 36).

Under these circumstances, the offshore dispute in the Gulf of Tonkin seems to take on more significance for both Vietnam and China.

6 - Summary

The Gulf of Tonkin is surrounded by the Vietnamese mainland and coastal islands, the Chinese mainland, the Leizhou Peninsula,

⁴²"West Nanhai Oil Company Becomes the Operator of the First Oilfield in South China Sea: Smooth Progress of Sino-French Economic and Technological Cooperation", People's Daily (Overseas Edition), 15 August 1988, at 3, in Chinese.

⁴³People's Daily (Overseas Edition), January 10, 1989, at 2; February 10, 1989, at 3, in Chinese.

⁴⁴Samuels, Marwyn, CONTEST FOR THE SOUTH CHINA SEA, New York, Methuen, 1982, at 159.

⁴⁵Howell, Leon and Morrow, Michael, ASIA: OIL POLITICS AND THE ENERGY CRISIS, New York, International Documentation Nos. 60-61, 1974, at 92.

and Hainan Island. There are two openings in the Gulf: the main opening between the Vietnamese coast and Hainan Island, and the Qongzhou Strait between Leizhou Peninsula and Hainan Island.

The Gulf takes the shape of a fan-arc, with Hainan Island in the center. It takes a northeast direction first and then in the middle turns southeastward. Near the land boundary termini, Tra Co, the coasts on both sides become very irregular with the presence of islands and deep indentations. Chinchou Wan cuts deeply into the Chinese coast to the east of Tra Co. Near Tra Co, the coasts of Vietnam and China have an adjacent relationship. For the most part of the Gulf, the coasts of the two countries run parallel with each other in a complete oppositeness till the closing line of the Gulf.

There are six groupings of islands in the Gulf: Hainan Island, Archipelago des Fai Tsi Long, Iles Kao Tao, Dao Bach Long Vi, Weizhou Dao and Xieyang Dao, and individual coastal islands. Hainan Island is the largest and is assimilated into the mainland for the purpose of maritime delimitation. Archipelago des Fai Tsi Long extends for 70.4 miles along the Vietnamese coast southwest of Tra Co. These islands lie very close to the mainland coast and should be regarded as an integral part of the mainland. Iles Kao Tao is separated from Archipelago des Fai Tsi Long by a narrow channel. Dao Bach Long Vi with some inhabitants, sits very close to the median line between the Vietnamese mainland coast and the coast of Hainan Island. Weizhou Dao and Xieyang Dao are surrounded on three sides by Chinese coasts of the mainland, Leizhou Peninsula, and Hainan Island. They are located in the northeastern part of the Gulf. There are a number of individual coastal islands along both the Vietnamese and Chinese coasts.

Most of the Gulf sea floor is less than 50 meters deep. Three tectonic units interact with each other in the Gulf: the South China-North Vietnam Foldbelt, the Southeastern Maritime Foldbelt of Central Hainan Island and the Indonesian Foldbelt of Vietnam. Three sedimentary deposits can be identified: the North Bay Basin, the Red River Trough, and the Yinggehai Basin.

The Gulf abounds in fisheries, including demersal, coastal pelagic, and crustacean. Both Vietnam and China depend heavily on the fishery industry of the Gulf.

Offshore oil deposits have been found in the Gulf and are now under exploration and exploitation by China. Foreign oil companies are collaborating with China and Vietnam to undertake the offshore operation. Four oilfields and gasfields have been under construction by China, in cooperation with foreign oil companies. Vietnam is also pursuing an active program of oil exploration in the Gulf.

CHAPTER III

THE DISPUTE IN THE GULF OF TONKIN

1 - Origin and Development of the Dispute¹

Before 1974, there was no dispute as to the maritime division in the Gulf of Tonkin. There are two reasons for this. First, China had a very cordial relationship with Vietnam, and secondly, there was no immediate need to draw a division line to separate the respective jurisdictions in the Gulf between Vietnam and China.

1(a) - Exchange of letters in 1957-1958

In November of 1956, representatives from Vietnam's Hai Ninh, Lang Son and Cao Bang provinces and those from China's Guangdong and Guangxi provinces met to discuss questions relating to border management. These discussions touched on the issues concerning alignment of the land boundary. These local officials agreed to submit these questions to their respective central authorities for resolution.

In November of 1957, the Central Committee of Vietnam's Workers' Party proposed in a letter to the Central Committee of China's Communist Party, that:

¹For background information, see Valencia, Mark J., SOUTH-EAST ASIAN SEAS: OIL UNDER TROUBLED WATERS -- Hydrocarbon Potential, Jurisdictional Issues, and International Relations, Singapore, Oxford University Press, 1985; Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 209-233; Prescott, J.R.V., MARITIME JURISDICTION IN SOUTHEAST ASIA: A Commentary and Map, East-West Center, Honolulu, 1981; Lo Chi-Kin, CHINA'S POLICY TOWARDS TERRITORIAL DISPUTES -- The Case of the South China Sea Islands, London, Routledge, 1989, 84-132.

²China stated the following (UN Doc. A/34/235; S/13318.): "In the two decades and more prior to 1974, the Chinese and Vietnamese sides respected each other's territorial sea and sovereignty in the Beibu Gulf area. There was a relationship of friendly co-operation on such matters as shipping, fishery, scientific research and resistance to imperialist aggression, and no disputes occurred."

³"Letter dated 14 May 1979 from the Representative of China to the Secretary General", in UN Doc. A/34/235-S/13318.

"the national border question, in view of its importance, must be settled in accordance with the existing legal principles or with new ones defined by the two Governments. Local authorities and organizations are strictly forbidden to enter into negotiations on setting up new boundary markers or on ceding territory to each other."⁴

In April 1958, the Central Committee of the Chinese Communist Party expressed its agreement on these proposals with Vietnam in a letter of reply.⁵

The main contents of the agreement, according to Vietnam, are as follows:

1. the two sides maintain *status quo* on the borderline left by history;
2. the national border question, in view of its importance, should be settled in accordance with the existing or reaffirmed legal principles, and decisions should be made by the two Governments;
3. all eventual border or territorial disputes should be settled through negotiations.⁶

For China, the agreement means that:

1. both sides would respect the boundary line delimited by the Sino-French boundary accords;
2. they would strictly maintain the *status quo* of the boundary pending a negotiated settlement of the boundary question by the two Governments;
3. the local authorities were not empowered to settle questions pertaining to territorial ownership.

Although there is a subtle difference in interpretation of this agreement by exchange of letters, the parties are not in dispute as to the main contents of this agreement. This is the

⁴"Letter dated 14 May 1979 from the Representative of China to the Secretary General", in UN Doc. A/34/235-S/13318. See *infra* Appendix III, Document Number 7.

⁵"Letter dated 14 May 1979 from the Representative of China to the Secretary General", UN Doc. A/34/235-S/13318; "Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General", UN Doc. A/34/170-S/13234.

⁶"Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General", UN Doc. A/34/170-S/13234. See *infra* Appendix III, Document Number 1.

⁷"Letter dated 14 May 1979 from the Representative of China to the Secretary General", UN Doc. A/34/235-S/13318. See *infra* Appendix III, Document Number 7.

first accord between Vietnam and China on matters relating to boundary delimitation. Guided by this agreement, the two countries succeeded in maintaining border peace and friendship until 1974.

Though the agreement was concerned more with land frontier, it referred to the basic principles for settlement of the boundary issue, that is, respect for the borderline defined by the Sino-French conventions, and the application of existing legal principles or new ones as deemed appropriate by the two Governments. In this way, the two sides committed themselves to solve the boundary issue based on legal principles. There is no indication that the sea boundary in the Gulf of Tonkin has been settled yet.

1(b) - First round of negotiations in 1974

On 26 December 1973, the Vietnamese Ministry of Foreign Affairs informed the Chinese Government of its intention to undertake prospecting for oil in the Gulf of Tonkin with a proposal that negotiations be commenced immediately to delimit the maritime boundary in the Gulf.⁸ Oil companies from Japan, France, and Italy were prepared to cooperate with Vietnam in the exploration and exploitation of its continental shelf in the Gulf.

On 18 January 1974, the Chinese Government agreed to start negotiations. At the same time, China proposed that no third country should be brought in for the exploration and exploitation in the Gulf, and that the rectangular area formed by the 18th and 20th parallels of latitude and the 107th and 108th meridians of longitude should not be prospected pending the settlement of the maritime boundary in the Gulf.⁹ Vietnam obviously did not make object to the setup of the rectangular zone, but insisted instead that the eastern line of the zone coincide with the 108°3'13" meridian east of Greenwich as laid down in the 1887 Sino-French Convention. The difference measures about 3 nautical miles between the 108th meridian and 108°3'13" meridian east. China has leased to AMOCO and TOTAL this sliver of difference.¹⁰

Negotiations started on 5 August 1974 in Beijing. The views of the two sides appeared diametrically opposing. Vietnam put forward the arguments that the 1887 Convention had delineated the

⁸"Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General", UN Doc. A/34/170-S/13234.

⁹"Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General", UN Doc. A/34/170-S/13234.

¹⁰Valencia, Mark J., "Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas?" 16 Ocean Development and International Law 211-254(1986), at 242.

maritime boundary in the Gulf of Tonkin, which was the 105°43' Paris meridian east; that all Governments of the two countries for the last century had "exercised sovereignty and jurisdiction according to that line"; and that the Gulf belongs to the "regime of historic water" situated between Vietnam and China.¹¹

China categorically rejected these arguments. According to China, the 108°3'13"E longitude line merely divided the ownership of islands, not the sea areas. China pointed out that the term "Gulf of Tonkin" did not appear at all in the Convention, nor was the Gulf included in its entirety in the attached map to the Convention. It is inconceivable that in the late 19th century when the doctrine "freedom of the high seas" prevailed everywhere, France and China would divide such an expanse of high seas among themselves and regard it as inland waters. As to the assertion of historic water and respect for this meridian by all the Governments of both sides, China stated that the 3-mile rule had been observed by the previous Governments of China and the French colonial administration in Vietnam in respect of the territorial sea; and that China had had a 12-mile territorial sea since 1958 and never exercised jurisdictions beyond this territorial sea in the Gulf. Vietnam declared a 12-mile territorial sea in September 1964 and indicated it on a map. It would be inconceivable for Vietnam to draw another boundary line within its claimed internal historic water if the line of 108°3'13" meridian east represented the boundary line in the Gulf.¹²

There is strong evidence from the above brief account of the views of Vietnam and China that a legal dispute was existent. The questions are two-fold: first, whether the 1887 Convention established a maritime boundary, and second, if not, how the areas of sea are to be divided between the two littoral claimants.

1(c) - Second round of negotiations in 1977

In 1975, China proposed to hold talks on the land border issue and in June 1977, it was agreed that the division of sea areas in the Gulf of Tonkin be included in the negotiations. When negotiations started on 7 October 1977 in Beijing, it was quickly revealed that the difference of positions was so great that it was impossible to achieve any concrete resolution. Vietnam regarded the Sino-French Conventions in the late 19th century as the basis for both land frontier and sea boundary, while China maintained its

¹¹"Letter dated 14 May 1979 from the Representative of China to the Secretary General", UN Doc. A/34/235-S/13318. See *infra* Appendix III, Document Number 7.

¹²"Letter dated 14 May 1979 from the Representative of China to the Secretary General", UN Doc. A/34/235-S/13318. See *infra* Appendix III, Document Number 7.

position that whereas the land boundary was settled in principle by the Sino-French Conventions, the maritime division in the Gulf had remained to this day an unresolved issue.¹³

During the negotiations, it was agreed that the land border issue could be detached from the maritime boundary problem and the former could be settled first. For this purpose, Vietnam put forward a draft treaty on land frontier and China offered an eight-point proposal. But due to the fundamental opposing views between the two countries, no result was produced.¹⁴

1(d) - Negotiations after the 1979 Border Conflict

In the aftermath of the border conflict, China proposed to resume talks at the vice-minister level of foreign affairs. Negotiations started on 18 April 1979 in Hanoi. Altogether 15 plenary sessions were held in 1979, without any progress, because of the irreconcilable positions of both parties. In 1980, China walked away from the negotiation table because there was "no significance" to continue the talk.¹⁵ Later, Vietnam repeatedly proposed to resume the third round of talks.¹⁶ China refused all these proposals.¹⁷

1(e) - Hostilities and protests after 1977

With the rapid deterioration of relations between Vietnam and China after the Vietnam War, a border war on land broke out in

¹³"Letter dated 14 May 1979 from the Representative of China to the Secretary General", UN Doc. A/34/235-S/13318; "Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General", UN Doc. A/34/170-S/13234. See *infra* Appendix III, Documents Number 1 and 7.

¹⁴"Letter dated 14 May 1979 from the Representative of China to the Secretary General", UN Doc. A/34/235-S/13318; "Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General", UN Doc. A/34/170-S/13234.

¹⁵"Letter dated 17 March 1980 from the representative of China to the Secretary-General", UN Doc. A/35/134-S/13846; "Letter dated 15 February 1980 from the representative of Vietnam to the Secretary-General", UN Doc. A/35/128-S/13837.

¹⁶UN Doc. A/35/716-S/14288; A/36/332-S/14555; A/36/473-S/14675; A/37/85-S/14865.

¹⁷UN Doc. A/36/56-S/14318; A/36/484-S/14679.

February 1979. Hostilities on the sea were also on the increase.¹⁸ On 16 June 1982, Chinese fishing vessels in the Gulf of Tonkin were attacked and seized by the Vietnamese navy.¹⁹ When China signed contracts with four American oil companies for prospecting and exploration of oil in the Gulf of Tonkin in July 1982, Vietnam registered a strong protest.²⁰ Again, when the U.S. oil companies went into exploration and exploitation in the Gulf at the beginning of 1983, Vietnam issued another protest against the Chinese encroachment on its territorial waters and gave a stern warning that foreign oil companies must bear the consequences.²¹ This was followed by a Chinese statement that asserted the legitimacy of China's conduct in extracting oil from the Gulf and gave assurance to the worried foreign oil companies.²²

On 12 November 1982, Vietnam established straight baselines in its "Declaration on Baseline of Vietnam's Territorial Waters".²³ In this declaration, Vietnam reaffirmed its previous position that the maritime boundary in the Gulf of Tonkin was delimited by the 1887 Sino-French Convention. A counter-argument was expressed by

¹⁸On March 3, 1982, an incident occurred in the south part of the Gulf of Tonkin. Chinese fishing boats were fired upon and then seized by Vietnam, "Letter dated 17 March 1982 from the Representative of Viet Nam to the Secretary-General", UN Doc. A/37/120-S/14911; "Letter dated 8 March 1982 from the representative of China to the Secretary-General", UN Doc. A/37/110-S/14898.

¹⁹"Letter dated 27 June 1982 from the representative of China to the Secretary-General", UN Doc. A/37/318-S/15264.

²⁰Statement by Vietnam News Agency, "Letter dated 29 September 1982 from the representative of Vietnam to the Secretary-General", UN Doc. A/27/507-S/15441. See *infra* Appendix III, Document Number 3.

²¹Statement by Vietnam News Agency, "Letter dated 16 February 1983 from the representative of Vietnam to the Secretary-General", UN Doc. A/38/94-S/15612. See *infra* Appendix III, Document Number 4.

²²Statement by New China News Agency, "Letter dated 22 February 1983 from the representative of China to the Secretary-General", UN Doc. A/38/97-S/15624. See *infra* Appendix III, Document Number 9.

²³"Letter dated 30 November 1982 from the representative of Vietnam to the Secretary-General", UN Doc. A/37/697; also see LIMITS IN THE SEAS, No. 99, "Straight Baselines: Vietnam". See *infra* Appendix I.

China in a following statement.²⁴

France stated in a note to the Secretary-General of the United Nations, that while in disagreement with part of the straight baselines established by Vietnam, France "is unaware of any title which would substantiate Viet Nam's claim that the part of the Gulf of Bac Bo (Gulf of Tonkin) under Viet Nam's jurisdiction constitutes historic waters".²⁵

As a major fishing country in the region, Thailand rejected part of the baselines asserted by Vietnam. As to the historic waters claimed by Vietnam, both in the Gulf of Tonkin and the Gulf of Thailand, Thailand "is of the view that such claims cannot be justified on the basis of the applicable principles and rules of international law".²⁶ This was followed by a Vietnamese statement of 21 January 1986 which rebutted the Thai position.²⁷

The Vietnamese claim was also rejected by Singapore. In Singapore's view, Vietnam's straight baselines "do not conform to the well-established rules in international law" and Singapore was bound to reject the claim of historical waters by Vietnam.²⁸

In 1987, the United States sent a note to record its objection to the historical waters claim in the Gulf of Thailand between

²⁴"Letter dated 29 November 1982 from the representative of China to the Secretary-General", UN Doc. A/37/682-S/15505. See *infra* Appendix III, Document Number 8.

²⁵"Note of France, 5 December 1983", THE LAW OF THE SEA: Current Developments in State Practice, New York, United Nations, 1987, at 146. See *infra* Appendix IV, Document Number 1.

²⁶Statement by Thailand, UN Doc. A/40/1033 of 12 December 1985. See *infra* Appendix IV, Document Number 2.

²⁷Statement of Vietnam of 21 January 1986, UN Doc. A/41/99 of 22 January 1986. See *infra* Appendix III, Document Number 5.

²⁸Note dated 5 December 1986 setting out the position of the Government of the Republic of Singapore on the Vietnamese claims concerning the so-called historical waters and the drawing of baselines, United Nations Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989, at 84-85. See *infra* Appendix IV, Document Number 3.

Vietnam and Kampuchea.²⁹

These are brief accounts of the development of the dispute in the Gulf of Tonkin. At the moment, there is no noticeable sign indicating a thaw of the respective views of either Vietnam or China.

2 - Positions of the Parties on Delimitation in the Gulf of Tonkin

Both Vietnam and China put forward their principles for dealing with the dispute in the course of negotiations. In the proposal put forward by Vietnam in the first session of the negotiations on 18 April 1979, point three read as follows:

"Settlement of border and territorial problems between the two countries on the principle of respect for the *status quo* of the borderline left by history and delineated by the 1887 and 1895 Conventions signed by the French Government and the Ch'ing Dynasty, as agreed upon between the Vietnamese and the Chinese sides; respect for independence, sovereignty and territorial integrity".³⁰

In its eight-point proposal of the second session of negotiations, China stated:

"Each side shall respect the other side's sovereignty over its 12 nautical-mile territorial sea, and the two sides shall demarcate their respective economic zones and continental shelves in the Beibu Gulf and other sea areas in a fair and reasonable way, in accordance with the relevant principles of the present-day international law of the sea."³¹

²⁹Note dated 17 June 1987 from the United States Mission to the United Nations referring to an accord entitled "Agreement on the historical waters of the Socialist Republic of Vietnam and the People's Republic of Kampuchea", United Nations Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989, at 86. See *infra* Appendix IV, Document Number 4.

³⁰"Letter dated 18 April 1979 from the representative of Vietnam to the Secretary-General", UN Doc. A/34/201-S/13257. For the complete text of the proposal, see *infra* Appendix III, Document Number 2.

³¹"Letter dated 26 April 1979 from the representative of China to the Secretary-General", UN Doc. A/34/213-S/13278. For the complete text of the proposal, see *infra* Appendix III, Document Number 6.

While these principles have dealt with the boundary problem in general terms, their specific views on the delimitation in the Gulf of Tonkin will be summarized below (see Map 6).

2(a) - Position of Vietnam

The relevant provision in the Vietnamese Declaration of 1982 on the question concerning the Gulf of Tonkin is quoted below:

The Gulf of Bac Bo (Tonkin Gulf) is a gulf situated between the Socialist Republic of Vietnam and the People's Republic of China, the maritime frontier in the gulf between Vietnam and China is delineated according to the June 26, 1887 convention of frontier boundary signed between France and the Qing Dynasty of China.

The part of the gulf appertaining to Vietnam constitutes the historic waters and is subject to the juridical regime of internal waters of the Socialist Republic of Vietnam.

The baseline from Con Co Island to the mouth of the gulf will be defined following the settlement of the problem relating to the closing line of the gulf.³²

In general, Vietnam insists that the maritime boundary in the Gulf of Tonkin is a settled boundary by virtue of the Sino-French Convention of 1887. Its claim is three-fold. First, the sea boundary is the 108°3'13" meridian east of Greenwich as defined in Article 2 of the 1887 Convention between France and China. Second, the part of the Gulf appertaining to Vietnam is under the regime of historic waters. Third, for the past century successive administrations of Vietnam and China observed the above-mentioned meridian line so that the conduct of the parties amounts to a validation of the Convention line.

2(b) - Position of China

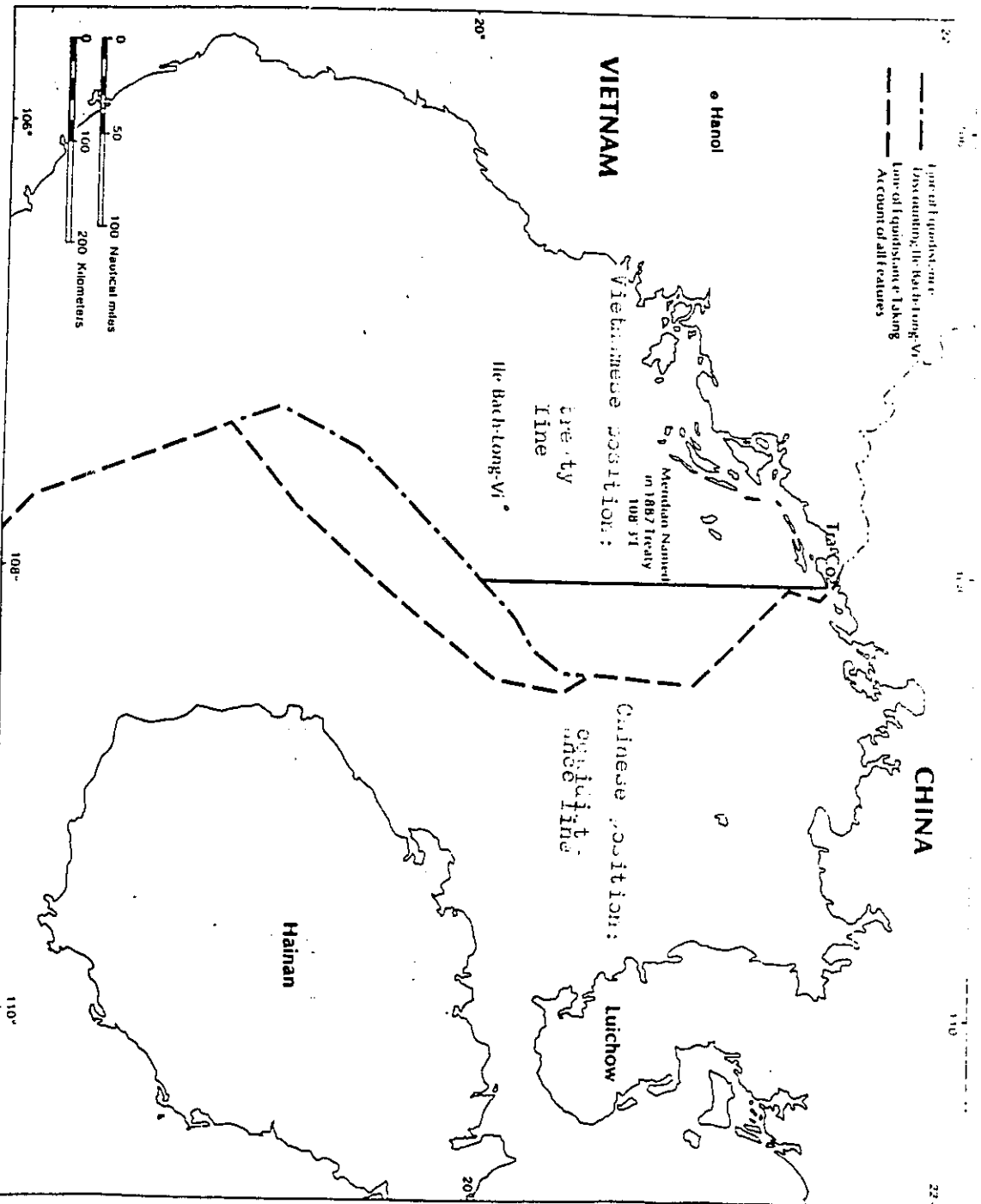
China made clear its position in the statement concerning the Vietnam's Declaration on Baselines:

"It must be pointed out that the Sino-Vietnamese boundary delimitation convention signed between China and France in 1887 did not in any way delimit the maritime area in the Beibu Gulf. Therefore, no maritime boundary line has ever existed in the sea of the Beibu Gulf. On 26 December 1973, the Vietnamese Government formally stated to the Chinese Government that 'owing to the fact that Vietnam

³²"Letter dated 30 November 1982 from the representative of Vietnam to the Secretary-General", UN Doc. A/37/697; also see LIMITS IN THE SEAS, No. 99. For the complete text of the declaration, see *infra* Appendix I, Document Number 2.

Map 2 : 108 3' E Meridian and Median line in the Gulf of Tonkin

Source: Morgan, J.R. and Valencia, M.J., ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, University of California Press, 1983.



has been in a state of war, the maritime area of the Beibu Gulf has so far not been delimited between the two countries'. This clearly indicated that originally, the Vietnamese Government also recognized the fact that China and Vietnam had not delimited the Beibu Gulf."³³

The Chinese position, in principle, is that the sea areas in the Gulf of Tonkin have never been delimited between China and Vietnam. Specifically, China holds that the 108°3'13" meridian east of Greenwich as set out in the 1887 Convention only divided the ownership of islands, not the maritime boundary for general purposes. Moreover, China refuted the assertion that successive governments on both sides have respected the meridian for the past century, nor did China subscribe to the argument that the Gulf constitutes a historic gulf appertaining to the legal regime of internal waters. However, it is unknown what legal principles China will rely on to delimit the boundary in the Gulf.

3 - Summary

There is a legal dispute involving the delimitation of a maritime boundary for all purposes in the Gulf of Tonkin. The dispute centres around the question of whether the 1887 Convention established a maritime boundary between the two countries. If the Convention line is rejected, the question becomes what line will be equitable pursuant to international law. The arguments of Vietnam are (1) intention of the Parties to the Convention and purpose of the Convention, namely, to separate not only the land area but also the sea area in the Gulf, (2) adherence by successive governments of both countries, and (3) relevance of historic waters. The arguments of China are (1) intention of the Parties to the Convention and purpose of the Convention, namely, to establish boundary for land area only, including the islands in the Gulf, (2) no recognition or acceptance from later governments for the line, and (3) the undelimited marine area and waters in the Gulf should be settled in accordance with international law.

In order to settle the dispute, two more questions have to be addressed under either the Convention line or any delimitation line drawn in accordance with general international law. They are the starting and terminating points of the line. There is no indication that Vietnam and China have reached agreement on these very important questions. The starting point will presumably be the land boundary terminus on the shoreline, namely the eastern point of Tra Co. But that point must also be passed by Paris meridian 105°43'E.

³³"Letter dated 29 November 1982 from the representative of China to the Secretary-General," UN Doc. A/37/682-S/15505. For the complete text of the statement, see *infra* Appendix III, Document Number 8.

In addition, it is necessary to ascertain the original location of the eastern point of Tra Co as it existed in 1887. The question concerning terminating point is hinged on the closing line of the Gulf. Again, no agreement has been reached.

PART 2

LAW ON MARITIME BOUNDARY

DELIMITATION

Since the modern expansion of maritime frontiers, there have been successive attempts to systemize the rules and principles applicable.¹ The applicable rules have a variety of origins. Some are derived from legal principles for the division of inland water bodies, such as rivers and lakes. Others may originated from rules used for short-distance delineation, for instance, that of territorial sea or contiguous zone or fishery zone of short distance. Still others probably stem from the legal object to which they apply, for example, the continental shelf and the exclusive economic zone. Rules entailed in multilateral conventions frequently fail to correspond to the *opinio juris* evidenced by State practice as a result of disequilibrium of development in customary international law and conventional international law.² Even the judicial and arbitral decisions, the mainstream in this development, are not immune from ambiguity.³ The scholarly attempt to deduce categorical rules often presents a confusing picture in this field.⁴ All this makes it more difficult to ascertain the

¹Rhee, Sang-Myon, "Sea Boundary Delimitation between States Before World War II", 76 American Journal of International Law 555-588(1982).

²Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 21-45.

³Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 31-33.

⁴For example, see Attard, David Joseph, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 211-276 (He regards economic considerations as relevant to delimitation); Brown, E.D., THE AREAS WITHIN NATIONAL JURISDICTION, London, Graham & Trotman, 1984 (He supports the equidistance as the rule of delimitation); Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989 (He is very critical of the declaratory theory and

applicable principles and rules on maritime boundary delimitation.

This part analyzes the rules and then presents them as precisely as possible. The analysis is centered on those principles, rules, criteria, circumstances, factors, and methods directly relevant to the present case in the Gulf of Tonkin. An overview of the applicable law is given in which the dimensions of the applicable law are described. Chapter V discusses the principle of agreement and relevant circumstances. Chapter VI focuses on equity as a central recurring theme in the evolution of the applicable law.

natural boundary concept); Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988 (He puts forward the functionalist approach to ocean boundary-making); Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989 (He is of the opinion that delimitation must derive from equity and a more uniform approach must be ensured to maritime delimitation); and Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985 (He feels that the three trends, namely, State practice, Law of the Sea Conference, and judicial and arbitral decisions will be difficult to be reconciled).

CHAPTER IV

OVERVIEW OF THE APPLICABLE LAW

1 - Types of Maritime Boundaries

Classification of maritime boundaries has been closely associated with the legal regimes to which they attach. These regimes can be considered in either functional or geographical terms. Historic waters, territorial sea, and continental shelf, in descending order, are more akin to the category of geographical (territorial) jurisdiction. Contiguous zone, fishery zone, pollution zone, security zone, and exclusive economic zone are more associated with functional jurisdiction. But it must be borne in mind that the distinction is not always so clear and a given regime may be considered either functional or geographical or both. With the expansion of coastal State's jurisdiction over the sea, neighboring States cannot avoid delimitation.

1(a) - Separate maritime boundary

The earliest type of maritime boundary is a single boundary to separate a single regime, mostly territorial seas and continental shelf. In the 1982 Convention on the Law of the Sea, separate provisions are made for each different regime. In State practice, 67 general maritime boundaries, 49 continental shelf boundaries, 1 fishing boundary, and 18 territorial seas boundaries have been concluded.⁵

After the delimitation of continental shelf and fishing zone by a single line in the Gulf of Maine case, the question arises whether a single boundary to delimit two or three regimes is permissible in international law. Conversely, the question becomes whether delimitation within 200 mile zone must proceed by a single line. There are examples where two separate boundary lines have been drawn to delimit the seabed and the water column.⁶

⁵LIMITS IN THE SEAS, Maritime boundaries of the world, No. 108, 1988.

⁶Treaty concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters (between Australia and Papua New Guinea), Dec. 18, 1978, (entered into force Feb. 22, 1985), 18 International Legal Materials 291(1979). For a good analysis see Burmester, H., "The Torres Strait Treaty: Ocean Boundary

A good many ocean boundaries are continental shelf boundaries without separate EEZ boundaries delimited yet. It is premature to consider that a single line is legally required within 200-mile zone.

1(b) - Single maritime boundary

The ocean is composed of surface, water column, seabed, and subsoil. Some of the regimes are concerned mainly with the water column, such as pollution zone or fishery jurisdiction. Others may be more linked to the seabed and subsoil, for example, continental shelf. Still others, like the territorial sea, historic waters, and exclusive economic zone, deal with water column, seabed, and subsoil. This situation is further complicated by the coincidence of various boundaries in a defined geographical area at the same time:

"In the case of the seabed one is concerned with a terrain that is constant, of identifiable substance, and with specific features, and so boundary making there is not unlike boundary-making on land. But in the case of the superjacent waters, one is concerned with an element that is featureless and mobile, and upon which boundary lines can only be notional."

Dean Sharma has termed the 200-mile zone as the demarcation line for inner continental shelf and outer continental shelf. Inner continental shelf has been partially integrated with the regime of EEZ.⁸ Within the 200-mile zone, a single line will become more preferable. He concluded that within 200-mile zone, distance will have a more important role to play and partial integration between continental shelf and EEZ will have "considerable repercussions" on equitable principles and relevant circumstances on maritime delimitation.⁹ He went short of saying that within the 200-mile zone, delimitation must be effected by a single line as a matter

Delimitation by Agreement", 76 American Journal of International Law 321-349(1982).

¹O'Connell, D.P., THE INTERNATIONAL LAW OF THE SEA, Vol. II, Oxford, Clarendon Press, 1984, at 635.

⁸Sharma, Surya P., "The Single Maritime Boundary Regime and the Relationship between the Continental Shelf and the Exclusive Economic Zone", 2 Journal of International Estuarine & Coastal Law 203-226(1987).

⁹Sharma, Surya P., "The Single Maritime Boundary Regime and the Relationship between the Continental Shelf and the Exclusive Economic Zone", 2 Journal of International Estuarine & Coastal Law 203-226(1987), at 226.

of law. After review of State practice and international judicial decisions, Dean McRae "doubted that we have had the final word on this matter".¹⁰

Because of the differences between each regime and jurisdiction, there are different requirements of boundary delimitation for each regime. For the territorial sea, the primary consideration is security and territorial sovereignty. In the case of exclusive economic zone or continental shelf, resources become the focus of the delimitation process. The applicable rules, most of which are associated with delimitation of continental shelf, may not be completely suitable for the division of exclusive economic zone or for multiple purposes.¹¹

Measured by their seaward extension from the riparian States, maritime boundaries can be classified into two groups: short-distance boundary and long-distance boundary. Boundaries dividing territorial sea and contiguous zone fall within the first group. Boundaries delineating exclusive economic zone and continental shelf belong to the second group. The applicable rules and practical methods for the delimitation of long-distance boundary are not always the same as those applicable to delimitation of short-distance boundary.

There is no agreement between Vietnam and China on the question of drawing a single or separate maritime boundary in the Gulf of Tonkin. Because of Vietnam's claim that the 1887 Convention line has established a general maritime boundary, it becomes unnecessary for Vietnam to choose a single or separate boundary in the Gulf of Tonkin. However, in its 1977 Statement, Vietnam established a 12-mile territorial sea, a 24-mile contiguous zone, a 200-mile exclusive economic zone, and a margin/200-mile

¹⁰McRae, Donald M., "The Single Maritime Boundary: Problems in Theory and Practice", in Brown, E.D. and Churchill, R.R., eds., THE UN CONVENTION ON THE LAW OF THE SEA: Impact and Implementation, Proceedings of the 19th Annual Conference of the Law of the Sea Institute (1985), 225-234, at 230.

¹¹McDorman, Ted L. and others, "The Gulf of Maine Boundary: Dropping Anchor or Setting a course?" 9 Marine Policy 90-107(1985), at 101. He observed that:

"The result of this history is a body of law which is oriented to spatial rather than functional aspects of delimitation. No law has yet developed to deal with new jurisdictional zones (in particular the exclusive economic zones) which exist to allow States functional control over ocean space for particular purposes, rather than quasi-territorial control such as that of the continental shelf regime."

continental shelf.¹² On several occasions, Vietnam protested against the Chinese encroachment upon its "territorial waters and continental shelf" in the Gulf of Tonkin.¹³ Given the complexity associated with the separate maritime boundary in terms of administration and management, the less-than-400-mile distance of the enclosed sea areas in the Gulf, and the Vietnamese insistence on the 1887 Convention line, it is very unlikely that Vietnam has contemplated separate boundaries for the shelf and the EEZ in the Gulf of Tonkin.

In its 8-point proposal, China stated:

"Each side shall respect the other side's sovereignty over its 12 nautical-mile territorial sea, and the two sides shall demarcate their respective economic zones and continental shelves in the Beibu Gulf and other sea areas in a fair and reasonable way, in accordance with the relevant principles of the present-day international law of the sea."¹⁴

It is not clear whether China has a single or separate maritime boundary in mind with respect to delimitation in the Gulf of Tonkin. When rejecting Vietnamese claim that the Gulf had been delimited by the 1887 Convention, China did not specify what kind of boundary it preferred.¹⁵ The choice between a single or separate regime is complicated by the dispute between China and Japan in the East China Sea. There, China insists that the continental margin which extends beyond 200 miles and comes closer to Japanese Ryukyu

¹²Smith, Robert W., EXCLUSIVE ECONOMIC ZONE CLAIMS -- An Analysis and Primary Documents, Dordrecht, Martinus Nijhoff Publishers, 1986, at 481. See Appendix I.

¹³"Statement by the Viet Nam News Agency protesting against the signing of contracts between the Chinese authorities and foreign oil and companies", UN Doc. A/37/507-S/15441, 1 October 1982; "Statement by the Viet Nam News Agency", UN Doc. A/38/94-S/15612, 18 February 1983. See Appendix IV.

¹⁴"Proposal of principles for handling Sino-Vietnamese relations put forward by the delegation of the Chinese Government at the second session of the Sino-Vietnamese negotiations on 26 April 1979", UN Doc. A/34/213-S/13278. See *infra* Appendix IV, Document Number 6.

¹⁵See in particular "Speech made by Han Nianlong, head of the Chinese Government delegation and Vice-Minister for Foreign Affairs, at the fourth plenary meeting of the Sino-Vietnamese negotiations on 12 May 1979", UN Doc. A/34/235-S/13318. See Appendix IV.

Archipelago be adopted as the boundary line for continental shelf.¹⁶

It appears, however, that China would opt for a single maritime boundary in the Gulf of Tonkin for the following reasons. First, unlike the East China Sea, the Gulf of Tonkin does not have a sufficiently distinguishable natural feature (such as, a trough or trench) to identify a separate boundary for the shelf. The sea floors are for the most part flat with a depth not exceeding 100 metres. The most conspicuous feature of that magnitude, the Yinggehai Basin to the west of Hainan Island, is nothing more than a natural feature of the area. In the Gulf of Maine case, the Chamber dismissed the argument that the Northeast Channel constituted a natural break in the continuity of the area, affirming the ruling in the Anglo-French case with respect to the Hurd Deep and the Hurd Deep Fault Zone, which is much more accentuated than the Northeast Channel.¹⁷ Secondly, unlike the situation in the Torres Strait Treaty between Australia and Papua New Guinea,¹⁸ there is no fixed patterns of offshore oil concessions or fishing activities in the Gulf of Tonkin that would command respect by reasons of history or agreement.¹⁹ Thirdly, the administrative complexity of separate boundaries for the shelf and the EEZ will not be easy to manage for both Vietnam and China in the Gulf of Tonkin.²⁰

¹⁶For a recent study on this dispute, see Rhee, Sang-Myon and MacAulay, James, "Ocean Boundary Issues in East Asia: the Need for Practical Solutions", in Johnston, Douglas M. and Saunders, Phillip M., eds., OCEAN BOUNDARY MAKING -- Regional Issues and Developments, London, Croom Helm, 1988, 74-108. For further study, see "East China Sea" in the Selected Bibliography.

¹⁷ICJ Rep. 1984, para. 46, at 274.

¹⁸Treaty concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters (between Australia and Papua New Guinea), Dec. 18, 1978, (entered into force Feb. 22, 1985), 18 International Legal Materials 291(1979). For a good analysis, see Burmester, H., "The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement", 76 American Journal of International Law 321-349(1982).

¹⁹For detailed analysis, see Chapter IX

²⁰The practical problems of drawing separate boundaries are discussed in McRae, Donald M., "The Single Maritime Boundary: Problems in Theory and Practice", in Brown, E.D. and Churchill, R.R., eds., THE UN CONVENTION ON THE LAW OF THE SEA: Impact and Implementation, Proceedings of the 19th Annual Conference of the Law of the Sea Institute (1985), 225-234, at 228-232.

The problem here is akin to that in the Gulf of Maine case and the Guinea--Guinea-Bissau case. These cases debated whether a single line would delimit both the exclusive economic zone and continental shelf, as well as the short-distance territorial sea. In the Gulf of Tonkin, the boundaries to be delineated include territorial sea, exclusive economic zone, continental shelf, and possibly historic waters if the Vietnamese claim succeeds. Delimitation of contiguous zone seems to be subsumed under delimitation of exclusive economic zone.²¹ The use of a single line to delimit multiple maritime zones has been endorsed by two judicial decisions. There is no reason why there should not be a single line in the Gulf of Tonkin.

2 - Sources of the Applicable Law

After decades of development, a set of distinguishable rules on maritime boundary delimitation have been developed through such forms as multilateral conventions, bilateral treaties, unilateral actions, national legislation, international conferences, judicial and arbitral decisions, and writings of prominent publicists. This is a flux of rules that requires careful discerning and ascertaining. Some discrepancy and inconsistency exist not only between different sources of law, but also between different conventions, treaties, decisions and scholarly writings themselves. How to harmonize and synchronize this body of mixture will be the central issue in finding out the applicable law in maritime boundary delimitation.²²

2(a) - Multilateral conventions

After the emergence of the concept of continental shelf in the Truman Proclamation in 1945, nations, especially Latin American ones, started extending their jurisdiction to the offshore area beyond the traditional narrow belt of territorial sea. After a few years of discussion in the International Law Commission under the auspices of the United Nations, the first United Nations Conference on the Law of the Sea was convened in Geneva from February 24 to April 27, 1958. Eighty-six States attended. After protracted

²¹Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 56-57.

²²Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 281. Having identified three trends in the development of maritime boundary delimitation law, Dr. Jagota asked: "How will these three trends, apparently divergent, be coordinated in State practice into an applicable delimitation law for guidance to the States, or by the Courts or other forums in resolving delimitation disputes? Will there be a merger or some form of a three-in-one solution?"

debate, the Conference adopted four conventions, two of which are the Continental Shelf Convention and the Territorial Sea and Contiguous Zone Convention.

Articles 12 and 24 of the Territorial Sea Convention specified the applicable principle in delimiting maritime spaces as the equidistance method. The equidistance principle has been generally accepted with regard to the territorial sea and contiguous zone delimitation in the 1982 Law of the Sea Convention.

The provision on delimitation in the Continental Shelf Convention, however, has been overtaken by new development in customary law. In the 1969 North Sea cases, Germany argued for a just and equitable share, while Denmark and the Netherlands insisted on application of equidistance rule. The International Court of Justice rejected that the equidistance-special circumstances had become part of customary international law. Instead, emphasis was placed on equitable principles and relevant factors.²³

These two conventions are still in force and as of 31 December 1988, 69 States are parties to the Territorial Sea Convention, and 76 to the Continental Shelf Convention.²⁴ However, if one looks at the trend in depositing instruments of ratification and accession, it becomes apparent that the last accession to the Territorial Sea Convention was in December 1973 by German Democratic Republic and the last accession to the Continental Shelf Convention was in April 1974 by Cyprus.²⁵ Since then, only one more State has become a party to the Continental Shelf Convention by virtue of succession of States.²⁶ The two conventions were opened for signature in April 1958 and came into force in 1964. Neither Vietnam nor China is a party to these two conventions.²⁷ They have now been overtaken by the UNCLOS III, international judicial and arbitral decisions, the Law of the Sea Convention, and State practice. With the increase of new members to the international community and entry into force

²³ ICJ Rep. 1969, para. 101.

²⁴ UN Doc. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, New York, United Nations, 1987, at 701 and 718.

²⁵ UN Doc. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, New York, United Nations, 1987, at 701 and 718.

²⁶ Solomon Islands became party to the Continental Shelf Convention in September 1981 after its gaining independence from Britain, see UN Doc. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, New York, United Nations, 1987, at 718.

²⁷ UN Doc. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, New York, United Nations, 1987, at 701 and 718.

of the Law of the Sea Convention, the two Geneva Conventions have increasingly become obsolete in guiding State practice.

The third relevant convention is the 1982 Law of the Sea Convention. 159 States and entities signed the Convention, representing the overwhelming majority of nations around the Globe.²⁸ Both Vietnam and China have signed but have not ratified it. This comprehensive convention contains articles on delimitation of territorial sea, exclusive economic zone and continental shelf. These are Articles 15, 16, 74, 75, 83, 84 and paragraph 1 of Article 298. Articles 16, 75, and 84, of more technical nature, are concerned with publicity of the delimitation and deposit of geographical coordinates and charts. Paragraph 1 of Article 298 deals with the choice of dispute settlement mechanisms. It is Articles 15, 74 and 83 that really touch upon the nucleus of delimitation question. That there is legal significance of the provisions of the unproclaimed Convention, both in terms of codifying existing rules and of creating new rules of international law, can be vividly illustrated in the 1982 Tunisia-Libya case in which the International Court of Justice was asked to take into account the "new accepted trends in the Third Conference on the Law of the Sea".²⁹

While Article 15 of the 1982 Law of the Sea Convention copied almost exactly Article 12 of the 1958 Territorial Sea Convention, Articles 74 and 83 on delimitation of exclusive economic zone and continental shelf depart appreciably from Article 6 of the 1958 Continental Shelf Convention. The paragraphs on delimitation criteria have met a storm of criticisms,³⁰ because it embodies an almost empty reference to such criteria. The provision is as follows:

The delimitation of the exclusive economic zone (continental shelf) between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

The only express requirement is to arrive at an equitable solution. This formula opens the door for the consolidation and

²⁸As of 3 May 1990, the Convention has received 43 ratifications. In order to bring the Convention into force, an additional 17 ratifications are required in accordance with Article 308 of the Convention. See "Status of the United Nations Convention on the Law of the Sea", 15 Law of the Sea Bulletin 1-7(1990).

²⁹ICJ Rep., 1982, para. 23, at 37.

³⁰See for instance, Brown, E.D., "Delimitation of Offshore Areas: Hard Labour and Bitter Fruits at UNCLOS III", 5 Marine Policy 172-184(1981).

crystallization of customary international rules.

2(b) - Treaties and agreements

Up to December 1989, 122 bilateral agreements have been concluded between States concerning maritime boundaries.³¹ 103 agreements have been thoroughly analyzed by Dr. Jagota.³² These

³¹LIMITS IN THE SEAS, No. 108, Maritime Boundaries of the World. As of July 15, 1988, 118 maritime boundaries have been concluded.

³²Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 331-344. The list has expanded to include:

1. Maritime Delimitation Agreement between the Government of His Most Serene Highness of the Prince of Monaco and the Government of the French Republic, 16 February 1985, 9 Law of the Sea Bulletin 58-61 (1987).
2. Exchange of Notes constituting an Agreement between Finland and Sweden confirming part of the national frontier between the two States, 14 June 1985, United Nations Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989, at 184-187.
3. Maritime Delimitation Treaty between Colombia and Honduras, 2 August 1986, 10 Law of the Sea Bulletin 103-104 (1987).
4. Agreement between the Government of the French Republic and the Government of the Italian Republic on the Delimitation of the Maritime Boundaries in the Area of the Strait of Bonifacio, done at Paris on 28 November 1986, 10 Law of the Sea Bulletin 95-97 (1987).
5. Agreement between the Socialist Republic of the Union of Burma and the Republic of India on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal, 23 December 1986, 10 Law of the Sea Bulletin 105-107 (1987).
6. Agreement between the Government of the Kingdom of Sweden and the Government of the Union of Soviet Socialist Republics concerning the delimitation of the continental shelf and of the Swedish fishing zone and the Soviet economic zone in the Baltic Sea, 18 April 1988, United Nations Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989, at 203-205.
7. The Maroua Declaration of June 1, 1975 between Cameroon and Nigeria, "Cameroon-Nigeria: Maroua Declaration (1 June 1975)", United Nations Office for Ocean Affairs and the Law of the Sea, MARITIME BOUNDARY AGREEMENTS (1970-1984), New York, United Nations, 1987, at 97-99.
8. Agreement between Sweden and Denmark concerning continental

agreements contain binding provisions for the States parties and therefore are themselves a source of international law. Customary rules may be embodied in these agreements or emerging rules can be further crystallized. In addition, treaties and agreements are the express evidence of State practice.

Altogether 49 agreements relate to delimitation of continental shelf. This is perhaps because the continental shelf regime was the earliest long-distance national zone to be received in international law. 18 agreements divide the territorial sea boundary. 2 agreements are on the demarcation of fishery zone. In 4 cases a joint or common zone have been set up so as to facilitate efficient management and avoid the thorny problem in drawing a line. And 67 agreements deal with maritime boundary for multiple purposes.³³

The trend is the increase of agreements on maritime boundary for multiple purposes. This is especially so with regard to the long-distance delimitation, so to speak, of continental shelf and exclusive economic zone. Meanwhile, separate boundary lines for continental shelves or exclusive economic zones within the 200-mile zone will be on the decline. For territorial sea, there might be still chances to conclude separate agreements due to reasons of expansion from 3 to 12 miles, history, special circumstances, and

shelf and fishing zone boundary, of 1984, United Nations Office for Ocean Affairs and the Law of the Sea, MARITIME BOUNDARY AGREEMENTS (1970-1984), New York, United Nations, 1987.

9. Argentina and Chile Agreement on Delimitation in the Beagle Channel, 1984, 24 International Legal Materials 1-31(1985).
10. Agreement between Solomon Islands and Australia establishing certain sea and sea-bed boundaries, 13 September 1988, United Nations Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989, at 206-209.
11. Agreement between France and the United Kingdom relating to the delimitation of the territorial sea in the Straits of Dover, 2 November 1988, United Nations Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989, at 210-212.
12. Agreement between UK and Ireland on continental shelf delimitation, 1988, in Simmonds, K. ed. NEW DIRECTIONS IN THE LAW OF THE SEA, New Series, London, Oceana Publications Inc., 1989.
13. US-USSR Agreement on Maritime Boundary, June 1, 1990, 29 International Legal Materials 941-945(1990).

³³Based on LIMITS IN THE SEAS, No. 108, July 1988, analysis by Robert W. Smith.

application of equidistance line, though merging with the general maritime boundary line will occur fairly frequently.

2(c) - International judicial and arbitral decisions

A total of eight international judicial and arbitral decisions have been rendered: four by the International Court of Justice, four by arbitral tribunals.

1. 1909 Grisbadarna Arbitration (Norway v. Sweden);
2. 1969 North Sea Continental Shelf cases by ICJ;
3. 1977 Anglo-French Continental Shelf Arbitration, 1978 Anglo-French Continental Shelf Arbitration (Interpretation of the 1977 Award);
4. 1977 Chile-Argentina Beagle Channel Arbitration;
5. 1982 Tunisia-Libya Continental Shelf case by ICJ, 1985 Tunisia-Libya Continental Shelf case (Interpretation of the 1982 Judgment);
6. 1984 Gulf of Maine case by ICJ's Special Chamber;
7. 1985 Guinea/Guinea-Bissau Maritime Boundary Arbitration;
8. 1985 Libya-Malta Continental Shelf case by ICJ.

These decisions constitute the main body of jurisprudence on maritime delimitation. Their full exploration will clarify a great deal of confusion even though they themselves are occasionally not immune from these defects.

On 11 December 1986, El Salvador and Honduras submitted their dispute in the Gulf of Fonseca to the ICJ to delimit both land frontier and maritime areas.³⁴ The arbitral award on maritime boundary between Senegal and Guinea-Bissau was challenged by Guinea-Bissau in the ICJ.³⁵ Denmark brought a case against Norway with respect to the delimitation of maritime boundary between

³⁴9 Law of the Sea Bulletin, April 1987, at 65. Also see El Salvador-Honduras case, case concerning the land, island and maritime frontier dispute, Nicaraguan application for permission to intervene, Order of 28 February 1990, ICJ Rep. 1990, p.3.

³⁵"Letter dated 13 April 1988 from the Permanent Representative of Guinea-Bissau to the United Nations addressed to the Special Representative of the Secretary-General for the Law of the Sea", 11 Law of the Sea Bulletin, July 1988, at 64-65. On 31 July 1989, the Arbitral Tribunal delivered its award, but Guinea-Bissau challenged its existence and validity by bringing an application to the ICJ on 23 August 1989, see "Communique", 15 Law of the Sea Bulletin, May 1990, at 63. Also see Guinea-Bissau--Senegal case, case concerning the Arbitral Award of 31 July 1989, Request for the indication of provisional measures, Order of 2 March 1990, ICJ Rep. 1990, p.64.

Norway's Jan Mayen Island and Denmark's Greenland.³⁶ The area under dispute is about 72,000 square kilometres.³⁷ More recently, the longstanding dispute on the sea boundary between Canadian Newfoundland and French islands St. Pierre and Miquelon was submitted to arbitration.³⁸

Some disputes on maritime boundaries will be likely solved by third-party procedure, including judicial solution. The accumulation of case law will further clear the way for a precise definition of the applicable law on maritime boundary delimitation.

2(d) - Unilateral claims and actions

States occasionally act unilaterally to secure or bolster their claim and protect its interests. For example, Indonesia asserted its claim of archipelagic State as early as 1957 while international recognition only came in 1982 when the LOS Convention finally approved it.³⁹ Libya regards the Gulf of Sidra as historic waters but this claim has been seriously challenged by the United States.⁴⁰ The Philippines' claim that its archipelagic waters are similar to internal waters not subject to transit passage has been objected to by a number of East European States, including the USSR.⁴¹ North Korea's 50-mile security zone was challenged by the

³⁶12 Law of the Sea Bulletin, December 1988, at 76.

³⁷Freestone, David, "Maritime Boundary in the Area between Greenland and Jan Mayen (Denmark v. Norway)", 4 Journal of International Estuary & Coastal Law 67-70(1989).

³⁸Canada-France Arbitration to Resolve their Dispute on St. Pierre and Miquelon, 29 International Legal Materials 1-14(1990); 93 Revue Generale de Droit International Public 480-485(1989).

³⁹See Kittichaisaree, Kriangsak, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA, Singapore, Oxford University Press, 1987.

⁴⁰"Communication Transmitted to the Permanent Missions of the States Members of the United Nations at the Request of the Permanent Representative of the United States to the United Nations, 10 July 1985", 6 Law of the Sea Bulletin 40(October, 1985). For an excellent analysis of the issue, see Spinnato, John M., "Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra", 13 Ocean Development and International Law 65-85(1983).

⁴¹Objection by Bulgaria, 7 Law of the Sea Bulletin, at 7; objections by Byelorussian SSR, Czechoslovakia, Ukrainian SSR, and USSR, 6 Law of the Sea Bulletin, at 9-13.

United States.⁴² Whether a unilateral claim and the supporting actions would be accepted in international law depends upon not only the degree of legitimacy of the claim and actions themselves, but also the reaction of States concerned, especially those directly affected by the claim and actions.

The evolutionary history of the law of the sea is fraught with unilateral claims and actions. In the area of maritime delimitation, however, unilateral actions or claims could hardly be used to justify a line of division preferred by one party because by definition, delimitation involves two or more States and therefore some sort of agreement has to be reached in order to draw a line of delimitation.⁴³ There is no scarcity of instances in this respect. Turkey tried to exercise sovereign control over the continental shelf in the Aegean Sea but met with fierce protest from Greece.⁴⁴ Japan and South Korea signed delimitation agreement on the East China Sea. The legal validity of their agreement was challenged by China.⁴⁵ Vietnam claimed the waters off its coast in the Gulf of Thailand, Gulf of Tonkin as historical waters but the claim was protested by France,⁴⁶ Thailand,⁴⁷ China,⁴⁸ Singapore,⁴⁹ and

⁴²"Protest of the United States of America", 4 January 1990, 15 Law of the Sea Bulletin, May 1990, at 8-9.

⁴³Generally see Chapter V on agreement.

⁴⁴Gross, L., "The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean", 71 American Journal of International Law 31 (1977); Georgopoulos, A., "Delimitation of the Continental Shelf in the Aegean Sea", 12 Fordham International Law Journal 90-126(1989).

⁴⁵"China's Sovereignty over Continental Shelf Is Inviolable", Peking Review, 17 June 1977, at 16-17.

⁴⁶"Note of France, 5 December 1983", THE LAW OF THE SEA: Current Developments in State Practice, New York, United Nations, 1987, at 146. See *infra* Appendix IV, Document Number 1.

⁴⁷"Statement by Thailand", UN Doc. A/40/1033 of 12 December 1985. See *infra* Appendix IV, Document Number 2.

⁴⁸"Letter dated 29 November 1982 from the representative of China to the Secretary-General", UN Doc. A/37/682-S/15505. See *infra* Appendix III, Document Number 8.

⁴⁹"Note Dated 4 December 1986 setting out the position of the Government of the Republic of Singapore on the Vietnamese claims concerning the so-called historical waters and the drawing of baselines", THE LAW OF THE SEA: Current Development in State Practice, New York, United Nations, 1989, at 84-85. See *infra*

the United States.⁵⁰

2(e) - Opinions of prominent jurists

The abundant writings on maritime boundary delimitation have great influence on the formation of rules and principles to settle maritime boundary controversy.⁵¹ They also present systematic analysis to maritime delimitation, especially when the law applicable is still in its primitive evolutionary stage, the opinions of scholarly works carry more weight than otherwise it would.⁵²

3 - Classification of Rules

The influx of concepts, theories, methods, principles, ideas, factors, and synthesis has created a confusion of rules applicable to maritime delimitation. It is, henceforth, imperative that a well-structured classification of all these rules be provided.

3(a) - Questions to be submitted

It is appropriate at first to look at some of the questions presented before international judicial or arbitral tribunals. The most typical question is this: what are the rules and principles applicable to maritime boundary delimitation in this dispute? This question is often followed by: what is the course of boundary? A brief survey will find that the formulation of the questions has

Appendix IV, Document Number 3.

⁵⁰Note dated 17 June 1987 from the United States Mission to the United Nations referring to an accord entitled 'Agreement on the historical waters of the Socialist Republic of Vietnam and the People's Republic of Kampuchea', 7 July 1982", THE LAW OF THE SEA: Current Development in State Practice, New York, United Nations, 1989, at 86. See *infra* Appendix IV, Document Number 4.

⁵¹The following writings are most recent and important. Attard, David Joseph, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 211-276; Brown, E.D., THE AREAS WITHIN NATIONAL JURISDICTION, London, Graham & Trotman, 1984; Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989; Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988; Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989; and Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985.

⁵²See bibliography at the end of the thesis.

some similarity.

Case	rules	application
<u>North Sea</u>	principles & rules	
<u>Anglo-French</u>		course
<u>Aegean Sea</u>	principles & rules	course
<u>Beagle Channel</u>		boundary-line
<u>Tunisia-Libya</u>	principles & rules	practical methods
<u>Gulf of Maine</u>		course
<u>Guinea--Guinea-Bissau</u>	existing treaty	course
<u>Libya-Malta</u>	principles & rules	practical application
<u>Gulf of Fonseca</u>	determination of the legal situation in islands and maritime areas	
<u>Denmark-Norway</u>	international law	drawing the line
<u>Guinea-Bissau--Senegal</u>	existing treaty	course
<u>Canada-France</u> ⁵³	principles & rules	drawing the line

There are five patterns on the presentation of the questions. The first is that of North Sea cases in which only applicable principles and rules of international law were asked. The parties reserved to themselves the right to delimit the continental shelf in conformity with the Court's decision. The second pattern appeared in the Tunisia-Libya case and the Libya-Malta case, in which the Court was asked to determine not only the applicable principles and rules of law, but also how in practice they can be applied. The third variation is that the tribunal was requested to decide the applicable principles and rules as well as the course of boundary, as done in the Greece-Turkey case. The fourth pattern was expressed in the Guinea--Guinea-Bissau case where a historical existing treaty was involved. The last formulation was seen in the Gulf of Maine case and Anglo-French case where only the course of the boundary line was requested.

Although not imperative, agreement on the starting and terminating points or areas will greatly assist the adjudication process. The starting point of the boundary line was defined by geographical coordinates by the Parties and the ending point was to be in a triangle in the Atlantic Ocean in the Gulf of Maine case.⁵⁴ In the *compromis* between Canada and France on St. Pierre and Miquelon arbitration, the Parties requested that the boundary

⁵³The *compromis* between Canada and France is to require the Court to rule in accordance with the principles and rules of international law applicable in the matter, the Court is requested to carry out the delimitation in technically precise manner. The boundary shall be a single delimitation with starting and terminating points, 29 International Legal Materials 1-14(1990); 93 Revue Generale de Droit International Public 480-485(1989).

⁵⁴ICJ Rep. 1984, para. 5, at 253.

line should have starting and terminating points and be drawn in a technically precise manner.⁵⁵

Taking into account of various considerations in the Gulf of Tonkin dispute, the questions to be answered would be:

1. Did the Convention of 1887 between France and China establish the maritime boundary between Vietnam and China in the Gulf of Tonkin?
2. In the event of a negative answer to the first question, what principles and rules of international law are applicable to the delimitation of the territorial sea, exclusive economic zone and continental shelf in the Gulf of Tonkin?
3. What is the course of the single maritime boundary between Vietnam and China in the Gulf of Tonkin between the eastern point of Tra-co and the closing line of the Gulf?

In case the answer to the first question is positive, there would be no need to go on to the second and third questions.

3(b) - Classification of rules

In the pioneering North Sea cases of 1969, a rudimentary classification of the rules was given.⁵⁶ Equity was placed at the top, followed by a number of relevant factors and then came the useful methods to effect an equitable solution. The conceptual framework did not take shape until the 1982 Tunisia-Libya case. The operative paragraph of the Judgment listed equitable principles as the primordial rule. All relevant circumstances were singled out and there appeared a rather lengthy passage on practical methods.⁵⁷

The Gulf of Maine case has thus far made the greatest contribution to the classification of rules and non-rules relating to maritime delimitation when the Chamber made clear the distinction

"between what are principles and rules of international law governing the matter and what could be better described as the various equitable criteria and practical methods that may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules in question."⁵⁸

A useful attempt to formulate the legal framework applicable to maritime delimitation was made by Professor Pharand in an analysis

⁵⁵ 29 International Legal Materials 1-14(1990); 93 Revue Generale de Droit International Public 480-485(1989).

⁵⁶ ICJ Rep. 1969, para. 101, at 53-54.

⁵⁷ ICJ Rep. 1982, para. 133, at 92-94.

⁵⁸ ICJ Rep. 1984, para. 80, at 290.

of the Gulf of Maine case.⁵⁹ The hierarchical framework between legal rules and other considerations seems to have the following order: legal principles, equitable criteria, relevant circumstances, and practical methods.

3(b)(i) - Legal principles

The legal principles as understood in the context of delimitation of maritime boundary convey the following meaning:

1. that any delimitation must be effected by agreement between the parties;
2. that such agreement must be arrived at in accordance with equitable criteria;
3. and that failing agreement, the boundary must still be determined on equitable criteria.⁶⁰

3(b)(ii) - Equitable criteria

Equitable criteria, which will be discussed in Chapter VI, were listed in the Gulf of Maine case.⁶¹ In the context of continental shelf delimitation, the Court gave some examples of the equitable criteria (called equitable principles by the Court) in the Libya-Malta case.⁶² The Chamber in the Gulf of Maine case indicated one basic criterion: overlapping and convergence of coastal projections of disputing States should be divided equally.⁶³

3(b)(iii) - Relevant circumstances

⁵⁹Pharand, D., "Delimitation of Maritime Boundaries: Continental Shelf and Exclusive Economic Zone, in Light of the Gulf of Maine Case, Canada v. U.S.A.(1984)", 16 Revue generale de droit 363-386(1985).

⁶⁰North Sea cases, ICJ Rep., 1969, para. 101 (C) (1) (2); Anglo-French case, 1977, para. 70, at 55; Tunisia-Libya case, ICJ Rep., 1982, para. 133 A (1) (2) (3), at 93; Gulf of Maine case, ICJ Rep., 1984, para. 112, at 299-300; Guinea--Guinea-Bissau case, 1985, para. 88, at 289; Libya-Malta case, ICJ Rep., 1985, para. 79 A (1) (2), at 57.

⁶¹ICJ Rep. 1984, paras. 157, 196, at 312-313, 328.

⁶²ICJ Rep., 1985, para. 46, at 39-40.

⁶³ICJ Rep. 1984, paras. 115, 195-197, at 300, at 327-328.

Relevant circumstances and factors for maritime boundary delimitation⁶⁴ include:

1. relationship of the coasts;⁶⁵
2. concavity and convexity of the coasts;⁶⁶
3. length of the coastlines;⁶⁷
4. general direction of the coasts and its change;⁶⁸
5. general geographical context;⁶⁹
6. distance between the opposite coasts;⁷⁰
7. location of the intersection between the land frontier and the coastline, and perpendicularity or bisector to the general direction of the coast;⁷¹
8. question of islands;⁷²

⁶⁴For a thorough analysis of these circumstances, see Evans, Malcolm, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989.

⁶⁵North Sea cases, ICJ Rep. 1969, para. 57-58; Anglo-French case, 1977, paras. 95, 238, at 66, 119; Gulf of Maine case, ICJ Rep. 1984, para. 187, at 324.

⁶⁶North Sea cases, ICJ Rep. 1969, para. 89; Anglo-French case, 1977, paras. 95, at 66; Guinea--Guinea-Bissau case, para. 104, 108, at 295, 297.

⁶⁷North Sea cases, ICJ Rep. 1969, para. 91; Anglo-French case, 1977, paras. 181-183, at 96; Gulf of Maine case, ICJ Rep. 1984, para. 222, at 336; Libya-Malta case, ICJ Rep. 1985, paras. 73, 78, 79(B)2, at 52, 56-57.

⁶⁸North Sea cases, ICJ Rep. 1969, para. 101 (D) 3, Anglo-French case, 1977, paras. 181, at 96; Tunisia-Libya case, ICJ Rep. 1982, paras. 122-128, at 86-89; Gulf of Maine case, ICJ Rep. 1984, paras. 28-35, at 268-271.

⁶⁹North Sea cases, ICJ Rep. 1969, para. 89(b); Libya-Malta case, ICJ Rep. 1985, para. 69, at 50; Guinea--Guinea-Bissau case, 1985, para. 108, at 297.

⁷⁰Anglo-French case, 1977, para. 201, at 102; Libya-Malta case, ICJ Rep. 1985, para. 73, at 52.

⁷¹Tunisia-Libya case, ICJ Rep. 1982, paras. 81, 133 B(4), at 64-65, 93; Gulf of Maine case, ICJ Rep. 1984, para. 176, at 318; Guinea--Guinea-Bissau case, 1985, para. 106, at 295-296.

⁷²North Sea cases, ICJ Rep. 1969, para. 101(D)(1); Anglo-French case, 1977, paras. 180-184, at 95-96; Tunisia-Libya case, ICJ Rep. 1982, para. 133 B(3), at 93; Gulf of Maine case, ICJ Rep. 1984, para. 196, at 327-328; Guinea--Guinea-Bissau case, 1985, paras. 95-97, at 291-293; Libya-Malta case, ICJ Rep. 1985, paras. 53, at 42-

9. geomorphology and geology;⁷³
10. natural prolongation;⁷⁴
11. unity of deposits;⁷⁵
12. ecological factor;⁷⁶
13. navigational considerations;⁷⁷
14. security and defence;⁷⁸
15. establishment or delimitation of any other maritime zones;⁷⁹
16. interests of and effects on third States;⁸⁰
17. historic title;⁸¹
18. existing treaties or other *de facto* lines;⁸²

43.

⁷³Tunisia-Libya case, ICJ Rep. 1982, paras. 68, 80, at 58, 64.

⁷⁴North Sea cases, ICJ Rep. 1969, para. 101(D)(2).

⁷⁵North Sea cases, ICJ Rep. 1969, para. 101(D)(2); Tunisia-Libya case, ICJ Rep. 1982, para. 107, at 77-78; Libya-Malta case, ICJ Rep. 1985, paras. 50, at 41.

⁷⁶Gulf of Maine case, U.S. Memorial, paras. 315, 317; Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 212.

⁷⁷North Sea cases, ICJ Rep. 1969, Separate Opinion of Judge Padilla Nervo, para. 93, at 84; Anglo-French case, 1977, paras. 188, at 98; Beagle Channel case, para. 110, at 124-125.

⁷⁸Truman Proclamation, NEW DIRECTIONS IN THE LAW OF THE SEA, at 106; Anglo-French case, 1977, para. 188, at 98; Guinea--Guinea-Bissau case, 1985, para. 124, at 302; Libya-Malta case, ICJ Rep. 1985, paras. 51, at 42.

⁷⁹Anglo-French case, 1977, para. 202, at 102-103; Tunisia-Libya case, ICJ Rep. 1982, para. 90-92, at 68-69; Gulf of Maine case, ICJ Rep. 1984, para. 221, at 335-336; Libya-Malta case, ICJ Rep. 1985, para. 33, at 33.

⁸⁰North Sea cases, ICJ Rep. 1969, para. 101(D)(3); Anglo-French case, 1977, paras. 25-28, 236, at 37-38, 118; Guinea--Guinea-Bissau case, 1985, paras. 94, at 291; Libya-Malta case, para. 20-23, at 24-28; Libya-Malta case, Application to Intervene (Italy), ICJ Rep. 1985, para. 43.

⁸¹Grisbadarna case, Scott, Brown James, ed., THE HAGUE COURT REPORT, New York, Oxford University, 1916, at 130; Tunisia-Libya case, ICJ Rep. 1982, paras. 76, 97, at 62-63, 71-72.

⁸²See Chapter VII.

19. State conduct;⁸³
20. economic considerations.⁸⁴

For greater clarity, those listed circumstances may be conveniently classified into two groups: the geographical and related ones (mainly coastal geographical ones) and the non-geographical ones. Numbers 1 to 8 are the geographical circumstances and numbers 9 to 20 are the non-geographical circumstances. Emphasis is increasingly being placed on the geographical factors, especially those relating to the coasts.⁸⁵

3(b)(iv) - Practical methods

So far the methods and techniques that have emerged are the following:⁸⁶

1. equidistance method;⁸⁷
2. perpendicular method;⁸⁸

⁸³Grisbadarna case, Scott, Brown James, ed., THE HAGUE COURT REPORT, New York, Oxford University, 1916, at 130; Tunisia-Libya case, ICJ Rep. 1982, para. 117, at 83-84.

⁸⁴See Chapter VI.

⁸⁵Gulf of Maine case, ICJ Rep. 1984, para. 195, at 327.

⁸⁶For detailed discussion see Chapter XI and Chapter XII.

⁸⁷Boggs, Wittemore S., "Problems of Water-Boundary Definition: Median Line and International Boundaries Through Territorial Waters", 27 Geographical Review 445(1937), at 448; Draft articles by the International Law Commission, Yearbook of International Law Commission, 1951, 1952, 1953, 1954, 1956; Article 6 of the 1958 Geneva Continental Shelf Convention; North Sea cases, ICJ Rep. 1969, paras. 22-23; Anglo-French case, para. 85; Tunisia-Libya case, ICJ Rep. 1982, para. 109, at 78-79; Gulf of Maine case, ICJ Rep. 1984, para. 159, at 313-314; Guinea--Guinea-Bissau case, para. 102; Libya-Malta case, ICJ Rep. 1985, para. 19, at 23-24; for its use in State practice, see Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 121.

⁸⁸LIMITS IN THE SEAS(Columbia-Panama in the Pacific Ocean), No. 79 (1978); Soviet Union-Poland in the Baltic Sea, see Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 119; LIMITS IN THE SEAS(Uruguay-Brazil, Uruguay-Argentina), No. 64 (1975) and No. 73 (1976); Sharjah-Ummal Qaiwan, see Gulf of Maine case, Canadian Reply, Annexes, Vol. I, at 23 and 27; Tunisia-Libya case, ICJ Rep. 1982, para. 119, at 84; Gulf of Maine case, ICJ Rep. 1984, paras. 224-226, at 337-338.

3. bisector method;⁸⁹
4. longitudinal or latitudinal lines or azimuth therefrom;⁹⁰
5. continuation of the land frontier;⁹¹
6. equiratio method;⁹²
7. area-weighted equidistance method;⁹³
8. method based on geomorphology;⁹⁴

⁸⁹Iran-Saudi Arabia agreement in the Persian Gulf (Kharg Island), see Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 76-77; Anglo-French case(Scilly Isles), 1977, paras. 249-251, at 123-124; Tunisia-Libya case(Kerkennah Islands), ICJ Rep. 1982, paras. 127-129, at 88-89; Gulf of Maine case, ICJ Rep. 1984, paras. 213, 222, at 333, 336-337.

⁹⁰LIMITS IN THE SEAS(Senegal--Guinea-Bissau), No. 68 (1976); LIMITS IN THE SEAS(Senegal-Gambia), No. 85 (1979); Mauritania-Morocco maritime boundary agreement, see Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 97-98; LIMITS IN THE SEAS(Chile-Peru), No. 86 (1979); LIMITS IN THE SEAS(Ecuador-Peru), No. 88 (1979); LIMITS IN THE SEAS(Columbia-Ecuador), No. 69 (1976); LIMITS IN THE SEAS(Columbia-Panama), No. 79 (1978); LIMITS IN THE SEAS(Columbia-Costa Rica), No. 84 (1979); LIMITS IN THE SEAS(Uruguay-Brazil), No. 64 (1975); LIMITS IN THE SEAS(Uruguay-Argentina), No. 73 (1976); Spain-Portugal, see Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 115; UK-Ireland, see Simmonds, K., ed., NEW DIRECTIONS IN THE LAW OF THE SEA, New Series, Looseleaf, Oceana Publications Inc., London, 1989, Binder I., at G6.

⁹¹Yearbook of the International Law Commission, 1956, Vol. II, at 272; Tunisia-Libya case, ICJ Rep. 1982, para. 120, at 85; Guinea--Guinea-Bissau case, 1985, para. 106.

⁹²Langeraar, Wijnand, SURVEYING AND CHARTING OF THE SEAS, Elsevier Oceanography Series, No. 37, 1984; Langeraar, W., "Equitable Apportionment of Maritime Areas through the Equiratio Method", 36 Hydrographical Review 19-28(1985); Langeraar, W., "Maritime Delimitation, The Equiratio Method -- A New Approach", 10 Marine Policy 3-18(1986).

⁹³Kapoor, D.C. and Kerr, Adam J., A GUIDE TO MARITIME BOUNDARY DELIMITATION, Toronto, Carswell, 1986, at 85.

⁹⁴Indonesia-Australia (Timor Trough), Indonesia-Thailand, see Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 83, 89, 123; Gulf of Maine case, United States Memorial, para. 315.

9. method based on ecological system;⁹⁵
10. technique of enclave;⁹⁶
11. half-effect technique;⁹⁷
12. coefficient percentage of coastal length technique.⁹⁸

Similarly, these practical methods can be put into two categories: geometric ones and non-geometric ones. Because of the increasing popularity of the adoption of plurality of the delimitation lines for several different zones, non-geometric methods are losing their attraction. On the other hand, geometric methods, because of their nearly mechanical operation and neutral nature, have been used increasingly.

4 - Process of Delimitation

A set of procedures to solve maritime boundary dispute has been developed through international judicial and arbitral decisions. Firstly, the delimitation area is defined and described along with the relevant coasts and their relationship. Secondly,

⁹⁵Gulf of Maine case, ICJ Rep. 1984, paras. 166-168, at 316-317; Weil, Prosper, THE LAW OF MARITIME DELIMITATION, Cambridge, Grotius Publications Limited, 1989, at 21-45.

⁹⁶Treaty concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters (Australia and Papua New Guinea), December 18, 1978, entered into force on February 22, 1985, 18 International Legal Materials 291(1979); LIMITS IN THE SEAS(Italy-Tunisia), No. 89 (1980); LIMITS IN THE SEAS(Italy-Yugoslavia), No. 9 (1970); LIMITS IN THE SEAS(Qatar-United Arab Emirates), No. 18 (1970); Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, trans. from French (Perspectives du Droit de la Delimitation Maritime), Cambridge, Grotius Publications Limited, 1989, at 273 (Dubai-Sharjah); Anglo-French case (Channel Islands), 1977, para. 196; Canadian position in the St. Pierre and Miquelon dispute with France, see McDorman, Ted L., "The Canada-France Maritime Boundary Case: Drawing a Line Around St. Pierre and Miquelon", 84 American Journal of International Law 157-189(1990), at 180-188.

⁹⁷LIMITS IN THE SEAS: Continental shelf boundary between Iran and Saudi Arabia(Kharg Island) (1968), No. 24, 1970; Anglo-French case(Scilly Isles), 1977, para. 235, at 118; Tunisia-Libya case(Kerkennah Islands), ICJ Rep. 1982, paras. 128-129, at 88-89; Gulf of Maine case(Seal Island), ICJ Rep. 1984, para. 222, at 336-337.

⁹⁸Guinea--Guinea-Bissau case(Bijago Archipelago), 1985, para. 97, at 292-293.

the court ascertains whether a preexisting boundary has already delimited the boundary in question. Thirdly, positions of disputants are set out. Fourthly, legal principles are stated. Fifthly, relevant circumstances are identified in light of the geographical situation. Sixthly, equitable criteria are prescribed on the basis of the relevant circumstances. Seventhly, a provisional line is drawn on the basis of legal principles, equitable criteria, and practical methods applicable. Eighthly, the provisional line is adjusted to reflect the relevant circumstances with a view to arriving at an equitable solution. Ninthly, the adjusted line is judged against the yardstick of proportionality to ensure equitableness of the result.⁹⁹

Though they are all vital to ensure the equitable delimitation of ocean boundaries, some need further elaboration. The drawing of provisional line is one of such steps.¹⁰⁰ A provisional line is important in two respects: as a basis of adjustment and as a reflection of the fundamental notion of equal division of the area involved. As a reflection of the equity, a provisional line ensures that the delimitation will be based on equitable considerations and that an equitable solution will be achieved. As a basis of adjustment to take into account other relevant circumstances, the adjustments are minor in most circumstances as demonstrated in the Gulf of Maine case where the court shifted the median line in order to give effect to Seal Island off the Nova Scotia coast.¹⁰¹ In the Libya-Malta case, there was a northward shift of the provisional median line by 18' of latitude.¹⁰²

As a starting line, the provisional line can be achieved through the drawing of an equidistance line to reflect the notion of equal division.¹⁰³ But in adjacent situations, a perpendicular or bisector line will be more appropriate.

⁹⁹Charney, Johnathan I., "The Delimitation of Ocean Boundaries", in D.G. Dallmeyer and L. DeVorse, eds., RIGHTS TO OCEANIC RESOURCES -- Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989, 25-51, at 33.

¹⁰⁰McDorman, Ted L., "The Canada-France Maritime Boundary Case: Drawing a Line around St. Pierre and Miquelon", 84 American Journal of International Law 157-189(1990), at 171-172.

¹⁰¹ICJ Rep. 1984, para. 222, at 336-337.

¹⁰²ICJ Rep. 1985, para. 73, at 52.

¹⁰³Weil strongly recommended the use of equidistance line as the starting line to effect a delimitation. See Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 208-209.

5 - Summary

There is a growing tendency within 200 miles to use a single maritime boundary line to separate both the continental shelf and the EEZ although a separate maritime boundary is applied occasionally to delimit either the continental shelf or the EEZ. A single maritime boundary is reinforced by their identical rules on entitlement within 200 miles. The delimitation in the Gulf of Tonkin is to be effected by a single line dividing both the continental shelf and the EEZ.

The sources of the applicable law are multiple. The two Geneva Conventions on territorial sea and continental shelf have become obsolete and offer little in guiding State actions. The two main accomplishments by the Law of the Sea Convention relating to delimitation are the principle of agreement and requirement of equitable solution. But concrete rules are mostly found in the six contemporary leading international judicial and arbitral decisions on delimitation. Scholarly writings have special significance since most of the rules are still rudimentary. The bulk of maritime delimitation is carried out by bilateral agreements between neighbouring States. There are more varieties of solutions in State practice than in the decisions. The differences among State practice, judicial decisions, and the Law of the Sea Convention can only be reconciled through gradual evolution of case law and State practice. A unilateral claim seldom validates an international maritime boundary.

The rules on delimitation can be classified into four categories: legal principles, equitable criteria, relevant circumstances, and practical methods. Each plays its own role in the hierarchical framework of rules.

The process of delimitation, among other things, involves the drawing of a provisional line in light of the basic equitable criterion (equal division of the overlapping area of coastal projection). Minor adjustments of the line, reflecting the relevant circumstances, usually follow. The provisional line can be conveniently effected by an equidistance line in an opposite situation. A perpendicular or bisector line will be better for an adjacent situation.

CHAPTER V

SUBSTANTIVE CONTENT OF THE LAW

Although there is a variety of interpretations and expressions of the content of the applicable law, discernible basic elements remain. There are five basic elements of this body of law. Firstly, there is the legal principle that requires delimitation to be undertaken by taking into account all relevant circumstances in order to arrive at an equitable result. Secondly, the delimitation line must be the result of agreement or some third party procedure settlement. Thirdly, all relevant circumstances must be taken into consideration. Fourthly, delimitation must be based on equitable criteria whatever they mean. And fifthly, practical methods must be selected to achieve an equitable solution. Two subjects are discussed in this chapter: delimitation by agreement and relevant circumstances. Practical methods will be examined in Chapter XII.

1 - Delimitation by Agreement

1(a) - Development

Initially pronounced in the 1945 Truman Proclamations on Continental Shelf¹ and on Fisheries,² the idea was recognized in the 1958 Geneva Continental Shelf Convention.³ Subsequent development

¹See Churchill, R., Nordquist, M. and Lay, H., NEW DIRECTIONS IN THE LAW OF THE SEA, Documents, Vol. 5, 1977, at 107.

²See Churchill, R., Nordquist, M. and Lay, H., NEW DIRECTIONS IN THE LAW OF THE SEA, Documents, Vol. 5, 1977, at 107.

³The first sentences of paragraphs 1 and 2 of Article 6 of the 1958 Continental Shelf Convention are as follows:

"Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such State shall be determined by agreement between them."

"Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them."

has further consolidated this fundamental principle of maritime boundary delimitation.

A large majority of maritime boundaries have been settled by agreements thus far, as indicated earlier.⁴ As of December 1989, there were 67 agreements on general maritime boundaries, 49 on continental shelf delimitation, 1 on exclusive economic zone, 2 on fishery zone, and 18 on territorial sea.⁵ After the signing of the 1982 Law of the Sea Convention, there was a definite increase of agreements reached for general maritime boundaries comprising, in the majority of cases, the continental shelf and the exclusive economic zone.

As the first and foremost principle, multilateral conventions hold that maritime delimitation should be reached by agreement. As indicated above, the 1958 Territorial Sea Convention and the Continental Shelf Convention all contain provisions for the resolution of maritime boundaries by agreement. The 1982 Law of the Sea Convention has made this even more clear in Articles 74 and 83:

The delimitation of continental shelf (exclusive economic zone) between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

Judicial decisions invariably hold that maritime boundary delimitation must be first of all settled by agreement. For example, in the North Sea cases, the Court declared "delimitation is to be effected by agreement in accordance with equitable principles".⁶ In the Tunisia-Libya case, the Court pointed out:

"an attempt by a unilateral act to establish

⁴Most of the agreements are contained and studied in the following publications. Office for Ocean Affairs and the Law of the Sea of the United Nations, THE LAW OF THE SEA: MARITIME BOUNDARY AGREEMENTS (1970-1984), New York, United Nations, 1987; Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985; Office of the Geographer, Department of State, United States of America, LIMITS IN THE SEAS, series; Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985; and Blagg, Bill, "Bilateral Agreements Relating to Maritime Boundaries", in Dallmeyer, Dorinda G. and DeVorse, Louis Jr., eds., RIGHTS TO OCEANIC RESOURCES -- Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989.

⁵LIMITS IN THE SEAS, No. 108, Maritime Boundaries of the World, July 20, 1988, principal analysis by Robert W. Smith.

⁶ICJ Rep. 1969, para. 101(1).

international maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law, that maritime boundaries, should be determined by agreement between Parties."⁷

1(b) - Specific aspects

The Chamber in the Gulf of Maine case expressed the principle of delimitation by agreement in the following terms:

"No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence."⁸

There are three elements in this passage. Firstly, States are enjoined from effecting delimitation lines by unilateral actions. Secondly, an agreement must be concluded in order to establish a valid maritime boundary, and the principle of good faith must be observed in negotiation with a genuine intention to arrive at a result. And thirdly, failing agreement, States concerned should adopt a procedure for dispute resolution by a competent third party.

Although it fails providing concrete criteria to guide maritime delimitation, the 1982 Law of the Sea Convention made an important contribution in the construction of mechanisms for the settlement of the disputes. Paragraph 3 of Articles 74 and 83 provides a solution of interim arrangement. At UNCLOS III, it was disputed whether a moratorium should be imposed on the exploitation of the disputed area in the provisional arrangement.⁹ It is unlikely that the States concerned would consent to or acquiesce in the exploitation of the resources by either side, because the dispute is about the resources, both living and non-living. Controversy also revolves around the conformity of such arrangements with the delimitation criteria. As long as the disputing States themselves agree upon such an arrangement, whether such arrangements are concluded on the basis of delimitation

⁷ICJ Rep. 1982, para. 87, at 66-67.

⁸ICJ Rep. 1984, para. 112(1), at 299.

⁹See Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 236.

criteria is not of prime importance.¹⁰

Three types of disputes are excluded from the application of LOS Convention: disputes prior to the entry into force of the Convention, disputes involving question of sovereignty, and disputes settled or agreed to be settled.¹¹ At UNCLOS III, differences existed between those in favour of a compulsory third-party procedure and those insisting on the consent of State parties.¹² As a compromise between the two camps, a compulsory conciliation procedure was chosen as the mechanism for settlement of dispute without explicit reference to boundary delimitation dispute.¹³

It is difficult to outline a definition of good faith and genuine intention to settle the dispute. Do they mean that the respective positions of the disputants cannot be reconciled to produce an agreement? The result must be equitable. Are negotiating States subject to the same standard of equitable requirements as expounded in the cases? Or do States have some leeway in their negotiation? As we have noted in Chapter VI, States have more freedom to choose among the equitable criteria, relevant circumstances and practical methods. But only if the negotiated agreements do not lead to a final settlement does the Convention apply.¹⁴

In summary, it can be stated that the principle of delimitation by agreement is both a procedural device and a substantive principle to abide by in delimitation of maritime boundary. Positively, delimitation has to be effected by agreement. Negatively, no lines resulting from a unilateral action can have an international legal validity. The agreement must be sought and negotiated in good faith and with a genuine intention to reach a positive result. Failing agreement, a third party procedure should be followed to resolve the dispute. The procedure in the 1982 Law

¹⁰See Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 236.

¹¹Article 298(1)(a). Also see UN Doc. NG7/20/Rev.1(25 August 1978), NG7/27(27 March 1979), NG7/31(5 April 1979), NG7/37(12 April 1979).

¹²See Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 237.

¹³Article 298 (1).

¹⁴Article 298(a)(iii) of the Law of the Sea Convention.

of the Sea Convention is the compulsory conciliation¹⁵ and States parties may chose another one.¹⁶ Also, State Parties may enter into provisional arrangements before reaching the final agreement.¹⁷

2 - Relevant Circumstances

The circumstances in which a maritime boundary is to be delimited have a great impact on the delimitation and vary considerably. They serve as a convenient guidance for States to follow in their practice. Yet, there has never been an authoritative exhaustive list of relevant circumstances relating to boundary delimitation of ocean space. Despite its doubtful legal value,¹⁸ such a list may help to clarify the imprecisions inherent in the rules applicable to maritime boundary delimitation in practical terms.

In the deliberations in the International Law Commission in the 1950s, exceptional configuration of the coast, presence of islands, navigable channels, and historic titles, were considered to provide a sufficient equitable basis for departing from the treaty rule as set forth in the Geneva Conventions reached afterwards.¹⁹

The 1969 North Sea cases enumerated as relevant geological structures, geographical configuration of the coast, preservation of unity of deposits, and proportionality.²⁰ Thereafter, judicial and arbitral decisions built up a body of identifiable circumstances which have been taken into account in delimitation. The following will give a brief account of the circumstances which have been used or argued. Some of the circumstances (relationship of the coasts; concavity and convexity of the coasts; lengths of coasts; general directions of coasts; question of islands; historic title; existing treaties or other *de facto* line; and state conduct) will be studied in the following chapters relating to a specific question encountered in the Gulf of Tonkin delimitation in Chapters VII, VIII, IX, X, and XI.

¹⁵Article 298 and Annex V.

¹⁶Article 299.

¹⁷Articles 287 and 290,

¹⁸Gulf of Maine case, ICJ Rep. 1984, para. 59, at 278.

¹⁹Yearbook of International Law Commission, 1953, Vol. II, at 300.

²⁰ICJ Rep. 1969, para. 93-99.

2(a) - Distance criterion

In the 1985 Libya-Malta case, the distance between the opposite coasts was held to be a relevant circumstance in the delimitation.²¹ If the distance had been too short, it would not have been possible to shift the median line in favour of Libya. The reasons were that Malta would have had little shelf left or the shifted line would have approached too close to Malta so as to bring security factor into consideration. Within 200-mile limit, the regime of shelf and the regime of EEZ which have their titles based on distance from the baselines, have evolved toward a common maritime boundary. This is particularly so with respect to the opposite situations of relevant coasts. If the distance between the opposite coasts is shorter than 400 miles, the shelf and the EEZ become merged as determined by the distance between the two States.

Article 76 of the Law of the Sea Convention provides the distance from the baselines as one of the two legal bases for a coastal State to claim continental shelf,²² which coincides with the outer limit of the exclusive economic zone as laid down in Article 57 of the Convention.²³ These provisions have propelled the move toward a merge of the two zones within 200-mile limit in practice

Judicial decisions have also endorsed this trend toward distance in entitlement common to both continental shelf and exclusive economic zone. The Court noticed for the first time the trend toward the distance principle in the Tunisia-Libya case.²⁴ According to the Chamber in the Gulf of Maine case, the concept of distance was distinct from that of adjacency which had a limited

²¹ICJ Rep., 1985, para.33, at 33.

²²Paragraph 1 of Article 76 reads:

"The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

²³Article 57 stipulates:

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

²⁴Tunisia-Libya case, ICJ Rep., 1982, para. 48, at 48-49.

application only.²⁵

The Libya-Malta case clarified further the distance principle. Malta argued vigorously that the distance principle, as embodied in the definitions of continental shelf and exclusive economic zone of the Law of the Sea Convention, had a special significance and that continental shelf had been detached from any physical prolongation within 200 miles from the baselines.²⁶ The Court admitted that:

one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State. This does not mean that the concept of the continental shelf has been absorbed by that of the exclusive economic zone; it does however signify that greater importance must be attributed to elements, such as distance from the coast, which are common to both concepts."²⁷

The distance principle was applied in the form of distance between the opposite coasts. The distance between Libya and Malta was sufficient to allow a northward transposition of the provisional median line by 24' of latitude.²⁸

However, this use of distance principle does not confer any special status upon equidistance method, as amply demonstrated by Tunisia-Libya case,²⁹ Gulf of Maine case,³⁰ and Libya-Malta case.³¹ Nor does it establish a principle of "absolute proximity".³²

In short, the criterion of distance plays an increasing role in delimitation within 200-mile limit from the baselines. Its application in the Libya-Malta case used the form of distance between the opposite coasts. The establishment of distance criterion common to both continental shelf and exclusive economic zone within 200 nautical miles has deprived geology, geomorphology,

²⁵ ICJ Rep., 1984, para. 103-106, at 296-297.

²⁶ ICJ Rep., 1985, para. 31, at 32.

²⁷ ICJ Rep., 1985, para. 33, at 33.

²⁸ ICJ Rep., 1985, para. 73, at 52.

²⁹ ICJ Rep. 1982, para. 110, at 79.

³⁰ ICJ Rep. 1984, paras. 106-107, at 297-298.

³¹ ICJ Rep., 1985, paras. 42-44, at 37-38.

³² ICJ Rep. 1985, para. 77, at 56.

and ecology of any material influence in the delimitation. It must be borne in mind, however, that the emergence of distance criterion does not confer any privileged role upon equidistance method or the notion of absolute proximity in maritime delimitation.

2(b) - Land boundary terminus and perpendicularity to coasts

The land boundary terminus on the coast could be relevant by reason of the extension of land boundary into the sea, as was shown in the Tunisia-Libya case.³³ In the absence of any maritime boundary agreement on territorial sea, exclusive economic zone or continental shelf, the terminus of land frontier becomes the starting point to delimit the lateral boundary between adjacent coasts of the parties.³⁴

Henceforth, the location of the terminus and its relationship with the coastlines on each side may help determine the method for delimitation. There are four possible situations. Firstly, if the coastlines on each side of the terminus run fairly straight up to a distance that can affect the course of boundary of long-distance maritime zones, the terminus could be used as the starting point of a perpendicular line to the general direction of the coastlines on each side of the terminus. Secondly, if the coastlines changes its direction at the point of terminus, the delimitation line could be the bisector line of the angle formed by the two relevant coasts on each side of the terminus provided that the coasts run reasonably straight. Thirdly, if the coastline on one side of the terminus is straight, on the other side concave or convex or irregular, the delimitation line is more difficult to determine. Fourthly, if the coastlines on each side tend to have irregular features but in such a way so as to have an equal effect, the line of delimitation could take a bisector line of the lines representing the general direction(s) of the relevant coasts.

In an adjacent situation, one consideration is the perpendicularity of the line from the terminus of land frontier. If the land boundary terminus on the coast is the point where a change of the general direction of the coasts occurs,³⁵ a bisector line would come closest to the requirement of equity.³⁶

³³ICJ Rep. 1982, paras. 82-86, at 65-66.

³⁴Bravender-Coyle, Paul, "The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries Between States", 19 Ocean Development and International Law 171-227(1988), at 199.

³⁵Tunisia-Libya case, ICJ Rep. 1982, paras. 119-120, at 84-85; Gulf of Maine case, ICJ Rep. 1984, para. 213, at 333.

2(c) - General geographical context

When a delimitation is carried out within a general geographical context, it is always possible that this context may have some bearing upon the delimitation in question, as the Libya-Malta case has shown.³⁶ In that case, the general geographical context was used to determine the northern limit of the shift of the provisional median line between Malta and Libya in order to reflect the great disparity of lengths of coasts between the parties. The general geographical context was also held to be applicable in the Guinea--Guinea-Bissau case. The Tribunal noted the concavity of the coastlines of Guinea-Bissau, Guinea and Sierra Leone and the convexity of coast of West Africa, and found that the directions of the lateral course of boundaries between these States should be approximately divergent.³⁷

The general geographical context might well become a relevant circumstance in a given case. Thus far, there were two instances where this circumstance was taken into consideration and played a supportive role.

2(d) - Geomorphology

Unlike geographical circumstances, geomorphology appertains only to the regime of continental shelf due to its exclusive linkage with the seabed. Its value has been considerably diminished in light of the trend of establishing maritime boundaries for multiple purposes. It is known that only in three instances, geomorphological circumstance has played some role.³⁸ In an agreement between Indonesia and Thailand, geomorphology was again taken into account.³⁹ In 1982, Norway and Iceland concluded an agreement on the delimitation of continental shelf between Jan Mayen of Norway and Iceland, based on the recommendations of the

³⁶ ICJ Rep. 1985, paras. 69-73, at 50-53.

³⁷ Arbitral Award, 1985, para. 108, at 297.

³⁸ In the Indonesia-Australian Agreement of 1972, the boundary line was decided to run between the actual median line and the deepest channel in the Timor Trough near the Indonesian coast. LIMITS IN THE SEAS, No. 87, 1979. Also see, Office for Ocean Affairs and the Law of the Sea of the United Nations, THE LAW OF THE SEA: MARITIME BOUNDARY AGREEMENTS (1970-1984), New York, United Nations, 1987, at 269-272.

³⁹ Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 84, 123. Also see LIMITS IN THE SEAS, No. 93, 1981; Office for Ocean Affairs and the Law of the Sea of the United Nations, THE LAW OF THE SEA: MARITIME BOUNDARY AGREEMENTS (1970-1984), New York, United Nations, 1987, at 200-202.

Conciliation Commission.⁴⁰ In its report, the Commission concluded that "geologically Jan Mayen Ridge is a microcontinent that predates both Jan Mayen and Iceland which are composed of younger volcanics; therefore the Ridge is not a natural geological prolongation of either Jan Mayen or Iceland".⁴¹ However, the northern part of the Ridge may be regarded as the geomorphological extension of Jan Mayen. Therefore, no claim to the area beyond 200 miles on the Jan Mayen Ridge would be upheld.

In consideration of the Hurd Deep Fault Zone, the Court of Arbitration in the Anglo-French case stated: "even if they are considered as distinct features in the geomorphology of the shelf, they are still discontinuities in the seabed and subsoil which do not disrupt the essential unity of the continental shelf."⁴² Similarly, the Court did not accept the Tripolitanian Furrow as an interruption of the natural prolongation and did not regard it as a relevant factor in the Tunisia-Libya case.⁴³ In the Gulf of Maine case, the Chamber dismissed the argument based on geomorphology and pointed out that the Northeast Channel was "quite simply a natural feature of the area".⁴⁴ The Chamber's hostility towards natural boundary was evidently revealed by demanding that a natural boundary be "genuine, sure and stable" and the factors forming the boundary must be "important, evident and conclusive to represent a single, incontrovertible natural boundary".⁴⁵ Again, the Court in the Libya-Malta case rejected Libya's submission that the delimitation line coincide with the so-called rift zone.⁴⁶

⁴⁰Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen by Elliot L. Richardson, Hans G. Andersen, and Jens Evensen. May 1981. 20 International Legal Materials 797-842(1981); Iceland and Norway: Agreement on the Continental Shelf between Iceland and Jan Mayen (entered into force June 2, 1982) 21 International Legal Material 1222-1226(1982).

⁴¹Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen by Elliot L. Richardson, Hans G. Andersen, and Jens Evensen. May 1981. 20 International Legal Materials 797-842(1981), at 35.

⁴²Arbitral Award, 1977, para. 107.

⁴³ICJ Rep. 1982, paras. 68, 80, at 58, 64.

⁴⁴ICJ Rep. 1984, para. 46, at 274.

⁴⁵ICJ Rep. 1984, paras. 54, 56, at 277.

⁴⁶ICJ Rep. 1985, paras. 40-41, at 35-37.

Geomorphological circumstances do not become relevant unless two separate continental shelves are discerned. Such instances are indeed rare. It is doubtful whether geomorphological considerations will ever be relevant again. The practice of using geomorphological factors cannot be characterized as "extensive and virtually uniform" so as to be admissible into the domain of customary international law.⁴⁷ With the trend of using a single line to delimit both the continental shelf and the EEZ, the utility of a geomorphology argument diminishes because of its exclusive association with the seabed.

2(e) - Geology, ecology and natural resources

The evolution of customary international law has gradually eroded geology as a relevant circumstance in maritime delimitation. First elaborated in the North Sea cases,⁴⁸ the geological factor has gradually given way to geographical factors.⁴⁹ With the advent of the 1982 Law of the Sea Convention, the trend toward a single maritime boundary line to separate both continental shelf and exclusive economic zone is growing. The resultant effect is the elimination of any relevance of geological consideration within 200-mile limit.⁵⁰

The factor of natural resources in the delimitation area, if proved to be material, can be taken into account in drawing the lines. Originating from the North Sea cases,⁵¹ this factor has been taken into account in a number of agreements on maritime boundary delimitation.⁵²

Because of the increasing popularity of adopting a single

⁴⁷North Sea cases, ICJ Rep. 1969, para. 74.

⁴⁸ICJ Rep., 1969, para. 95-96.

⁴⁹Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 25-32.

⁵⁰In the Libya-Malta case, ICJ Rep., 1985, para. 40, at 35., the Court said:

"Neither there is any reason why a factor which has no part to play in the establishment of title would be taken into account as a relevant circumstance for the purpose of delimitation."

⁵¹ICJ Rep., 1969, para. 97.

⁵²Agreements between Australia and Indonesia, 1972, the Federal Republic of Germany and Denmark, 1971, the Netherlands and Federal Republic of Germany, 1971, and Columbia and Honduras, 1986.

maritime boundary, difficulty may arise as to the usefulness of this factor in delimitation of exclusive economic zone. Indeed, the Chamber in the Gulf of Maine case reasoned that to delimit the continental shelf and exclusive economic zone by a single line, any criterion which is typically and exclusively bound up with one of them alone is to be discarded in favour of criterion or factor common to both regimes.⁵³

As Professor O'Connell correctly observed, the relevance of common mineral deposits to delimitation of continental shelf depends upon the condition that interests in the deposits have been acquired independently of the continental shelf doctrine.⁵⁴

Like geological factor, ecological consideration is closely associated with the water column and hence the exclusive economic zone. When the United States submitted its argument based on preservation of ecosystem on the Georges Bank, German Bank, and Scotia Bank, the Chamber was not impressed and rejected its application in the Gulf of Maine case.⁵⁵

2(f) - Navigational consideration

Navigational interests were listed in the catalogue of special circumstances within the meaning of Article 6 of the 1958 Geneva Continental Shelf Convention. In the Anglo-French case, the interests of preserving navigation through the Channel and the Hurd Deep Zone arose as the focal argument. France argued that its commercial ports, such as, Dunkerque, Le Havre, Antifer, and La Basse Seine were linked to the open sea through the Channel. The drawing of an equidistance line would have profound implications for France and the alternative route suggested by the United Kingdom was dangerous and narrow.⁵⁶

The navigational interests of coastal States may well be the pertinent circumstance to be taken into account. In the Anglo-French case, the very nature of the English Channel as a major international shipping passage diminished navigational considerations.⁵⁷ The Court stated that the interests dictated by navigation and security would have a subordinate role to play in

⁵³ICJ Rep., 1984, para. 193, at 326.

⁵⁴O'Connell, D.P., THE INTERNATIONAL LAW OF THE SEA, Vol. II, Oxford, Clarendon Press, 1984, at 711.

⁵⁵ICJ Rep., 1984, para. 166-174, at 316-319.

⁵⁶Arbitral Award, 1977, para. 162, at 88.

⁵⁷Anglo-French case, Arbitral Award, 1977, para. 188, at 98.

strengthening the main arguments by the parties.⁵⁸ The conclusion drawn by the Court was that these considerations "tend^{ed}§ to evidence the predominant interest of the French Republic in the southern areas of the English Channel".⁵⁹

In the Beagle Channel case, navigability played an important role in drawing the median line so as to enable the parties to navigate as much as possible within its own waters.⁶⁰ Scholars generally recognize the limited relevance of navigational considerations to maritime delimitation, particularly with respect to delimitation of territorial seas.⁶¹

2(g) - Security and defence interests

There is always the question of security in the majority of long-distance delimitation. As discussed above, security and defence were taken into account in the Anglo-French case by assigning them a supportive role in the overall assessment of the interests of the parties in the Channel region.⁶²

In the Guinea--Guinea-Bissau case, the Tribunal's finding that security was important only when the boundary line drawn lay opposite the coast of the State and in its immediate vicinity,⁶³ was in line with the approach adopted by the International Court in the Libya-Malta case.⁶⁴ The Court satisfied that the placing of the delimitation line was "not so near to the coast of either party as

⁵⁸Arbitral Award, 1977, para. 188, at 98.

⁵⁹Anglo-French case, Arbitral Award, 1977, para. 188, at 98.

⁶⁰Arbitral Award, 1977, para. 110, at 124-125.

⁶¹O'Connell, D.P., THE INTERNATIONAL LAW OF THE SEA, Vol. II, Oxford, Clarendon Press, 1984, at 712-713; Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 182-183; Attard, David Joseph, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 269-271; and Weil, Prosper, THE LAW OF MARITIME DELIMITATION - Reflections, Cambridge, Grotius Publications Limited, 1989, at 141, 227.

⁶²Arbitral Award, 1977, para. 188, at 98.

⁶³Arbitral Award, 1985, para.124, at 302.

⁶⁴ICJ Rep., 1985, para. 73, at 52; The Court was careful to avoid over-shifting of the provisional line so as not to lose the approximate median location and avoid bringing the factor of security into play; see also the Argentina-Chile Treaty on Beagle Channel of 1984, Article 8, 24 International Legal Material, 1985.

to make questions of security a particular consideration in the present case."⁶⁵

In his separate opinion, Judge Padillo Nervo mentioned the factors of "cable, safety or defence requirements".⁶⁶ The idea of security and defense has been endorsed by Weil,⁶⁷ Evans,⁶⁸ Attard,⁶⁹ and Vicuna.⁷⁰

Consideration of security and defence has some relevance in delimiting maritime boundaries when the boundary line approaches too close to the coast of the parties. It is unclear whether the court will consider the impairment of military mobility at sea. The complete revelation of the role of security and defence can only be made through progressive accumulation of case law.

2(h) - Establishment or delimitation of any other maritime zone

The establishment or delimitation of any other maritime zone will be relevant in the context of maritime delimitation. The two short-distance offshore boundaries between West Germany and its neighbours drawn before the 1969 North Sea cases were accepted by the parties and the starting point of the long-distance boundary continued at the end points of these two previous boundaries.⁷¹ In the treatment of the Channel Islands in the Anglo-French case, the 12-mile fishery zone of the Islands was respected by enclosing the Islands with a 12-mile continental shelf.⁷²

In the Gulf of Maine case, the Chamber took consideration of

⁶⁵ICJ Rep., 1985, para. 51, at 42.

⁶⁶North Sea cases, ICJ Rep., 1969, at 93.

⁶⁷Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 264-266.

⁶⁸Evans, Malcolm, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 172-178.

⁶⁹Attard, David Joseph, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 253.

⁷⁰Vicuna, Francisco Orrego, THE EXCLUSIVE ECONOMIC ZONE -- Regime and legal nature under international law, Cambridge, Cambridge University Press, 1989, at 217.

⁷¹See LIMITS IN THE SEAS, No. 10, 1970 and revised No. 10, 1974.

⁷²Arbitral Award, 1977, para. 202, at 102-103.

the 12-mile limit within the Bay of Fundy in calculation of the respective length of the coasts of the parties.⁷³ The technical expert for Canada in the Gulf of Maine case, Commander Cooper explained that the absence of the term "territorial sea" in the Judgment was possibly because Canada claimed a 12-mile territorial sea while the United States claimed 3 miles, or because Canada claimed the waters of the Bay of Fundy as historic waters.⁷⁴

Before the signing of the 1982 United Nations Convention on the Law of the Sea, 47 agreements on the separation of continental shelves were concluded between States. With the emergence of exclusive economic zone, these States will probably negotiate on delimitation of exclusive economic zones.⁷⁵ These established boundaries on continental shelf will gain importance. Indeed, the International Court declared in the Libya-Malta case:

"One of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State."⁷⁶

Although this statement referred to the case of delimitation within 200-mile limit, there was an implication here that the delimitation of exclusive economic zone would have some relationship with that of continental shelf and vice versa.

Two types of relationship are involved here. One is the relationship between the short-distance boundary and the long-distance boundary. The other is the relationship between the continental shelf and the exclusive economic zone. There might be two possible effects of short-distance boundary on establishment or delimitation of long-distance boundary. One is to continue the line in the same direction; the other is to extend the line in a changed direction in order to satisfy the requirements of equity. Of course, the establishment or delimitation of the short-distance boundary, mostly, if not always, precedes the long-distance boundary. Even in the case where short-distance boundary and long-distance boundary will be delimited or established simultaneously, the factors to be taken into account will be different between the

⁷³ICJ Rep., 1984, para. 221, at 335-336.

⁷⁴Cooper, John, "Delimitation of the Maritime Boundary in the Gulf of Maine Area", 16 Ocean Development and International Law 59-90(1986), at 83.

⁷⁵Vicuna, Francisco Orrego, THE EXCLUSIVE ECONOMIC ZONE -- Regime and legal nature under international law, Cambridge, Cambridge University Press, 1989, at 191-195.

⁷⁶ICJ Rep., 1985, para. 33, at 24.

two sets of boundaries.⁷⁷

The relationship between the delimitation of continental shelf and that of exclusive economic zone is a very extensive subject.⁷⁸ There are three possible scenarios. First, the delimitation line of continental shelf will coincide with that of exclusive economic zone. This is often referred to as a single line approach.⁷⁹ Secondly, those which have drawn continental shelf boundary line or exclusive economic zone boundary line, might pursue two different lines to separate the two jurisdictional zones (called dual line approach).⁸⁰ Thirdly, some States may make some segments of the delimitation lines of exclusive economic zone take the delimitation course of continental shelf, while in other segments, the two lines may run separately. In effect, this is the mixture of the single line approach and dual line approach, and may be termed as hybrid line approach.

Because the 49 agreements on the delimitation of continental shelf precede the delimitation of exclusive economic zone, divergence of the delimitation line of exclusive economic zone from that of continental shelf is possible. Only a few countries have drawn their exclusive economic zone boundaries prior to that of continental shelf. The majority of States have delimited neither of them. For them, the trend is to adopt a single line to be the boundary for both the continental shelf and the exclusive economic

⁷⁷For a thoughtful comment, see McRae, Donald M., "The Single Maritime Boundary: Problems in Theory and Practice", in Brown, E.D. and Churchill, R.R., eds., THE UN CONVENTION ON THE LAW OF THE SEA: Impact and Implementation, Proceedings, 19th Annual Conference of the Law of the Sea Institute, Honolulu, 1986, 225-234.

⁷⁸McRae, Donald M., "The Single Maritime Boundary: Problems in Theory and Practice", in Brown, E.D. and Churchill, R.R., eds., THE UN CONVENTION ON THE LAW OF THE SEA: Impact and Implementation, Proceedings of the 19th Annual Conference of the Law of the Sea Institute (1986), 225-234, at 230.

⁷⁹For example, the Gulf of Maine case, ICJ Rep. 1984.

⁸⁰For example, the Torres Strait Treaty between Australia and Papua New Guinea, in Lay, S., Houston, Churchill, R. and Nordquist, Myron, eds., NEW DIRECTIONS IN THE LAW OF THE SEA, Vol. II, Dobbes Ferry, Oceana Publications, 1981, at 215. Also see discussions in Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 219-220.

zone.⁸¹

2(i) - Interests of and effects on third States

In connection with the proportionality factor, the International Court was of the opinion that the effects of any other actual or prospective continental shelf delimitation between adjacent States in the same region may very well be a relevant circumstance.⁸² In the Anglo-French case,⁸³ reference was made to prospective claims of Ireland⁸⁴ and Spain.⁸⁴ The Arbitration Court envisaged that the meeting point between France, United Kingdom and Ireland would be the subject of negotiation between themselves.

This factor was reaffirmed in the Tunisia-Libya case with the omission of the word "adjacent".⁸⁵ In fact, Italy attempted to intervene in both Tunisia-Libya case⁸⁶ and Libya-Malta case.⁸⁷ Because approximately 25 enclosed or semi-enclosed seas exist throughout the world, occurrences of this circumstance will increase.⁸⁸

This factor played a significant role in the Libya-Malta case: Italian claim effectively circumscribed the terminating point of the median line between Libya and Malta.⁸⁹ This aspect was seriously criticized by Judges Jennings,⁹⁰ Oda,⁹¹ and Schwebel.⁹² Their

⁸¹If an unfavourable continental shelf boundary was established, State will try to obtain a different boundary for EEZ. Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 118-119.

⁸²North Sea cases, ICJ Rep., 1969, para. 101 (D) (3).

⁸³Arbitral Award, 1977, para. 25-28, at 37-38.

⁸⁴Arbitral Award, 1977, para. 236, at 118.

⁸⁵ICJ Rep., 1982, para. 133(B)(5), at 93.

⁸⁶ICJ Rep. Italian Intervention, 1981, at 3.

⁸⁷ICJ Rep. Italian Intervention, 1984, at 3.

⁸⁸Alexander, Lewis M., "Regionalism and the Law of the Sea: the Case of Semi-Enclosed Seas", 2 Ocean Development and International Law 151-186(1974).

⁸⁹ICJ Rep., 1985, para. 22-23, at 26-28.

⁹⁰Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, 1984, ICJ Rep., para. 28-31, at 158.

disagreement consisted in that the Italian claim was allowed to effectively determine the Court's jurisdiction and that the approach did not follow the previous precedents.⁹³ In their opinion, such use of third Party interest was excessive.⁹³

Facing the absence of established maritime boundaries between Guinea-Bissau and Senegal on the north and between Guinea and Sierra Leone on the south, the Arbitral Tribunal in the Guinea--Guinea-Bissau case deemed it necessary to take into account the coastlines of the whole West Africa.⁹⁴ Between the two options of polygon and maritime facade, the Tribunal selected the latter to suit better the situation in West African divergent directions. The final method was the perpendicular line to the straight line joining two salient points on Senegal and Sierra Leone.⁹⁵

In summary, a particular interest of a third State in the delimitation area, including claims of jurisdiction, fishery rights, historical title, security interests, and environmental concern, could become relevant. The question of effect is twofold. The effect of any actual or prospective delimitation in the same region is a factor to be considered. In contrast, the effect of the proposed delimitation that may have on a third State, such as the Italian interests in the Libya-Malta case, depending on its magnitude, may have some relevance in the delimitation. But the latter aspect has not been finally resolved by the jurisprudence of the Court. Because of the great number of tripartite or quadripartite potential boundary problems and the fact that there are 25 semi-enclosed or enclosed seas all over the world, this factor may arise fairly frequently.

2(j) - Economic Considerations

Economic consideration, in the broad sense, is not foreign to the regimes of both continental shelf⁹⁶ and exclusive economic

⁹¹ICJ Rep., 1985, Dissenting Opinion, para. 23, at 137.

⁹²ICJ Rep., 1985, Dissenting Opinion, at 173-175.

⁹³ICJ Rep., 1985, Dissenting Opinion of Oda, para. 23, at 137; Dissenting Opinion of Schwebel, at 173-175.

⁹⁴Maritime Boundary Award, 1985, paras.108-109, at 297.

⁹⁵Maritime Boundary Award, 1985, para.111, at 298.

⁹⁶Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 7-12.

zone.⁹⁷ The evolution of the delimitation criteria and relevant circumstances, however, is deemphasizing its relevance in the process of delimitation. It is very difficult to maintain a *priori* relevance of economic circumstances in any delimitation. But, in some cases, economic considerations were reflected in less direct forms such as, a concern for the socio-economic repercussions and well-being of the local residents,⁹⁸ or a pre-existing right entrenched in the history relevant to the delimitation.⁹⁹

The economic factor was dealt with in the Tunisia-Libya case. The Court rejected the arguments based on economic poverty by saying that such factors "are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other".¹⁰⁰ A similar approach was followed in the Guinea--Guinea-Bissau case.¹⁰¹ In the Libya-Malta case, propositions put forward by Malta based on the absence of energy resources, on an island developing country, and on the range of fishing activity, were regarded as irrelevant by the Court.¹⁰²

In the conciliation over Jan Mayen between Iceland and Norway, the dependence of Iceland on imports of oil was taken into account in determining the course of the boundary and in the establishment of the joint development zone.¹⁰³ After rejecting the U.S. predominance interest claim and the Canadian preservation of fishing pattern claim,¹⁰⁴ the Chamber in the Gulf of Maine case did not consider it necessary to bring economic factor into the process of delimitation, but was prepared to concede that only "catastrophic" consequence resulting from the line drawn would render it imperative to consider the economic factor at a

⁹⁷Attard, David Joseph, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 264-269.

⁹⁸Gulf of Maine case, para. 237, at 342.

⁹⁹Fisheries Jurisdiction case (UK v. Iceland), ICJ Rep. 1974, para. 58, at 3.

¹⁰⁰ICJ Rep., 1982, para. 107, at 77-78.

¹⁰¹Maritime Boundary Award, 1985, paras. 121-123, at 301-302.

¹⁰²ICJ Rep., 1985, para. 50, at 32.

¹⁰³20 International Legal Material (1981), at 826.

¹⁰⁴ICJ Rep. 1984, para. 235, at 341-342.

correctional stage later.¹⁰⁵

State practice shows that there are only a handful of instances where economic considerations were taken into account in settling maritime boundaries. Dr. Attard cited the 1975 Columbia-Ecuador Boundary agreement and the 1978 Mexico-United States agreement on the maritime boundary in the Pacific, and the 1978 Australia-Papua New Guinea agreement as examples of according weight to economic considerations.¹⁰⁶ His conclusion was that "to exclude their relevance would seem to go contrary to the EEZ's rationale and development, as well as the drafting history of its regime as found in the 1982 Convention."¹⁰⁷ Contrary to this assertion, Professor, Douglas M. Johnston sensed a trend towards the rejection of socio-economic considerations:

"This rejection usually is justified on the ground that socio-economic status is changeable in the short term, and that delimitation must be effected on the basis of permanent circumstances such as those of geography."¹⁰⁸

However, Dr. Evans divided the subject into (1) the general economic relationship, (2) developing nation status, (3) pre-existing economic dependence. The conclusions he reached were that pre-existing economic disparity was irrelevant, that the claim of developing nation status might be material on occasions, and that pre-existing economic dependence would play a role as an *ex post facto* means of demonstrating equitability.¹⁰⁹ Professor Weil explored the gulf between theory and practice with respect to economic factors. His interesting remarks were:

"In theory, the sharing of resources has no part to play in the delimitation process, but in practice it cannot be ignored since it is in reality the heart of the matter. Economic considerations are a relevant circumstance which nobody dare (or rather, can)

¹⁰⁵ ICJ Rep., 1984, paras. 57-59, 232-237, at 277-278, at 340342.

¹⁰⁶ Attard, David Joseph, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 269.

¹⁰⁷ Attard, David Joseph, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 269.

¹⁰⁸ Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 212.

¹⁰⁹ Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 184-189, 200-207.

mention."¹¹⁰

Scholarly opinions are divided. But given the way in which the court has treated the subject, economic considerations ought to be accompanied by other factors in order to play a role in the boundary-making process. A few instances of the use of economic factor in State practice does not satisfy the requirement of State practice as "extensive and virtually uniform".¹¹¹ While any maritime delimitation must accord prime importance to equity and observe the same governing legal principles,¹¹² there is a strong likelihood that a court may be barred from giving weight to economic factors in delimitation process, as the Court declared in the Libya-Malta case:

"For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable criteria to its delimitation, will qualify for inclusion."¹¹³

Economic considerations come into play only when the process of assessment of the equitableness of the line established is started according to the case law. When the delimitation line entails "catastrophic repercussions for the livelihood and economic well being of the population of the countries concerned", socio-economic factors may be taken into account.¹¹⁴ This heavy onus of proof makes it virtually impossible as a practical matter to bring economic factors into the delimitation process. Unlike the factor of coastal geography,¹¹⁵ economic considerations are definitely of declining significance, if any at all, in maritime delimitation.

3 - Summary

The rudimentary principle of delimitation by agreement serves

¹¹⁰Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 264.

¹¹¹North Sea cases, ICJ Rep., 1969, para. 74.

¹¹²See Gulf of Maine case, ICJ Rep., 1984, para. 112, at 299-300.

¹¹³ICJ Rep., 1985, para. 48, at 40.

¹¹⁴ICJ Rep., 1984, paras. 57-59, 232-237, at 277-278, at 340342.

¹¹⁵Willis, L.A., "From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries", 24 Canadian Yearbook of International Law 3-59(1986), at 52.

as an important element in the rules on maritime delimitation. There are three aspects: invalidity of unilateral delimitation, encouragement of conclusion of agreement, and availability of dispute settlement procedure.

The circumstances which characterize the delimitation area can thus be judicially classified into three categories. First, there are circumstances which are always relevant, such as the factors derived from coastal geography. Secondly, given certain conditions, some factors may play a role in delimitation, for instance, security, historic title, and navigation. Thirdly, some factors have been ruled out as not relevant, e.g., landmass,¹¹⁶ sovereign equality.¹¹⁷ To the observation that the "history of maritime delimitation decisions since the North Sea cases may be viewed as a progression of attempts to reduce the factors that may be considered",¹¹⁸ one may add that the process is also one of refining and outlining the relevance of the circumstances and factors.

With respect to the non-geographical factors, the questions are twofold: whether they can be relevant, and if so to what extent and in what manner. The conclusion that can be drawn from the above analysis are that non-geographical factors can still play a role in delimitation though often subordinate to the pre-eminent position of the geographical considerations.¹¹⁹ However, some factors, such as, historic title, existing treaties or *de facto* line, and State conduct, may very well become the decisive element under certain conditions. There is of course great validity of the conclusion reached by Willis:

"What is certain is that only those factors that are related either to the basis of title or the functions of the regime are eligible for any consideration at all."¹²⁰

The distance criterion has been accepted as relevant in opposite situation. But its relationship with adjacency is still obscure. The location of land boundary terminus and

¹¹⁶Libya-Malta case, ICJ Rep., 1985, para. 49, at 32.

¹¹⁷Libya-Malta case, ICJ Rep., 1985, para. 53, at 34.

¹¹⁸Collins and Rogoff, "The Gulf of Maine Case and the Future of Ocean Boundary Delimitation", 38 Maine Law Review 1 (1986), at 39

¹¹⁹Willis, L.A., "From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries", 24 Canadian Yearbook of International Law 3-58(1986), at 55.

¹²⁰Willis, L.A., "From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries", 24 Canadian Yearbook of International Law 3-59(1986), at 55.

perpendicularity to coasts are relevant considerations in adjacent situation. If a change of direction of the coastlines occurs at the land boundary terminus, a bisector line will generally be regarded as equitable. General geographical context can play a supportive and useful role. However, its exact relevance still needs to be unveiled through cases. With the toning down of the early doctrine of natural prolongation, geomorphology and geology are virtually stripped of any relevance in ocean boundary-making for delimitation within 200 miles. Ecology is rejected because of its exclusive association with the water column in a single line delimitation, and because of its dubious nature of stability and identifiability. Natural resources can have a useful role to play if accepted by the Parties. Its obligatory requirement seems to be less stringent. Navigation has been used to support other considerations. Its applicability to delimitation is more evident in near-shore areas. The same is true with the circumstance of Security. Much controversy centers around the interests of third State. It is not yet clear how to evaluate the effect of a third State's claim or interest in a particular delimitation. Establishment and delimitation of any other maritime zone is relevant. Due to the various marine zones to be delimited, this circumstance may arise fairly often. Pure economic interests will not be upheld by the courts. However, economic considerations can be relevant if used at the correctional stage to justify the lines thus drawn.

CHAPTER VI

EQUITY AND EQUITABLE CRITERIA

The rules of international law applicable to maritime boundary delimitation can all be elaborated under the rubric of equity. This concept has inspired the minds of judges, scholars and lawyers. The geographical features which create inequities can be attenuated and remedied. Practical methods that cause injustice to one party may also be corrected and redressed. The delimitation line drawn will be put under the test of proportionality which is derived from the concept of equity. Although equity is powerful and useful, it is elastic and vague: it stirs confusion and buries the seeds of discontent and dispute. In the words of Judges Ruda, Bedjaoui and Jimenez de Arechaga, it is "as uninformative as it is all-embracing."¹

What is equity? How is it applied in the context of maritime boundary delimitation? What criteria are qualified as equitable? This chapter attempts to address these key issues.

1 - Origin and Development

The legal concept of equity appeared first in the context of domestic law, then later in international law. Equity has been defined by Professor Charney in four different ways.

1. Equity is an accepted body of substantive law such as that found in English rules of equity.
2. Equity is a vehicle that can serve in individual cases to militate against the rigidity and harshness of the rules of positive law.
3. Equity is also seen as a term embracing certain basic norms of all legal systems, for example, honesty, good faith and generosity.
4. And equity is used as a doctrine that permits a court of justice to venture in a legal lacuna where

¹Libya-Malta case, ICJ Rep. 1985, para. 37, at 90.

there is a lack of articulated rules of law.²

From the inception of modern maritime boundary law, using equitable criteria to achieve an equitable result has guided the application of the rules. Expressed differently at times, multilateral conventions, bilateral agreements, international judicial and arbitral decisions, and scholarly writings are at one in insisting that whether carried out by agreement or by third-party procedure, maritime boundary delimitation must be made in accordance with equitable criteria to find an equitable solution.

1(a) - Prior to the North Sea cases

Early efforts to develop principles and rules of international law relating to sea and water boundaries were made to attain the goal of equitable solution. The median line method, condominium arrangements, perpendicular line to the general direction of the coast, thalweg or main channel principle, historic rights, the question of islands, and the equidistance method, all take equitable elements into consideration and take equitable results as the principal goal to be achieved.⁴ After a thorough study of the subject of maritime delimitation before World War II, Professor Rhee reached the broad conclusion: "The aim of delimitation has always been to find a mutually acceptable boundary, based on principles and rules that would provide an equitable result."⁵

In the Truman Proclamation of 1945, equity determined the boundary limit.⁶ This significant reference to equitable principles

²Charney, Jonathan I., "Ocean Boundaries Between Nations: A Theory For Progress", 78 American Journal of International Law 582-606(1984), at 588, footnote 40.

³Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 211.

⁴Rhee, Sang-Myon, "Sea Boundary Delimitation Between States before World War II", 76 American Journal of International Law 555-588(1982), at 585-587.

⁵Rhee, Sang-Myon, "Sea Boundary Delimitation Between States before World War II", 76 American Journal of International Law 555-588(1982), at 588.

⁶Department of State Bulletin, xiii, No. 327, September 30, 1945, at 485; Proclamation No. 2667, "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", September 28, 1945. 10 Federal Register 12303.

opened the door to the concept of equity as the fundamental cornerstone of the whole structure of the rules relating to maritime boundary delimitation. More than 20 years later, the International Court of Justice attributed special importance to the Truman Proclamation.

The 1958 Geneva Continental Shelf laid down rules for delimitation between States with adjacent or opposite coasts, but did not make express reference to the word "equity" or its derivatives. However, from its *travaux preparatoires*, there appeared to be some evidence which lent support to the concept of equity. For instance, the International Law Commission recommended the median line for opposite States but observed that there might be "reasons, such as navigation and fishing rights, which may divert the boundary from the median line."⁸ For an adjacent situation, the Commission proposed the equidistance line; however, it emphasized that "in a number of cases this may not lead to an equitable solution, which should then be arrived at by negotiations."⁹ It further added the following observation in its commentary to the draft article on delimitation:

"As in the case of the boundaries of the territorial sea, provision must be made for departure necessitated by an exceptional configuration of the coast, as well as the presence of islands or of navigable channels. This case may arise fairly often, so that the rule adopted is fairly elastic."¹⁰

It can be seen that there is considerable room to take into account various factors in order to draw the line in a fair and equitable way.

State practice, as chiefly reflected in their delimitation treaties and agreements, is also indicative of the application of the concept of equity in their agreements.¹¹ After a thorough analysis of over a hundred State agreements relating to maritime boundary delimitation, Dr. Jagota reached the conclusion that by adopting equidistance lines or other negotiated lines, the States parties to these agreements have satisfied with the equitable

⁷North Sea cases, ICJ Rep. 1969, para. 47.

⁸International Law Commission Yearbook, 1953, at 213.

⁹International Law Commission Yearbook, 1953, at 213.

¹⁰International Law Commission Yearbook, 1953, at 216.

¹¹Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 121.

character of the result thus achieved.¹²

Prior to 1969 North Sea cases, there was some development on the use of the concept of equity in sea and water boundary delimitations. But it was not formally incorporated into the positive legal rules on maritime delimitation until the North Sea cases.

1(b) - The North Sea cases

The North Sea cases stand as a historical monument in the formation and crystallization of customary rules on sea boundary delimitation. As remarked by the Special Chamber in the Gulf of Maine case: the 1969 North Sea cases judgment was "the judicial decision which has made the greatest contribution to the formation of customary law in this field".¹³ The judgment made several very important demarcations for the limit of the concept of equity. Thus, equity was distinguished from *ex aequo et bono*, from the application of abstract justice, from refashioning nature, and from equality.¹⁴ The role of equity was described as abating incidental special features which may give rise to inequity under certain circumstances.¹⁵ The principle of non-encroachment also stemmed from equity.¹⁶

The concept was enhanced to the top of the pyramid of all the conceptions, doctrines, rules, and principles. Relevant circumstances, equitable criteria, as well as practical methods, all have to be qualified and checked by equity. Furthermore, the result of the delimitation must also be tested by proportionality which is itself based on the fundamental concept of equity.

1(c) - Posterior to the North Sea cases

A great many important events have taken place since 1969. These include the rapid increase of State agreements and treaties

¹²Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 121-122.

¹³ICJ Rep., 1984, para. 91, at 293.

¹⁴ICJ Rep., 1969, paras. 85, 88, 91.

¹⁵ICJ Rep., 1969, para. 91.

¹⁶ICJ Rep., 1969, para. 101 (C) (i).

on maritime boundaries,¹⁷ the winding-up of the Third United Nations Conference on the Law of the Sea, the 1977 Anglo-French case¹⁸ between France and the United Kingdom, the 1982 Law of the Sea Convention, the 1982 Tunisia-Libya case,¹⁹ the 1984 Gulf of Maine case,²⁰ the 1985 Libya-Malta case,²¹ and the 1985 Guinea--Guinea-Bissau case.²² Each of these events have helped in shaping the law on maritime delimitation and has made specific contribution to the concept of equity as postulated initially by the North Sea cases.²³

2 - Substantive Meaning

2(a) - Equity and its derivatives

The frequent interchangeable employment of equity and its derivatives have caused confusion and imprecision of the terms. The derivatives of the word equity include "equitable", "inequitable", "equitableness", "inequitableness", "inequity", "equitably" and "inequitably". One often encounters such phrase as "equitable solution", "equitable result", "equitable principles", and "equitable criteria". As is shown below, these phrases carry different legal connotations and should be used and read with care and caution.

2(b) - Essence of equity in maritime delimitation

The International Court of Justice first explained the use of equity in maritime delimitation in the North Sea cases:

"Whatever the legal reasoning of a court of justice, its decision must by definition be just, and therefore in that sense equitable."²⁴

The Court tried to distinguish equity as forming an inherent part of any rule of law, from non-rule of law and *ex aequo et bono*. But

¹⁷See LIMITS IN THE SEAS, No. 108, Maritime Boundaries of the World, July 1988.

¹⁸Arbitral Award, 1977, para. 70, at 48.

¹⁹ICJ Rep., 1982, para. 44, at 47.

²⁰ICJ Rep., 1984, para. 112, at 300.

²¹ICJ Rep. 1985, paras. 45-46, at 38-40.

²²Arbitral Award, 1985, para. 88, at 289.

²³ICJ Rep. 1969, para. 47.

²⁴North Sea cases, ICJ Rep. 1969, para. 88, at 48.

such an elaboration can hardly satisfy the dire need to search for legal rules to govern maritime delimitation. This expression is a denial to the non-rules of law but does not contain much as a rule of law to guide State practice.

In spite of his critical view on the scope of equity in delimitation of sea boundaries, Professor O'Connell admitted the important role played by equitable principles.²⁵ Professor Bravender-Coyle commented:

"It is now clearly established that equitable principles must be taken into account in the delimitation of maritime boundaries under customary international law."²⁶

In an excellent review of the six major international decisions, Willis of Canada's Justice Department also averred that equitable criteria and the concept of equity were of cardinal importance.²⁷ Writing in 1984, Beaglehole of New Zealand arrived at the conclusion that equity was the governing principle and its application must be circumscribed by relevant circumstances.²⁸ In his treatise on the regime of exclusive economic zone, Dr. Attard also reached the conclusion that "the goal of EEZ or shelf-delimitation is the achievement of an equitable solution."²⁹ Professor Sohn agrees that equity has emerged from precedents as an important factor to be considered in maritime delimitation.³⁰ The Chilean jurist Vicuna stated that international law did lay down some fundamental rules in equity, for instance, the obligation not

²⁵O'Connell, D.P., THE INTERNATIONAL LAW OF THE SEA, Vol. II, Oxford, Clarendon Press, 1984, at 693-699.

²⁶Bravender-Coyle, Paul, "The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries Between States", 19 Ocean Development and International Law 171-227(1988), at 199.

²⁷Willis, L.A., "From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries", 24 Canadian Yearbook of International Law 3-59(1986).

²⁸Beaglehole, Stephen, "The Equitable Delimitation of the Continental Shelf", 14 Victoria University W. L. Review 413-442(1984), at 442.

²⁹Attard, David Joseph, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 253.

³⁰Sohn, Louis B., "Exploring New Potentials in Maritime Boundary Dispute Settlement", in Dallmeyer, Dorinda G. and DeVorsey, Louis Jr., eds., RIGHTS TO OCEANIC RESOURCES --Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989, 153-165, at 163.

to use force in the dispute, and the obligation to search for an equitable solution.³¹ In Professor Fu's view, the central issue in maritime delimitation was the identification of equitable principles.³²

In his treatise on maritime delimitation, Professor Weil viewed that the normativity of equity was threefold: equitable solution, equitable criteria, and practical methods.³³ Equity, after the Libya-Malta case, has played the corrective role and thus has been enriched with normativity.³⁴

Evans dealt with the question of equitable principles from the perspective of relevant circumstances. His conclusion was that "the application of equitable principles means the application of an equitable process", a function of the relevant circumstances.³⁵ In this regard, Evans replaces confusion over equitable criteria with confusion over relevant circumstances.³⁶ Given the practical approach courts have adopted in adjudicating maritime boundary delimitation disputes, this may be desirable in resolving concrete and practical problems, because relevant circumstances are not abstract but identifiable under certain conditions.

On the other hand, Professor Weil represents the group that insists on the addition of normative character of rules relating

³¹Vicuna, Francisco Orrego, THE EXCLUSIVE ECONOMIC ZONE -- Regime and Legal Nature Under International Law, Cambridge, Cambridge University Press, 1989, at 211-212.

³²Fu, Kuen-Chen, "Equitable Considerations Taken Into Account in International Ocean Boundary Delimitation Cases", 6 Chinese Yearbook of International Law and Affairs 1-19(1986-1987), at 1.

³³Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 159-167.

³⁴Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 180-182.

³⁵Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 78.

³⁶Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 78.

to maritime delimitation.³⁷ This view requires a more structural approach to maritime boundary delimitation: a provisional line by equidistance and a subsequent adjustment by equitable criteria. The objective of this view is much commendable: to give more certainty in settling maritime boundaries. But as courts have repeatedly refused to accept equidistance line as having any special status in comparison with other methods of delimitation, it would be unforeseeable to witness a complete comeback of pre-North Sea cases equidistance method.

A third approach is what Professor Johnston described as the tension between the facilitative function and the declaratory function of judicial tribunals.³⁸ Judges, academicians, and lawyers seem to disagree over whether to find equitable criteria through the judicial process, or to have the process create the criteria.³⁹ Johnston's view makes more sense because it is ultimately up to the courts that make the judgment. Therefore, the central question is what function courts should have in the process. Cases have shown that courts are not hesitant to play facilitative even creative function when faced with the uncertainties and confusion in the applicable rules. The danger is how far can we afford to allow courts to go in that direction.

While admitting the central role played by the concept of equity and equitable criteria derived from it, jurists opine that their scope of application must be assessed against the consideration of various factors. In particular, equity must increase its normativity by acting as a corrective norm. Weil's sharp observation has paved the way to a new and more practical conceptional approach to equity. However, Evans may be right in focusing more carefully on the identifications and functions of the relevant circumstances as an aspect of equity. This split between conceptual restructuring of equity and practical enrichment of equity reflects a fundamental difficulty in maritime delimitation: the lack of both predictability and certainty of the rules.

2(c) - Delimitation of the concept of equity

2(c)(i) - Distinction from *ex aequo et bono*

³⁷Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 180-182.

³⁸Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 210-211.

³⁹Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 210-211.

Equity, first of all, does not sanction recourse to rules outside the domain of law in resolving delimitation of maritime boundaries. There is a line which must be drawn unequivocally between applying the rule of equity and making decision *ex aequo et bono*. In the draft articles on delimitation of continental shelf adopted by the ILC in 1951, the continental shelf boundary must be established by agreement, and since there might be no general rules for such delimitation, if no agreement is reached, recourse may be had to arbitration *ex aequo et bono*.⁴⁰ After consultation with the Committee of Experts and discussions within the Commission, the Commission selected the method of equidistance as the treaty rule and abandoned the idea of settling the continental shelf boundary course by reference to arbitration *ex aequo et bono*.

When the ICJ explained with difficulty the concept of equity in the North Sea cases, it observed that equity rested on a broader legal basis:

"when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*"⁴¹

Again, the Court reemphasized this distinction in the Tunisia-Libya case:

"Equity as a legal concept is a direct emanation of the idea of justice..... Application of equitable principles is to be distinguished from a decision *ex aequo et bono*."⁴²

Uncertainty in attaching weight to various relevant considerations does not permit the Court to deliver its judgment with discretion outside the law or to try to bring about a settlement by conciliation.⁴³

Even though the rule of equity is very fluid and elastic, even though the acquisition of its parameters in a given case requires a concerted effort, its application is not the same as *ex aequo et bono*. However, equity must mean more than this in order to

⁴⁰Report of ILC, 3rd Session, 16 May-27 July 1951, Yearbook of ILC 1951. Vol. II, at 143.

⁴¹ICJ, Rep. 1969, para. 88.

⁴²ICJ Rep. 1982, para. 71, at 60.

⁴³ICJ Rep. 1982, para. 71, at 60.

acquire the character of legal rules with reliability and predictability.

2(c)(ii) - Distinction from applying abstract justice

Applying equitable principles in delimiting ocean spaces between sovereign States is not to be merely equalled with applying abstract justice, for equity, as a legal rule, requires the direct application of equitable principles.⁴⁴ These principles result in the following three specific rules:

1. the obligation to negotiate and to conduct a meaningful negotiation;
2. the obligation to take into account all relevant circumstances to ensure the application of equitable principles with various methods;
3. the obligation not to encroach upon the natural prolongation of another State.⁴⁵

The concept of equity in domestic law to abate the harshness and rigidity of the strict application of law is not paralleled in international law. On the contrary, there is a dearth of normative rules relating to maritime delimitation. The rule of equity, as understood in the field of maritime boundary delimitation, contains two elements: as directly applicable legal rule, and as a means to choose the interpretation most appropriate to the requirements of justice.⁴⁶

To find the real content of equity, one must search the various aspects of equity in maritime delimitation: legal principles, equitable criteria, relevant circumstances, and practical methods. The evolution of case law suggests that crystallization occurs in the application field not in the theoretical laboratory.

2(c)(iii) - Distinction from equality, distributive justice and refashioning nature

Although equity operates as a legal rule at the general level, applying directly to sea boundary delimitation, it also remedies the "disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by

⁴⁴ICJ Rep. 1969, para. 85.

⁴⁵North Sea cases, ICJ Rep. 1969, para. 85.

⁴⁶Tunisia-Libya case, ICJ Rep. 1982, para. 71, at 60.

geographical facts".⁴⁷ But it would strain the limits of equity if unequal geographical situations were treated as equal, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline.⁴⁸ The Court emphasized that these "natural inequalities could not be remedied by equity".⁴⁹

The Court rejected the argument of equitable apportionment and distributive justice, positing that the legal rights of a State over continental shelf were *ipso facto* and *ab initio*.⁵⁰ This view was endorsed in the Tunisia-Libya case.⁵¹ But does this view hold true with respect to the delimitation of EEZ the existence of which depends upon the positive declaration and action of the coastal States? Following this declaratory theory, tribunals have entered into an impasse of natural boundary dictated by nature which is constantly changing and hard to define.⁵² The trend has shown evident shift toward the preservation of those which are common to both shelf and EEZ and discarding of those that are unique to only one of them in their delimitation.⁵³

2(d) - Means versus end

As criticized by the Court in Tunisia-Libya case the term "equitable" is used to "characterize both the result to be achieved and the means to be applied to reach this result."⁵⁴ This duality is one source of confusion.

Maritime delimitation tries to achieve an acceptable and equitable result, but how to attain equitable requirements is paramount. While taking into account all relevant circumstances and

⁴⁷Anglo-French case, 1977, para. 101, at 68.

⁴⁸North Sea cases, ICJ Rep. 1969, para. 91.

⁴⁹North Sea cases, ICJ Rep. 1969, para. 91.

⁵⁰North Sea cases, ICJ Rep. 1969, paras. 18, 20.

⁵¹ICJ Rep. 1982, para. 71, at 60.

⁵²See Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 21-45.

⁵³For a recent study on this question, see Sharma, Surya P., "The Single Maritime Boundary Regime and the Relationship between the Continental Shelf and the Exclusive Economic Zone", 2 International Journal of Estuary and Coastal Law 203-226(1987).

⁵⁴ICJ Rep. 1982, para. 70, at 59.

factors, and selecting the appropriate practical method, one must remember that the aim is to satisfy the equitable requirements. As the ICJ stressed: seek one goal.⁵⁵ The point was reemphasized in the Tunisia-Libya case:

"It is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution."⁵⁶

This point was also affirmed by the same Court in the Libya-Malta case.⁵⁷

The articles in the Convention on the Law of the Sea on delimitation of shelf and EEZ, have resulted from political compromise that has been criticized as imprecise, circular reference, and empty.⁵⁸ Nonetheless, the replacement of equitable principles by equitable solution seems to signify the key position of the goal of equitable solution in delimitation.⁵⁹ The wording as appeared finally in the Third Law of the Sea Convention received the broadest possible support of the two competing camps: the equity group and the equidistance group.

An equitable solution requires an application of those equitable principles, using practical methods, in light of the relevant circumstances. Two points need emphasizing: (i) these means must be equitable judged by the attainment of an equitable solution and evaluated by the actual relevant circumstances; and (ii) the equitableness of a particular principle can only be measured by its usefulness in arriving at an equitable solution and

⁵⁵North Sea cases, ICJ Rep. 1969, para. 92.

⁵⁶ICJ Rep. 1982, para. 70, at 59.

⁵⁷ICJ Rep. 1982, para. 45, at 38-39.

⁵⁸"One might have expected more than a text that says nothing of significance while, worse still, trying to give a contrary impression by introducing unnecessary language and avoiding recognized terminology associated with the jurisprudence and scholarship on the subject." Oxman, Bernard H., "The Third United Nations Conference on the Law of the Sea: the Tenth Session (1981)", 76 American Journal of International Law 1-23(1982), at 14-15. Also see Attard, David, J., THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Pr., 1987, at 238; Tunisia-Libya case, ICJ Rep. 1982, separate opinions of Judge Oda, at 246, and Jimenez de Arechaga, at 108.

⁵⁹Tunisia-Libya case, ICJ Rep. 1982, para. 50, at 49.

by its helpfulness in a particular case. Thus, the Court pointed out in the North Sea cases that the real question is to define the means to carry out the delimitation in an equitable manner.⁶⁰

Endorsing these propositions, the Court stated in Tunisia-Libya case that equitable result cannot be achieved without taking into account the particular circumstances of the area.⁶¹

The Court recognized the duality of equity in the Libya-Malta case:

"even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application. This is precisely why the courts have, from the beginning, elaborated equitable principles as being, at the same time, means to an equitable result in a particular case, yet also having a more general validity and hence expressible in general terms."⁶²

Preferring the use of equitable criteria instead of equitable principles, the Special Chamber in the Gulf of Maine case declared that the highlighted principles are not in themselves principles and rules of international law.⁶³ "Their equitableness or otherwise can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible, to arrive at different, or even opposite, conclusions in different cases."⁶⁴

The confusion of judicial interpretation of equitable solution reveals both the lack of normative character of equity, and the particular facts-oriented approach. Development of legal rules can be made simultaneously at the level of the most abstract idea of equitable solution and at the level of equitable criteria, relevant circumstances, and practical methods.

2(e) - Equitable criteria

No complete list of the equitable criteria has emerged thus far. The Court, however, gave such an account as examples in two of its maritime delimitation cases. The Gulf of Maine case listed the following equitable criteria:

1. land dominates the sea;

⁶⁰ICJ Rep. 1969, para. 90, at 50.

⁶¹ICJ Rep., 1982, para. 72, at 60.

⁶²ICJ Rep. 1985, para. 45, at 39.

⁶³ICJ Rep. 1984, paras. 89, 158, at 292, 313.

⁶⁴ICJ Rep. 1984, para. 158, at 313.

2. equal division of the area of overlap;
3. non-encroachment principle;
4. avoidance of cut-off effect;
5. extent of coasts.⁶⁵

In the 1985 Libya-Malta case, the Court cited the following criteria:

1. no question of refashioning nature and geography;
2. non-encroachment principle;
3. principle of respect to all relevant circumstances;
4. equity is not necessarily equality;
5. no question of distributive justice.⁶⁶

The Chamber in the Gulf of Maine case distinguished between the basic criterion and the auxiliary criteria; it expounded the equal division of areas of convergence and overlapping as the basic criterion.⁶⁷ Three auxiliary criteria were singled out by the Chamber: (i) difference of the lengths of the respective coasts of the two parties, (ii) the non cut-off effect criterion, and (iii) the presence of islands.⁶⁸ The Chamber also stressed the need to adjust and flexibly apply the requirements of equity.⁶⁹ It explained the subtle difference between relevant circumstances (mainly geographical circumstances or features), equitable criteria, and legal principles. Equitable criteria are derived from equity, but are not themselves rules of international law.⁷⁰ These equitable criteria can be determined in relation to the geographical features of the delimitation area.⁷¹ The criterion advocated by the U.S. based on an ecological unity and a single management regime was rejected.⁷² However, there might be some ambiguity between the equitable criteria on the one hand and the relevant circumstances

⁶⁵ICJ Rep. 1984, para. 157, at 312-313. Extent of coasts should come under the heading of relevant circumstances not equitable criteria. The reason is that extent of coasts refer to a set of factual elements that can be ascertained. Logically, the lengths, irregularities (concavity and convexity), and general directions of coasts are closely associated with the physical geography.

⁶⁶ICJ Rep. 1985, para. 46, at 39-40.

⁶⁷ICJ Rep. 1984, para. 195, at 327.

⁶⁸ICJ Rep. 1984, para. 196, at 328.

⁶⁹ICJ Rep. 1984, para. 196, at 327.

⁷⁰ICJ Rep. 1984, para. 89, at 292.

⁷¹ICJ Rep. 1984, para. 59, at 278.

⁷²ICJ Rep. 1984, para. 168, at 317.

on the other. In his separate opinion, Judge Schwebel drew his own line and pointed out the possibility of multiple⁷³ ramifications flowing from the application of equitable criteria.

Ambiguity also comes from the equitable criteria which are associated more with the process of delimitation (for example, non-encroachment, or no refashioning nature) and the equitable criteria which are identified with the factual situation (for example, extent of coasts, and presence of islands). When trying to reformulate the fundamental rules governing every maritime delimitation, the Chamber stated:

In either case, delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.⁷⁴

But in another section, the Chamber approved the interchangeable use of "relevant circumstance" with that of "equitable criterion".⁷⁵ From the jurisprudence, it is not certain whether there is any material difference between equitable criteria and relevant circumstances. However, it is more logical not to mix the two in an abstract legal reasoning because not all equitable criteria are relevant circumstances. For instance, non-encroachment, respect to all relevant circumstances, and land dominates the sea are not relevant circumstances. They are principles derived from equity and have nothing to do with geographic or other relevant circumstances. The distinction between the two may be tenuous but it may be important for a tribunal to select. If a factor is an equitable criterion, according to the formulation of the applicable law by the Chamber, the tribunal is obliged to apply equitable criteria. On the other hand, if a factor is a relevant circumstance, the tribunal is obligated to consider it but not necessarily apply it. For the present purpose, it is more convenient to discuss them in separate chapters.

The above equitable criteria serve as examples, not as an exhaustive list. Such a list is not useful unless placed in the context of the relevant circumstances.⁷⁶ These criteria have been held by judicial and arbitral decisions and they have withstood the test of scholarly comments and investigation.

The Chamber dispelled some confusion arising from the ambiguity of using different phrases. Now, the elements involved

⁷³ICJ Rep. 1984, at 357-358.

⁷⁴Gulf of Maine case, ICJ Rep. 1984, para. 112(2), at 299-300.

⁷⁵Gulf of Maine case, ICJ Rep. 1984, para. 237, at 342.

⁷⁶Gulf of Maine case, ICJ Rep. 1984, para. 158, at 313.

in a maritime boundary delimitation include: (i) legal principles which are delimitation by agreement and delimitation by applying equity; (ii) equitable criteria that encompass one basic criterion if there is no special circumstance, and many more auxiliary criteria; (iii) relevant geographical features and other circumstances of the delimitation area; (iv) the practical methods that can effect equitable solutions dictated by the satisfaction of equitable criteria and requirements of legal principles on the basis of the physical geographical features and other factual circumstances.

2(f) - Balancing-up of various considerations

The idea of balancing up various considerations first appeared in an oft-quoted *obiter dictum* of the International Court in the North Sea cases:

"In fact, there is no legal limit to the considerations which States may take into account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to exclusion of all others."⁷⁷

The weight to be attached to each particular consideration will be decisive of the overall result, even though all relevant circumstances may be considered.⁷⁸

When commenting on the specific features of the Channel Islands, the Court of Arbitration in the Anglo-French case concluded that they called for "an intermediate solution that effects a more appropriate and a more equitable balance between the respective claims and interests of the Parties".⁷⁹ In Tunisia-Libya case, the Court viewed its task as "to apply equitable principles as part of international law and to balance up the various considerations which it regards as relevant in order to produce an equitable result".⁸⁰

The Chamber in the Gulf of Maine case, recognized the balancing process by holding that "international law requires... recourse be had in each case to the criterion or the balance of different criteria, appearing to be most appropriate to the

⁷⁷ICJ Rep. 1969, para. 93, at 50.

⁷⁸Blecher, M. D., "Equitable Delimitation of the Continental Shelf", 73 American Journal of International Law, 60 (1979), at 70.

⁷⁹Arbitral Award, 1977, para. 198, at 101.

⁸⁰ICJ Rep. 1982, para. 71, at 60.

concrete situation".⁸¹

The jurisprudence of international judicial decisions insist on the process to balance up the various circumstances and criteria to ensure the achievement of an equitable solution. But two outstanding difficulties remain unresolved: how to identify the relevance of a particular circumstance and criterion, and how to determine the weight to be given to each specific consideration.⁸²

Furthermore, in this balancing-up process that subjectivity may frequently occur. It is the mysterious "black box". Again, resort must be had to the identification of relevant circumstances and the weight attributed to them in accordance with equitable criteria.

3 - Summary

The concept of equity has underlain the rules, criteria, circumstances and methods in maritime delimitation. It has been recognized in judicial decisions as the supreme controlling device, concurrently as the collateral corrective tool in delimitation. There are still, however, uncertainties as to its future and its derivation. Only one thing is certain: any delimitation must find an equitable solution in the minimum.

Nevertheless, to demand merely an equitable result is not far from *ex aequo et bono*. The essence of equity in maritime delimitation reveals a fundamental difference in approaches to rule-making: one is to increase the normative content of equity (inclusive of legal principles, equitable criteria, relevant circumstances and practical methods); the other is to concentrate on identifying and selecting relevant circumstances. The former is more like rule-creating from the top and the latter rule-finding at the bottom.

International law has mapped out some rudimentary contour of equity both negatively and positively. Thus, negatively it is distinct from *ex aequo et bono*, from applying abstract justice, and from equality, distributive justice or refashioning nature. Positively, equity is expressed through some of the well-known equitable criteria: land dominates the sea, equal division of overlap, non-encroachment, cut-off effect, and respect for all relevant circumstances. However, it is still not clear whether there is any material significance in the difference between equitable criteria and relevant circumstances. Case law so far has

⁸¹ICJ Rep. 1984, para. 158, at 313.

⁸²Attard, D. J., THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, clarendon Press, 1987, at 275.

failed to make any clear distinction between the two concepts.

Equity dictates both means and ends. It also contains the balancing process. Little guidance from the courts has rendered uncertain the questions of how to select equitable criteria and relevant circumstances and what weight to accord to them.

PART 3

APPLICATION OF THE LAW TO THE GULF OF TONKIN

The question of the relevant area and its geometric shape will be discussed first. Whether the 1887 Sino-French Convention established a maritime boundary in the Gulf of Tonkin will be considered in Chapter VIII. Chapter IX will examine the issue of historic title and State conduct in the Gulf of Tonkin delimitation. This is followed by two Chapters dealing with the geographical circumstances and presence of islands. In view of the importance of the adoption of practical methods in the delimitation process, various methods that have emerged from State practice, judicial or arbitral decisions over the years will be examined in Chapter XII. Finally, a chapter is devoted to the check and balance device of proportionality as a substantive as well as procedural safeguard in preserving justice and equity in maritime delimitation.

CHAPTER VII
APPLICATION OF THE CONCEPT OF
DELIMITATION AREA
TO THE GULF OF TONKIN

Every boundary delimitation over ocean spaces has to be undertaken within certain geographical limits with respect to which the State parties have different or opposing positions. Sometimes only part of a State coast and the ocean space adjacent to it falls within the delimitation area. In some localities, the determination of the delimitation area becomes difficult and has great importance in the delimitation process.

In this Chapter, four issues will be discussed. They are the identification of the relevant coasts, the relationship between the relevant coasts, the determination of the delimitation area, and the geometric shape of the delimitation area.

1 - Identification of the Relevant Coasts

The first question to be dealt with is where the relevant coasts are. International judicial and arbitral decisions have laid down some guidelines as to how relevant coasts can be identified.

1(a) - Extent of overlapping

The extent of overlapping from projections of the land territories of contesting parties, which is the source of disputes, is determinative of the relevance of a particular coast. In the Anglo-French case, the area of delimitation, and hence the relevant coasts were defined by the parties as starting from 30 minutes west of Greenwich Meridian westward as far as the 1000 meter isobath.¹ The relevant coasts were formed by the British coast and French coast abutting on the English Channel, the Scilly and Ushant Islands to the Atlantic region, and the Channel Islands.

The International Court of Justice stressed in the Tunisia-Libya case that the coasts were the

¹Arbitration Awards, 1977, para. 1, at 29.

starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position.²

If the extension of part of the coast of one party did not overlap with the extension of the coast of another party, that part of the coast would be excluded from consideration for delimitation.³ The determining element was whether the extension of that part of the coast would have overlapped with that of another party. The coasts north of Ras Kaboudia and east of Ras Tajoura in the Court's opinion, had no overlap from their extension and hence ceased to have relevance to the delimitation in that case.

In the Libya-Malta case, it was found that the whole coasts of Malta facing Libya and the coasts of Libya from Ras Ajdir to Ras Zarruq formed the relevant coast.⁴ The Italian claim also had an impact on the determination of the relevant coast on the Libyan side.⁵

In the case of a bay or gulf, if the delimitation is to be effected within the bay or gulf, the question will be transferred to a determination of the closing line for the bay or gulf. Because in their special agreement, the United States and Canada had reached a consensus as to the closing line of the Gulf of Maine, the delimitation process within the closing line of the Gulf passed the stage of ascertaining which part of the coast was relevant.⁶

The closing line for delimitation purposes in a bay or gulf is significant for a number of reasons. First, the closing line will determine the inner zone of the gulf proper which forms one of the delimitation areas. Secondly, the closing line will have a significant impact on the calculation of the lengths of coasts for the purposes of weighing as a relevant circumstance and acting as a factor in the proportionality test. Lastly, the closing line will set the primary reference parameter for delimitation in the outer zone of the gulf.

1(b) - Closing lines of the Gulf of TonKin

The question in the Gulf of Tonkin is where naturally the Gulf

²Tunisia-Libya case, ICJ Rep. 1982, para. 74, at 61.

³ICJ Rep. 1982, para. 75, at 61-62.

⁴ICJ 1985, para. 68, at 50.

⁵ICJ Rep. 1985, para. 68, at 50; para. 22, at 26.

⁶Gulf of Maine case, ICJ Rep. 1984, para. 34, at 270.

ends and merges with the waters of the South China Sea and how the closing line should be drawn.

The rules on natural entrance points and closing line for bays are formulated with a view of drawing a closing line to the bay so as to claim the waters inside as internal waters either on the basis of historical title or Article 7 of the 1958 Territorial Sea Convention and Article 10 of the 1982 Law of the Sea Convention. But there is no legal hindrance which will prevent the use of such definition for the purpose of delimiting a general maritime boundary. However, the concern of identifying natural entrance points and drawing the closing line in delimiting long-distance maritime boundary differs from that in dividing the internal waters from territorial sea or from high seas. In the former, because coastal States only exercise sovereign rights, not complete sovereignty, the tension is between the coastal States abutting on the bay in question. In the latter, the tension is between the coastal State and the world maritime community at large because the waters within the closing line would be subject to the regime of internal waters of the coastal State.

1(b)(i) - Natural entrance points

The first issue is how to define the points by which the entrance of the bay is determined. According to Shalowitz, the **natural entrance points** for most bays would be the mainland headlands, which was either the apex of a salient of the coast, the point of maximum extension of a portion of the land into the water, or a point on the shore at which there was an appreciable change in the general direction of the coast.⁷ In his treatise on bays, Strohl defined **natural entrance points** as the points at which the coastline could most reasonably be said to turn inward to form an indentation or bay.⁸ As to the other terms used to describe the entrance of bays, such as mouth of the bay, headlands, and *inter fauces terrae*, he felt that they were inadequate in conveying the idea of bay as understood in the law of the sea.⁹ In a recent monograph on the regime of bays, the **natural entrance points** are defined as "those points along the shore at which the sea turns inward toward the land, thus forming a well-marked and land-locked

⁷Shalowitz, A., SHORE AND SEA BOUNDARIES, Washington, Government Printing Office, 1962, at 63-64.

⁸Strohl, Mitchell P., THE INTERNATIONAL LAW OF BAYS, The Hague, Martinus Nijhoff, 1963, 426p., at 68.

⁹Strohl, Mitchell P., THE INTERNATIONAL LAW OF BAYS, The Hague, Martinus Nijhoff, 1963, 426p., at 68.

indentation."¹⁰

There is largely a consensus on the definition of natural entrance points by which the closing line of the bay is drawn. In the first place, there must be an appreciable change of general direction of the coast at the points and the direction must be inward toward land. Secondly, such inward change of directions at these points must result in a well-marked and land-locked indentation. Features which can be taken as natural entrance points must possess both characters.

Turning to the situation in the Gulf of Tonkin, it must be borne in mind that there are two openings in the Gulf: the grand entrance between Vietnam and China and the Qongzhou Strait between China mainland and Hainan Island. Since Qongzhou Strait is entirely bordered by China on both sides, the question of the closing line will only arise in calculation of the length of coasts of China adjacent to the Gulf. Our concern here mainly relates to the grand entrance between Vietnam and China because it is this entrance which will determine the delimitation area in the Gulf and a line of delimitation must terminate on this closing line somewhere in the entrance. The Qongzhou Strait entrance will be relevant to the calculation of the length of the coast.

According to the two criteria outlined above, there are several salient points on both coasts of Hainan Island of China and Vietnam in the grand entrance. The salient points on Hainan Island facing Vietnamese coast from north to south include Yingge Tsu, Chinmu Chiao, and Tahua Chiao. The salient points on Vietnamese coast facing the southwestern coast of Hainan Island from north to south are Mui Ron, Cap Lay, Mui Da Nang, and Mui Batangan (see the underlined places on Map 4 at page 26 and Map 7 at page 124).

1(b)(ii) - Closing lines

A closing line was defined by Strohl as "the line marking the boundary between the internal waters of a bay and the marginal belt. It was used where the boundary was drawn between the natural entrance points."¹¹ In the opinion of Westerman, a closing line was the "imaginary line drawn across the mouth of a bay for boundary delimitation purpose." He explained such a closing line as separating the internal waters from the other regime of national

¹⁰Westerman, Gayl S., THE JURIDICAL BAY, New York, Oxford University Press, 1987, at 112.

¹¹Strohl, Mitchell P., THE INTERNATIONAL LAW OF BAYS, The Hague, Martinus Nijhoff, 1963, 426p., at 68.

or international jurisdiction.¹²

That selection of the closing line for delimitation purpose has great impact on how the boundary line would run was noted in American in the context of the federal State between constituent states.¹³ Its importance in international maritime delimitation has not been seriously addressed yet.

The considerations which have relevance to the drawing of a closing line for the purpose of delimitation rather than delineation can be stated to include, (i) the location of natural entrance points, (ii) the difference of choice of equitable criteria, relevant circumstances, and practical methods in delimiting the boundary between the inner zone and the outer zone, (iii) the coverage of all delimitation boundaries by all possible relevant coasts in the bay, and (iv) the positions of the parties involved as to the drawing of the closing line.

(1) - Closing lines for grand entrance between Vietnam and China

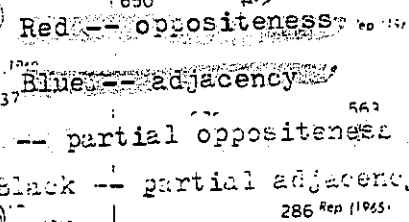
The Chinese position on the closing line for the grand entrance in the Gulf of Tonkin is indeterminate and ambivalent. However, an introductory textbook on adjacent seas around China regards the line connecting Yingge Tsu on the Island of Hainan and Cap Lay and Con Co Island on the coast of Vietnam as the closing line for the Gulf (see Line 2 of Map 7).¹⁴ There are several other suggestions by Chinese hydrographers and jurists. The first of these appears to take the straight line between Chinmu Chiao on Hainan Island and Mui Da Nang on Vietnamese coast as the closing line (see Line 4 of Map 7). Another possible closing line is the line linking Chinmu Chiao on Hainan Island and Cap Lay on Vietnamese coast (see Line 3 of Map 7). The last suggestion consists of the straight line between Yingge Tsu on Hainan Island

¹²Westerman, Gayl S., THE JURIDICAL BAY, New York, Oxford University Press, 1987, at 5, note 6.

¹³The case is Georgia v. South Carolina, 257 U.S 516. Also see Barmeyer, Patricia T., "Litigation of State Maritime Boundary Dispute", in Dallmeyer, Dorinda G. and DeVorse, Louis Jr. eds., RIGHTS TO OCEANIC RESOURCES -- Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989, 207p, at 56-57.

¹⁴Sun, Xiangping, WOGUO DE HAIYANG, in Chinese, Beijing, Commercial Press, 1985, 213p, at 4.

VIETNAM



and Mui Ron on Vietnamese coast (see Line 1 of Map 7).¹⁵

There is no direct information available as to the position of Vietnam on the natural entrance points and the closing line of the Gulf. However, in Vietnam's Declaration on Baseline of Territorial Waters of 1982, the baseline from Con Co northward was intentionally left undecided until the settlement of the question of the opening line of the Gulf.¹⁶ It can be reasonably inferred that Vietnam contemplates that the closing line of the Gulf will be somewhere either across or north of Con Co. And between Con Co and Baie du Brandon, the most salient points along the Vietnamese coast are Cap Lay and Mui Ron. Where the closing line will be drawn is still speculative.

The South China Sea Fisheries Development and Coordinating Programme under Food and Agriculture Organization (FAO) of the United Nations used the line between Yingge Tsu and Cap Lay as the closing line (Line 2 of Map 7) in its grand entrance and the line between Chiaowei Chiao and Linkao Chiao as the closing line in Qongzhou Strait in the Gulf of Tonkin.¹⁷ In his article on marine regions, Morgan classified the Gulf of Tonkin as a separate marine region by enclosing the Gulf from Chinmu Chiao on Hainan Island to Mui Da Nang on the Vietnamese coast (see Line 4 of Map 7), with the whole Qongzhou Strait being included.¹⁸

Theoretically, however, for the purpose of delimitation the line linking Tahua Chiao on Hainan Island and Mui Batangan on Vietnamese coast can also be the closing line for the Gulf (see Line 5 of Map 7). The question then becomes which of the above closing lines will best satisfy all the considerations in a closing line for delimitation purpose in a bay or gulf.

The shortest closing line for the grand entrance is from Yingge Tsu to Cap Lay (121.8 nautical miles) (see Line 2 of Map 7). This is also the line adopted in the Chinese introductory

¹⁵Private correspondence (letter dated December 15, 1988) with a Chinese authority on the law of the sea from Institute of International Law, Academy of Social Sciences of China.

¹⁶LIMITS IN THE SEAS, No. 99.

¹⁷Aoyama, Tsuneo, THE DEMERSAL FISH STOCKS AND FISHERIES OF THE SOUTH CHINA SEA, United Nations Development Programme, Rome, 1973, at 9.

¹⁸Morgan, Joseph, "Marine Regions and Regionalism in Southeast Asia", 8 Marine Policy 299-310(1984).

textbook on sea around China¹⁹ and in the FAO South China Fisheries Programme.²⁰ Vietnam's Declaration on Straight Baselines (1982) also contemplated this line as the closing line.²¹ But this line would leave part of the coasts on Hainan Island and on Vietnamese coast south of this line still facing each other and another boundary delimitation has to be undertaken to remedy the leftover. From a judicial viewpoint, the inclusion of all possible relevant coasts in the Gulf is desirable. Furthermore, the relationship between the Chinese coast and the Vietnamese coast is still obviously opposite, facing each other down from this line in the Gulf.

The two lines between Yingge Tsu and Mui Ron (see Line 1 of Map 7) and between Chinmu Chiao and Cap Lay (see Line 3 of Map 7) also suffer from the same defects as the line between Yingge Tsu and Cap Lay because they leave some coasts facing each other in an opposite situation out of the delimitation area in the Gulf.

The next line to be considered is the straight line connecting Chinmu Chiao and Mui Da Nang (see Line 4 of Map 7). These two capes falls clearly under the definition of the natural entrance points. They also mark significant change in coastal relationship from that of complete oppositeness to that of partial oppositeness, using the term employed in the Anglo-French Case. In that case, in rejecting the argument that the coasts of the Parties in the Atlantic region was opposite, the Arbitration Court observed that "although separated by some 100 miles of sea, their geographical relation to each other" was still one of lateral rather than opposite coasts.²²

This line (Line 4 of Map 7) was among the possible closing lines suggested by Chinese hydrographers and jurists.²³ But Vietnam clearly did not regard this line as the closing line of the Gulf. In its 1982 Declaration on the Territorial Sea Baselines, Vietnam stated "the baseline from Con Co Island to the mouth of the gulf will be defined following the settlement of the problem relating

¹⁹Sun, Xiangping, WOGUO DE HAIYANG, in Chinese, Beijing, Commercial Press, 1985, 213p, at 4.

²⁰Aoyama, Tsuneco, THE DEMERSAL FISH STOCKS AND FISHERIES OF THE SOUTH CHINA SEA, United Nations Development Programme, Rome, 1973, at 9.

²¹LIMITS IN THE SEAS, No. 99.

²²Anglo-French Arbitration, 1977, para. 233, at 117.

²³Private correspondence (letter dated December 15, 1988) with a Chinese authority on the law of the sea from Institute of International Law, Academy of Social Sciences of China.

to the closing line of the Gulf".²⁴ The reason behind Vietnam's rejection lies in that the Convention line (Meridian 108°3'E of Greenwich) would reach Vietnam's shore in its southern terminus. By confining the closing line to the north of or on Con Co Island, Vietnam can take full advantages of the claim based on the 1887 Convention line.

Geographically, however, the line between Chinmu Chiao and Mui Da Nang (Line 4 of Map 7) seems to enclose the gulf properly. For the purpose of delimitation, this line only leaves the coasts with partial oppositeness out of the delimitation area. That part of the area bordered by coasts with partial oppositeness will call for different set of equitable criteria, have different relevant circumstances and use different practical methods in its delimitation. Besides, the effect of the Paracels Archipelago will be taken into account in that part of the sea. On balance, therefore, it seems that for the purpose of delimitation, the closing line for the grand entrance of the Gulf of Tonkin should be the line connecting Chinmu Chiao and Mui Da Nang (see Line 4 of Map 7).

The last line to be examined is the line linking Tahua Chiao on Hainan Island and Mui Batangan on Vietnamese coast (see Line 5 of Map 7). This line marks the transition from partial oppositeness to complete "adjacency" facing the open waters in the South China Sea. However, the two capes linking the line do not fit into the definition of natural entrance points comfortably because they do not mark the significant change of coastal direction inward toward land. The partial oppositeness also calls for different set equitable criteria, different relevant circumstances, and different practical methods. Moreover, there is no indication from either China or Vietnam that this line could ever become the closing line for the grand entrance of the Gulf. However, the area enveloped by the line between Chinmu Chiao and Mui Da Nang (Line 4 of Map 7) and by the line between Tahua Chiao and Mui Batangan (see Line 5 of Map 7) can be distinguished from the area lying completely off the coasts of China and Vietnam. Therefore, it is open for China and Vietnam to treat this area differently from the area lying outside this line.

A further observation is that Vietnam and China may further define the delimitation area by enclosing more open waters outside the closing line of the Gulf, as Canada and the United States did

²⁴STATEMENT BY THE GOVERNMENT OF THE SOCIALIST REPUBLIC OF VIETNAM ON THE TERRITORIAL SEA BASELINE OF VIET NAM, November 12, 1982, UN Doc. A/37/697.

in the Gulf of Maine case.²⁵ But a complicating factor, the dispute over territorial sovereignty and maritime boundary over and around Paracels Archipelago, will come into play once the delimitation area extends beyond the line between Tahua Chiao and Mui Batangan (Line 5 of Map 7).

(2) - Closing lines for Qongzhou Strait

The second group of closing lines in the Gulf of Tonkin must be drawn with respect to Qongzhou Strait. There are two possible closing lines here. One closes the west end of Qongzhou Strait and the other the east end.

The question of a body of waters such as a bay or a strait which lies entirely within the coasts of one State in a large bay or gulf where two States are contesting for maritime boundary has been fairly dealt with by the Special Chamber of ICJ in the treatment of the Bay of Fundy in the Gulf of Maine case.²⁶ A distinction must be drawn, however, in the use of such a body of waters and its coasts between for the purpose of determining the geometric shape of the delimitation area and for the purpose of calculating the length of the coasts.²⁷ The Chamber concluded that there is no justification for the idea that if a fairly substantial bay opening on to a broader gulf is to be regarded as a part of it, its shores must not all belong to the same State.²⁸

For the purpose of calculating the length of the coasts, the imaginary line across the bay is to be disregarded. But in the case of Qongzhou Strait, it is not a bay but a passage of waters. Though China regarded the strait as internal waters, foreign commercial vessels and warships have been allowed to sail through subject to a prior notice requirement. There is no doubt that the strait falls within the "strait used for international navigation" under Article 37 of the UN Convention on the Law of the Sea.²⁹ Unlike the treatment of the Bay of Fundy in the Gulf of Maine case, the

²⁵ICJ Rep. 1984, para. 5, at 253.

²⁶ICJ Rep. 1984, paras. 31, 184, 221, at 268-270, 322-323, and 335-336.

²⁷Gulf of Maine case, ICJ Rep. para. 31, at 268-270.

²⁸Gulf of Maine case, ICJ Rep. para. 221, at 335-336.

²⁹Straits used for international navigation are straits "between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone".

closing line of the east end of the Strait facing the South China Sea should not be included in the actual calculation of the coastal lengths, while the closing line on the west end can be taken as the imaginary line for the purpose of determination of geometric shape of the delimitation area. This is particularly justifiable in light of the 1958 Declaration on Territorial Sea by China which enclosed the whole strait as internal waters of China.³⁰ The strait was enclosed by lines on both ends for the purpose of regulating passage of ships.³¹

China has determined that the width of her territorial sea is twelve miles measured from straight baselines. In view of the position taken by the Chamber in the Gulf of Maine case with regard to the calculation of coastal length in the Bay of Fundy,³² it seems logical to measure from the outlines of the 12 mile territorial sea limit notwithstanding the claim by China that the entire Qongzhou Strait falls under the regime of internal waters.³³

There are two possible closing lines for the eastern entrance of Qongzhou Strait. In the Chinese Qongzhou Strait Regulations, the straight line linking Mulan Tou (20°9'37" N, 110°41' E) and Shengkouhou Sha (20°26'N, 110°30'22"E) was adopted as the closing line for the eastern entrance.³⁴ In the LIMITS IN THE SEAS, the line linking Mulan Tou and Niupi Chiao was indicated on the map as the hypothetical closing line for the eastern entrance.³⁵ These two proposed lines essentially run the same course. Therefore, the closing line on the eastern entrance is adopted for the purpose of determining the relevant coasts of the Qongzhou Strait as the line connecting Niupi Chiao with Mulan Tou.

The closing line on the western end facing the Gulf of Tonkin

³⁰LIMITS IN THE SEAS, Straight Baselines of People's Republic of China, No. 43, at 1.

³¹QONGZHOU STRAIT REGULATIONS (1964), in Lay, S.H. and Nordquist N., NEW DIRECTIONS IN THE LAW OF THE SEA, Vol. II, 1973, at 549.

³²Gulf of Maine case, ICJ Rep. para. 221, at 335-336.

³³Canada has claimed that the waters in the Bay of Fundy are historic waters. See Cooper, John, "Delimitation of the Maritime Boundary in the Gulf of Maine Area", 16 Ocean Development and International Law 59-90(1986), at 83.

³⁴QONGZHOU STRAIT REGULATIONS, in Lay, S.H. and Nordquist N., NEW DIRECTIONS IN THE LAW OF THE SEA, Vol. II, 1973, at 549.

³⁵LIMITS IN THE SEAS, Straight Baselines of People's Republic of China, No. 43, accompanying map.

for the purpose of determining the geometric shape of the delimitation area should follow the rules by and large applicable to the closing line in the grand entrance of the Gulf. The line connecting the natural entrance points should be taken as the closing line of the strait on its western end. In the Chinese regulation on Qongzhou Strait, the line between Chiaowei Chiao (20°13'30"N, 109°55'30"E) and Linkao Chiao (20°0'22" N, 109°42'6" E) was used as the closing line for the western entrance.³⁶ In the LIMITS IN THE SEAS, the line between Tenglou Chiao and Linkao Chiao was drawn to show the hypothetical straight baseline of China on the western entrance of Qongzhou Strait.³⁷ Because there is no substantial difference between the two lines above, for the purpose of determining the geometric shape of the delimitation area, the line linking between Chiaowei Chiao and Linkao Chiao as the closing line on the western entrance of Qongzhou Strait.

It is regrettable that in most of the literature on delimitation the drawing of closing line for the purpose of delineating internal waters and the drawing of closing line for the purpose of delimiting continental shelf or EEZ have not been adequately distinguished.

2 - Relationship Between the Relevant Coasts

Both opposite and adjacent relationships between the relevant coasts are existent in the Gulf of Tonkin.

2(a) - General

The 1958 Convention made distinctive provisions for these two situations. Because of the different geographical situations, the equitable requirements call for different methods to effect the delimitation. In the North Sea case, the Court observed the appropriateness of the median line in opposite situation and the danger of using equidistance line in the adjacent case.³⁸

In the Anglo-French case, the Court of Arbitration elucidated the two situations by stating that "the relationship of 'opposite' or 'adjacent' States is nothing but a reflection of the

³⁶QONGZHOU STRAIT REGULATIONS, in Lay, S.H. and Nordquist N., NEW DIRECTIONS IN THE LAW OF THE SEA, Vol. II, 1973, at 549.

³⁷LIMITS IN THE SEAS, Straight Baselines of People's Republic of China, No. 43, accompanying map.

³⁸ICJ Rep. 1969, para. 57-58, at 89.

geographical facts."³⁹ That the difference was from geographical facts and not from any legal theory was reemphasized later in the decision.⁴⁰ These two situations are regarded as comprehensive and all geographical situations will fall under Article 6 as interpreted by the Arbitral Court.⁴¹

Two relationships must be considered to determine the relationship of the relevant coasts between the parties. One is the relationship of States to each other and the other is the relationship of the State to the continental shelf off its coasts.⁴² The Special Chamber in the Gulf of Maine envisaged the possibility of "partial relationship of adjacency" and "partial relationship of oppositeness".⁴³ The Chamber had this warning:

difficulties might arise, of a practical nature in particular, since every effort should be made to prevent the partial relationship of adjacency from ultimately dominating over the partial relationship of oppositeness, or vice-versa.⁴⁴

This point is particularly relevant in the Gulf of Tonkin because of the complex relationship between the coasts of Vietnam and China.

2(b) - In the Gulf of Tonkin

In the Gulf of Tonkin, both opposite and adjacent situations, as well as quasi or partial adjacency or oppositeness exist. The situation of adjacency or oppositeness is a fact of nature. While partial oppositeness or partial adjacency is more difficult to classify.

Like the Gulf of Maine, the land boundary terminus (Tra Co) marks the change of the general direction of the coast with a 40° degree bearing in the Gulf of Tonkin. Nevertheless, the coasts on both sides of Tra Co still have an adjacent relationship (from Tra Co to Kuantou Chiao on the Chinese coast) (see Blue Line of Map 7).

As the hypothetical delimitation line starting from Tra Co projects more seaward, the coast of from Kuantou Chiao to Yinglo Chiang has a partial adjacency with the coast from Tra Co to Hon

³⁹Arbitral Award, 1977, para. 95, at 66.

⁴⁰Arbitral Award, 1977, para. 238, at 119.

⁴¹Arbitral Award, 1977, para. 94, at 65.

⁴²Arbitral Award, 1977, para. 206, at 105.

⁴³ICJ Rep. 1984, para. 187, at 324.

⁴⁴ICJ Rep. 1984, para. 187, at 324.

Dau (see Black Line of Map 7).

The coast from Yinglo Chiang to Chiaowei Chiao is closer to oppositeness than to adjacency with the coast from Tra Co to Hon Dau. This is the partial opposite relationship as distinct from partial adjacent relationship (see Green Line of Map 7).

Stretching further seaward, the line will reach a midpoint between the coast from Tra Co to Hon Dau and the coast from Linkao Chiao to Tachiao Tou. The relationship changes from partial oppositeness to complete oppositeness. A roughly parallel complete opposite relationship continues till the closing line of the Gulf between Mui Da Nang and Chinmu Chiao (see Red Line of Map 7).

The coast between Mui Da Nang and Mui Batangan and the coast between Chinmu Chiao and Tahua Chiao change from that of complete oppositeness to that of partial oppositeness. However, this is out of the concern of the present study (see Green Line of Map 7).

To capture what has been said, there are four types of coastal relationships in the Gulf of Tonkin. First, a complete adjacency exists near Tra Co on both sides of the coasts as far as Kuantou Chiao on the Chinese coast. Secondly, this complete adjacency gradually gives way to a partial adjacent situation from Kuantou Chiao to Yinglo Chiang on the Chinese coast with the Vietnamese coast from Tra Co to Hon Dau. Thirdly, this partial adjacency is replaced by a partial oppositeness from Yinglo Chiang to Chiaowei Chiao on the Chinese coast with the corresponding Vietnamese coast. Fourthly, a complete oppositeness starts from Linkao Chiao on the Chinese coast till the closing line of the Gulf.

The significance of this characterization lies in that the classification calls for some specific method of delimitation at one sector and another method in another sector. Also the consideration of equitable criteria and the relevant circumstances may change from sector to sector.

In the Gulf of Tonkin, the basic equitable criteria, namely, the equal division of overlap of coastal projection, clearly calls for a bisector line method in the adjacent part of the coastal relationship. This bisector line can continue until the coastal relationship changes from that of partial adjacency to that of partial oppositeness. But this line will not create significant inequity if it continues until the point where the coastal relationship changes from that of partial oppositeness to that of complete oppositeness. Once the relationship becomes complete opposite, absent other unusual circumstances, the median line will apply. The specific method to effect the median line can be a simplified or a strict equidistance method.

3 - Determination of the Delimitation Area

The area to be delimited must be unmistakably defined. Based on physical background, the concept connotes legal significance. Defining the delimitation area as precisely as possible constitutes the first step in a legal inquiry of any maritime boundary case.

The main propositions are found in the Tunisia-Libya case when the Court stated:

It is evident that the first and most essential step in this respect is to determine with greater precision what is the area in the area in dispute between the Parties and what is the area which is relevant to the delimitation.⁴⁵

The area in dispute was that part which lies both off Libyan and Tunisian coasts.⁴⁶

After rejecting the unwarranted extension of coastal wings for the Gulf of Maine, the Chamber in the Gulf of Maine case sanctioned the concept by declaring:

it is ultimately only the concept of the delimitation area which is a legal concept, albeit one developed against the background of physical and political geography.⁴⁷

In the Libya-Malta case, the delimitation area is at least partly defined by the claims of a third party.⁴⁸ Judges Mosler and Schwebel dissented on this point.⁴⁹ Professor Charney observed that the "difficulty with this approach is that it may require consideration of the boundaries with third States".⁵⁰ Professor Weil also criticized the approach by stating that the "aims of a third State actually determined the extent and scope of the judicial function and set limits on the judicial settlement sought by the

⁴⁵ICJ Rep. 1982, para. 72, at 61.

⁴⁶ICJ Rep. 1982, para. 74, at 61.

⁴⁷ICJ Rep. 1984, para. 41, at 272.

⁴⁸ICJ Rep. 1985, para. 22, at 26.

⁴⁹ICJ Rep. 1985, Dissenting Opinion of Judge Mosler, at 115; Dissenting Opinion of Judge Schwebel, at 172.

⁵⁰Charney, Jonathan, "The Delimitation of Ocean Boundaries", 18 Ocean Development and International Law 497-532(1982), at 516.

parties".⁵¹ The approach is indeed questionable.

It is not necessary in every case to define the delimitation area, partly because the delimitation area is prima facie obvious and partly because it is geographically impossible.⁵²

Since the question of the closing line for the Gulf of Tonkin has been resolved, it is moot to pursue this question further. The remaining task is to describe the Gulf in geometric terms.

4 - Geometric Shape of the Delimitation Area

Faced with complex geographical situations, courts tend to describe the delimitation area in a geometric form by simplifying the coastline geography.⁵³

The Chamber in the Gulf of Maine case described the gulf as a roughly rectangular indentation, bordered on three sides by land and one side by ocean.⁵⁴ The continuous bays of Cape Cod and Massachusetts lie along the west side and the Bay of Fundy opens out at the inner end of the eastern side. The coasts of Massachusetts and Nova Scotia form the short opposite sides of the rectangle, while the shore of Maine, at the back of Gulf constitute the long side of the rectangle.⁵⁵ This geometric form becomes the basic framework of the delimitation in the decision.

In the Guinea--Guinea-Bissau case, after considering the arc of the circle, polygon, and maritime facade, the Arbitral Tribunal chose the maritime facade as the appropriate working geometric shape to effect the delimitation.⁵⁶ Charney suggested that once the geometric form is chosen, the boundary line should be drawn toward

⁵¹Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 255.

⁵²Charney, Jonathan, "The Delimitation of Ocean Boundaries", 18 Ocean Development International Law 497-532(1982), at 515.

⁵³Charney, Jonathan, "The Delimitation of Ocean Boundaries", 18 Ocean Development and International Law 497-532(1982), at 515.

⁵⁴ICJ Rep. 1984, para. 34, at 270.

⁵⁵ICJ Rep. 1984, para. 35, at 271.

⁵⁶Arbitral Award between Guinea--Guinea-Bissau, 1985, paras. 109-111.

the centre of the form.⁵⁷

Turning to the Gulf of Tonkin, a roughly irregular polygon exists. The sides of the polygon are formed by the lines consisting of Tra Co -- Hon Dau -- Cap Chao -- Mui Ga -- Cap Lay -- Mui Da Nang on the Vietnamese coast, and of Tra Co -- Kuantou Chiao -- Yinglo Chiang -- closest tip to Xieyang Dao -- Chiaowei Chiao -- Linkao Chiao -- Pingma Chiao -- Tachiao Tou -- Yingge Tsu -- Chinmu Chiao. The closing line between Mui Da Nang and Chinmu Chiao forms another side of the polygon. Except in the northeastern side of the Gulf, the coast of Vietnam southwest of Tra Co and the coast of Hainan southwest of Linkao Chiao run parallel to each other in an opposite situation till the Gulf merges with the South China Sea beyond the closing line. This is the most conspicuous characteristic of the delimitation area.

5 - Summary

The questions of relevant coasts and the delimitation area become the question of determining the closing lines in the Gulf of Tonkin. Measured by the change of directions and the inward formation of well-marked and land-locked indentation, the natural entrance points in the Gulf of Tonkin are Yingge Tsu, Chinmu Chiao, and Tahua Chiao on the Chinese coast, and Mui Ron, Cap Lay, Mui Da Nang, and Mui Batangan on the Vietnamese coast.

The considerations to determine the closing lines for the purpose of delimitation include (1) the location of the natural entrance points, (2) the difference of choice of criteria, circumstances, and methods of delimitation between the inner zone and the outer zone, (3) the coverage of all delimitation boundaries and relevant coasts, and (4) the position of the parties. The line connecting Mui Da Nang and Chinmu Chiao satisfies better than any other closing lines the requirements to be a closing line in the Gulf of Tonkin. The closing line in the Qongzhou Strait's west end is decided as the line between Niupi Chiao and Mulan Tou for the purpose of calculating the length of coasts. The closing line in the Qongzhou Strait's east end is decided as the line between Chiaowei Chiao and Linkao Chiao for the purpose of determination of the geometric shape of the delimitation area.

The classification of coasts as adjacent or opposite, partial adjacent or partial opposite has great importance in selecting the appropriate practical methods and in determining the applicable equitable criteria. In particular, the dominance by one situation over another is to be avoided. The geographical circumstances are

⁵⁷Charney, Johnathan I., "The Delimitation of Ocean Boundaries", in Dallmeyer, D.G. and DeVorse, L. Jr., eds., RIGHTS TO OCEANIC RESOURCES -- Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989, 25-49, at 40.

such that there are four types of relational situations in the Gulf of Tonkin. The coasts from Tra Co to Kuantou Chiao has a complete adjacency with the Vietnamese coast from Tra Co to Hon Dau. This adjacent relationship gives way to partial adjacency from Kuantou Chiao to Yinglo Chiang. From Yinglo Chiang to Chiaowei Chiao, the coasts become partial opposite. Finally, from Linkao Chiao to the closing line of the Gulf, a complete oppositeness exists.

The Gulf of Tonkin takes a shape of polygon. The coasts of China and those of Vietnam run parallel to each other in a complete opposite situation for the most part of the Gulf, except in the northeast corner where the coasts take several sides of the polygon.

CHAPTER VIII
RELEVANCE OF THE 1887
SINO-FRENCH BOUNDARY CONVENTION

A complicating factor in the Gulf of Tonkin dispute relates to the status and role to be given to a pre-existing treaty, and the subsequent State conduct in proving or disproving the line established by the treaty. A preliminary remark can be made to the effect that international law does not lay down rigid rules regarding existing treaties and the boundaries therefrom. Depending upon the circumstances, each individual case may receive its particular solution.

1 - Existing Treaties as a Basis for Maritime Boundary

There have been, thus far, no uniform rules in customary international law on the treatment of assertions and claims based on pre-existing treaties. The only absolute requirement is to satisfy the elements of equity. There have been very few maritime boundaries settled before the emergence of the continental shelf regime.

1(a) - State practice

There are cases where maritime boundaries have been based on existing treaties. For instance, the territorial waters between Singapore and Johore were separated by a treaty between Britain and Johore in 1928.¹ The maritime boundary between Brunei and Sabah and Sarawak were decided by the United Kingdom in 1958. In both cases, the boundaries were later recognized or accepted by the States concerned.² The United States and Great Britain separated their respective possessions of islands in Malaysia and the

¹Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1975, at 415-417.

²Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 82.

Philippines by a treaty in 1930.³ The lines have been incorporated into the Philippine maritime claims and accepted by the Malaysian Government.⁴ The maritime boundaries established by Indonesia and Australia in 1971 and 1973 were expressly accepted by Papua New Guinea when it achieved independence.⁵ On June 1, 1990, the Soviet Union and the United States signed an agreement to delimit their maritime boundary in the Bering Strait and Chukchi Sea by the express acceptance of the "western limit" defined in Article 1 of the 1867 Russia-U.S. Convention.⁶

1(b) - Judicial and arbitral decisions

Two international decisions have dealt with the question of pre-existing treaty as the basis of maritime boundary.

1(b)(i) - Tunisia-Libya case

When Tunisia and Libya argued their cases on grounds of geography, geomorphology, geology, historical fishing rights and economic considerations, the International Court found in the Tunisia-Libya case that the line set up by their former colonial powers was very relevant to the case and was given considerable weight (see Map 8).

Acknowledging the difficulties presented by the absence of any maritime boundaries between Libya and Tunisia, the Court regarded relevant the 1910 Convention between France and Italy on behalf of Tunisia and Libya because it established the land frontier and its intersection with the coastline, Ras Ajdir.⁷ Although it found that the ZV 45° line proposed by Tunisia was not opposable to Libya and the Petroleum Law of Libya of 1955 was not opposable to Tunisia, the Court did recognize the relevance of the line with a bearing

³Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 214.

⁴Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 214.

⁵Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 82.

⁶USSR-US agreement on the maritime boundary, 29 International Legal Materials 941-945(1990).

⁷ICJ Rep. 1982, para. 85, at 66.

⁸ICJ Rep. 1982, paras. 85-86, at 66.

⁹ICJ Rep. 1982, paras. 88-92, at 67-69.

The map shows the Mediterranean Sea region, including Tunisia and Libya. Key locations and features include:

- TUNISIA**: Labeled on the left side of the map.
- LIBYA**: Labeled on the right side of the map.
- Point A**: Located on the coast of Tunisia.
- Ras Kaboudia**: Located on the coast of Tunisia.
- Safaia**: Located on the coast of Tunisia.
- Kalij Qabis (Gulf of Gabes)**: Located on the coast of Tunisia.
- Jazur Qarqannah (Kerkennah)**: Located in the Gulf of Gabes.
- Jazirat Jarbah (Djerba)**: Located in the Gulf of Gabes.
- Ras Ajdu**: Located on the coast of Libya.
- Ras Tajoura**: Located on the coast of Libya.
- ISOLES PELAGIE (Italy)**: Located in the Mediterranean Sea.
- Isola di Lampedusa**: Located in the Isole Pelagie.
- Isola di Linosa**: Located in the Isole Pelagie.
- Isola di Lampione**: Located in the Isole Pelagie.
- Isola di Lampedusa**: Located in the Isole Pelagie.
- Survey Lines**:
 - Line A**: A line from Point A to Ras Kaboudia.
 - Line B**: A line from Ras Kaboudia to the Isole Pelagie.
 - Line C**: A line from Point A to the Isole Pelagie.
 - Line D**: A line from Point A to Ras Ajdu.
- Angles**:
 - 52° East of North**: Indicated near Ras Kaboudia and the Isole Pelagie.
 - 26° East of North**: Indicated near Ras Ajdu.

- Point A Most westerly point on the low water line of the Gulf of Gabes
- A-B Construction line drawn from Point A past the seaward tip of Ras Kaboudia
- A-C Construct on line drawn from Point A along the seaward coast of the Jazur Gardannah
- A-D Parallel of latitude of the most westerly point on the low water line of the Gulf of Gabes
- International boundary
- ICJ Award line
- 20 meter bathymetric contour
- 100 meter bathymetric contour

Map 5 : Tunisia-Ibaya case

Source: Department of State, Bureau of Intelligence and Research,
2 Geographical Notes, 1986, at 5.

north northeast from Ras Ajdir initiated by Italy.¹⁰ However, this line "falls short of proving the existence of a recognized maritime boundary between the two Parties."¹¹ Nonetheless, the Court found:

in view of the absence of agreed an clearly specified maritime boundaries, the respect for the tacit *modus vivendi*, which was never formally contested by either side throughout a long period of time, could warrant its acceptance as a historical justification for the choice of method for the delimitation of the continental shelf between the two States, to the extent that the historic rights claimed by Tunisia could not in any event be opposable to Libya east of the *modus vivendi* line.¹²

This line was further reinforced by the activities of the Parties in their oil concessions.¹³ Tunisia argued that its claim of historic rights was relevant in three ways: non-encroachment upon the area of historic rights, justification for the ZV 45° line, and justification for the drawing of straight baselines.¹⁴ As it turned out, all three claims were either satisfied (non-encroachment claim), or rejected (justification for ZV 45° line claim). Furthermore, one cannot fail to note that the enactment of petroleum licensing legislation and the grant of successive oil concessions by Tunisia and Libya observed the line of 26°,¹⁵ in approximate coincidence with the line indicated by the 1910 Convention. It is of significance that the Court rejected any suggestion that the 1910 Convention line also delimited the maritime boundary.¹⁶

In the end, it seems that the adoption of the maritime boundary line based on 1910 Franco-Italian Convention resulted from the conduct of the Parties, the satisfaction of historic rights claim of Tunisia, and the equitable character of the treaty line

¹⁰ICJ Rep. 1982, paras. 93-94, at 70.

¹¹ICJ Rep. 1982, para. 95, at 70.

¹²ICJ Rep. 1982, para. 95, at 70-71.

¹³ICJ Rep. 1982, para. 96, at 71.

¹⁴ICJ Rep. 1982, para. 102, at 75.

¹⁵ICJ Rep. 1982, para. 117, at 83-84.

¹⁶ICJ Rep. 1982, para. 120, at 85.

itself.¹⁷ It played a secondary and supportive role only.

1(b)(ii) - Guinea--Guinea-Bissau case

Guinea and Guinea-Bissau specifically addressed the issue of existing treaty line to the Arbitral Tribunal in the Guinea--Guinea-Bissau case:

Did the Convention of 12 May 1886 between France and Portugal establish the maritime boundary between the respective possessions of those two States in West Africa? What Judicial effect can be attributed to the protocols and documents annexed to the Convention of 1886 for the interpretation of the aforesaid Convention?¹⁸ Guinea-Bissau claimed that the Convention of 1886 did not establish a maritime boundary as such and the pertinent provision had no other purpose than to designate the islands belonging to Portugal. On the other hand, Guinea asserted that the said Convention "did establish the general maritime boundary between the respective possessions of those two States in West Africa seaward to the Cape Roxo meridian."¹⁹

After thorough scrutiny of the 1886 Convention, the Tribunal concluded that the object of the Convention was the colonial possessions of France and Portugal because of the frequent use of the terms *possessions* and *territoire* in the Convention text.²⁰ The tribunal declared that the "que l'absence totale des mots *eaux*, *mer*, *maritime* or *mer territoriale* constituted un indice sérieux de ce qu'il était essentiellement question de possessions terrestres."²¹ Hence,²² no maritime boundary was ever established by the 1886 Convention.²³

Moreover, in the opinion of the Tribunal, "que longtemps le problème ne s'est pas posé".²³ The events cited include the 1958 granting of an oil concession by Portugal, the drawing of straight baselines by Portugal in 1967 and by Guinea-Bissau in 1974, and

¹⁷Judge Jimenez de Arechaga gave an extensive reasons for this approach. ICJ Rep. 1982, separate opinion of Arechaga, paras. 96-102, at 129-132.

¹⁸Arbitral Award, 1985, para. 1, at 256.

¹⁹Arbitral Award, 1985, para. 17, at 262-263.

²⁰Arbitral Award, 1985, para. 56, at 279.

²¹Arbitral Award, 1985, para. 56, at 279.

²²Arbitral Award, 1985, para. 57, at 279.

²³Arbitral Award, 1985, paras. 63, at 281.

Guinea's maritime claim in 1964.²⁴ The Tribunal further found that the supplementary materials to the Convention did not purport to establish maritime boundaries either. The 1884-1885 Berlin Congress, the limit of territorial sea at that time, and the usual practice to use longitude or latitude lines to define islands, were all examined to confirm the above views.²⁵ The Tribunal concluded that the 1886 Convention did not establish any maritime boundary as such.

1(c) - The Law of the Sea Convention

The 1982 Law of the Sea Convention has the following provision in this regard:

Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone (continental shelf) shall be determined in accordance with the provisions of that agreement.²⁶

This paragraph reaffirms one of the basic rules of international law, namely, *pacta sunt servanda*. But before it can have binding force on States, a treaty must be accepted or recognized by the States parties concerned with the subject. The above provision of Articles 74/83 does not resolve the problem of how to interpret a pre-existing treaty as having the effect of establishing a maritime boundary.

1(d) - Scholarly writings

Legal writings have only marginally addressed the issue. When commenting on the "southern limit" in the 1886 Franco-Portuguese Convention in the Guinea--Guinea-Bissau case, Evans agreed with the conclusion of the Tribunal that the Convention line was to separate offshore islands and was influenced by the "position and angulation of the land boundary, rather than by law of the sea considerations."²⁷ Johnston was of the view that colonial boundary line can only play a secondary role if at all.²⁸ In his treatise on maritime boundary, Jagota regarded that the use of 1910 Franco-

²⁴Arbitral Award, 1985, paras. 63-66, at 281-232.

²⁵Arbitral Award, 1985, paras. 70-82, at 283-288.

²⁶Articles 74 and 83, paragraphs 4, 1982 Law of the Sea Convention.

²⁷Evans, Malcolm D, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 149.

²⁸Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 212.

Italian Convention line would make parties to a potential delimitation dispute more cautious.²⁹ When discussing the conduct of State as a relevant circumstance, Weil's view was that the use of pre-existing treaty line was confined to the discreet situation in the Tunisia-Libya case.³⁰

1(e) - Appraisal

To sum up, what is required by international law with respect to lines indicated by existing treaties is twofold: firstly, the treaty lines have been expressly accepted by the States concerned; and secondly, they have been recognized as equitable by the States concerned. Generally, it is felt that a pre-existing treaty, especially those concluded before the birth of the modern regime on the law of the sea with respect to national jurisdiction over the sea areas, could hardly have been designed as to establish maritime boundary for contemporary maritime legal jurisdictions as we understand today. Most of the lines specified in the pre-existing treaties were intended for the purpose of erecting land boundary and the supplementary question of separating islands.

2 - 1887 Sino-French Boundary Convention

2(a) - Background

The southern land frontier between Vietnam and China is the product of French colonial expansion in the Indo-Chinese Peninsula in the late part of the 19th century.³¹ Gradual French penetration in Indo-China led to increasing tension between France and China because China for centuries had exercised suzerainty over Vietnam. Between 1884 and 1885, a war broke out between France and China and a convention was signed in Tianjin (Tien-tsin) in 1885.³² Among other things, the Convention set the time table to resolve the

²⁹Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 193.

³⁰Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 258.

³¹Generally see Kao, Ting Tsz, THE CHINESE FRONTIERS, Palatine, Chinese Scholarly Publishing Company, 1980, at 261-326.

³²MacNair, MODERN CHINESE HISTORY -- Selected Readings, Vol. 2, at 487-489; China Maritime Customs, TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES, Vol. I, 2nd Edition, Shanghai, Inspectorate General of Customs, 1917, at 901-907, in Chinese and French.

delimitation of boundaries between China and Tonkin.³³

After two years of labourious work by the Commission, the result was reflected in the Convention between China and France respecting the Delimitation of the Frontier between China and Tonkin signed at Peking on 26 June 1887.³⁴ In 1895, another boundary treaty supplementary to the 1887 Convention was signed to settle the delimitation of the boundary between Yunnan of China and Annam.³⁵

2(b) - Relevant provisions

The most relevant treaty to the Gulf of Tonkin dispute between China and Vietnam is the 1887 Sino-French Convention. The most contentious provision of the 1887 Convention is as follows:

³³Article III reads: "Dans un délai de six mois à partir de la signature du présent Traité, des Commissaires désignés par les Hautes Parties Contractantes se rendront sur les lieux pour reconnaître la frontière entre la Chine et le Tonkin. Ils poseront, partout où besoin sera, des bornes destinées à rendre apparente la ligne de démarcation. Dans le cas où ils ne pourraient se mettre d'accord sur l'emplacement de ces bornes ou sur les rectifications de détail qu'il pourrait y avoir lieu d'apporter à la frontière actuelle du Tonkin, dans l'intérêt commun des deux pays, ils en référeront à leurs Gouvernements respectifs."

³⁴China Maritime Customs, TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES, Vol. I, 2nd Edition, Shanghai, Inspectorate General of Customs, 1917, at 933-936, in Chinese and French; De Clerq, Jules, RECUEIL DES TRAITES DE LA FRANCE, Tome Dix-Septième, 1886-1887, Paris, 13, Rue Soufflot, 1891, at 387-389, in French; Parry, Clive, ed., THE CONSOLIDATED TREATY SERIES, Vol. 169, 1887, Dobbs Ferry, Oceana Publications, Inc., 1978, at 345-347, in French. There is one major printing mistake in the De Clerq's and Parry's version of the treaty, and that is, in the second paragraph of Article 2, "nord-ouest de Monkai" should be "nord-est de Monkai". For English translations, see Office of the Geographer, U.S. Department of State, INTERNATIONAL BOUNDARY STUDY -- China-Vietnam, No. 38; Prescott, J.R.V., MAP OF MAINLAND ASIA BY TREATY, Melbourne, Melbourne University Press, 1975, at 453-454.

³⁵China Maritime Customs, TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES, Vol. I, 2nd Edition, Shanghai, Inspectorate General of Customs, 1917, at 942-945, in Chinese and French; Parry, Clive, ed., THE CONSOLIDATED TREATY SERIES, Vol. 181, 1895, Dobbs Ferry, Oceana Publications, Inc., 1978, at 376-378, in French. For English translations, see Office of the Geographer, U.S. Department of State, INTERNATIONAL BOUNDARY STUDY -- China-Vietnam, No. 38; Prescott, J.R.V., MAP OF MAINLAND ASIA BY TREATY, Melbourne, Melbourne University Press, 1975, at 454-456.

Au Kouang-Tong, il est entendu que les points contestés qui sont situés à l'est et au nord-est de Monka , au delà de la frontière telle qu'elle a été fixée par la commission de délimitation, sont attribués à la Chine. Les les qui sont à l'est du méridien de Paris 105°43' de longitude est, c'est-à-dire de la ligne nord-sud passant par la pointe orientale de l' le de Tch'a-Kou ou Ouan-chan (Tra-co) et formant la frontière sont également attribuées à la Chine. Les les Go-tho et les autres les qui sont à l'ouest de ce méridien appartiennent à l'Annam.

Les Chinois coupables ou inculpés de crimes ou délits, qui chercheraient un refuge dans ces les, seront, conformément aux stipulations de l'article 17 du traité du 25 avril 1886, recherchés, arrêtés et extradés par les autorités françaises.³⁶

However, other provisions will be discussed to give a contextual interpretation. So will be other relevant treaties, conventions, and conduct of the Parties to the extent that they may have the effect of consolidating the Convention line.

2(c) - Positions of the Parties

Vietnam has based part of its claim over the waters in the Gulf upon the 1887 Convention and China is vigorously opposing to such an interpretation.³⁷ The Vietnamese position with respect to maritime delimitation in the Gulf of Tonkin has been expressed in

³⁶For the complete text of the Convention see *infra*, Appendix II. The English translation by Dr. J.R.V. Prescott, MAP OF MAINLAND ASIA BY TREATY, Melbourne, Melbourne University Press, 1975, at 453-454), reads:

"At Koueng-Tong it is understood that the disputed points, which are situated east and northeast of Monkai, beyond the boundary fixed by the Commissioners, are allocated to China. The islands which are east of the Paris meridian of 105°43' east, that is to say the north-south line passing through the eastern point of the island of T'cha Kou or Ouan-Chan (Tra-co), which forms the boundary, are also allocated to China. The island of Gotho and other islands west of this meridian belong to Annam.

Chinese guilty or accused of crimes or misdemeanours who seek refuge in these islands, will, in accordance with the stipulations of Article 17 of the Treaty of 25 April 1886, be sought, arrested and extradited by the French authorities."

³⁷Generally see Chapter III.

more detail in a lengthy document.³⁸ In principle, Vietnam argues that Article 2 has delimited the borderline in the Bac Bo Gulf (Gulf of Tonkin) and that successive governments have observed and recognized this line.

China has rejected the Vietnamese view and elaborated its position more forcefully in negotiations with Vietnam.³⁹ China insisted that Article 2 of the Convention delimited only islands in the Beibu Gulf (Gulf of Tonkin). China argued that the term "Gulf of Tonkin" did not even appear in the Convention text and only a very small portion of the Gulf of Tonkin was shown in the attached map to the Convention. Moreover, China said that the division of such a large body of water between China and France would be against the prevailing trend of the freedom of the high seas in the late nineteenth century. With regard to the State conduct argument, China enumerated the following example to rebut the Vietnamese claim. First, Qing government and French colonial authorities observed 3-mile territorial seas. Second, both People's Republic of China and Socialist Republic of Vietnam declared 12-mile territorial seas. Third, no foreign ships have ever asked permission from Vietnam to enter into the west of 108°3'13"E.

2(d) - Rules of interpretation

Neither Vietnam nor China have acceded to the Vienna Convention on the Law of Treaties.⁴⁰ However, it is widely accepted that the rules on treaty interpretation are the codification of customary rules applied consistently by the International Court of Justice. Articles 31, 32, and 33 embody the rules on interpretation.

³⁸Memorandum dated 15 March 1979 of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam concerning the Chinese Authorities' provocations and territorial encroachments in the border region of Viet Nam, in "Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General," UN Doc. A/34/170-S/13234 of 12 April 1979. See *infra* Appendix III, Document Number 1.

³⁹Speech made by Han Nianlong, head of the Chinese Government delegation and Vice-Minister for Foreign Affairs, at the fourth plenary meeting of the Sino-Vietnamese negotiations on 12 May 1979, in "Letter dated 14 May 1979 from the representative of China to the Secretary-General", UN Doc. A/34/235-S/13318 of 14 May 1979. See *infra* Appendix III, Document Number 7.

⁴⁰MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL - Status as at 31 December 1987, New York, United Nations, 1988, at 767. So far as is known, Vietnam and China have not become parties to the Convention.

A treaty term should be given its ordinary meaning unless otherwise specifically agreed by the Parties. The terms of a treaty must be interpreted in their context and in light of the treaty's object and purpose. The context includes, in addition to the text of the treaty, the preamble and annexes, and any subsequent instrument or practice.⁴¹

If the meaning of a term is still ambiguous or obscure, or the result is absurd or unreasonable, resort may be had to supplementary means, such as the preparatory works of the treaty and the circumstances of its conclusion.

If there is a difference of meaning between authentic texts of the treaty, the meaning which can best reconcile the texts will be adopted in light of the object and purpose of the treaty.

2(e) - Interpretation of the 1887 Convention

Three questions must be answered with respect to the 1887 Convention. The first is whether the meridian of 105°43'E of Paris was intended to separate maritime areas between the Parties. The second question is concerned with any subsequent instrument or conduct which can justify such use of the meridian line. And lastly, there is the question of how to reconcile the difference between the Chinese and the French text.

2(e)(i) - Authentic texts of the Convention

Although not expressly provided in the Convention, the use of both Chinese and French languages with equal copies of each language to both Parties is a clear indication that both Chinese and French texts are authentic. Article I stated:

Les procès-verbaux et les cartes y annexées qui ont été dressés et signés par les commissaires français et chinois sont et demeurent approuvés.

In the penultimate paragraph of the Convention text, it is expressly provided that the boundary line has been marked by letters of the French alphabet and cyclical Chinese characters.⁴² In the accompanying map to the Convention, the sentence explaining

⁴¹United Nations Treaty Series, Vol. 1155, 331-353, at 340.

⁴²The relevant part stipulates: "Sur ces cartes, la nouvelle frontière est tracée par un trait rouge et indiquée sur les cartes du Yunnan par les lettres de l'alphabet français et les caractères cycliques chinois."

the lines was written in both Chinese and French.⁴³

It also appears that when China and France wanted to have one particular language as the authentic and authoritative text, they did so by express provision. In the Convention for the lease of Kuang-Chou Wan (May 27, 1898) between China and France, though equal number of copies written in both languages were distributed to each Party, the last sentence of the treaty was "en cas de contestation le texte français fera foi."⁴⁴

2(e)(ii) - Interpretation of key terms

To unveil the real intention of the Parties, to understand the significance of subsequent practice, and to reconcile the difference between the Chinese and the French languages, it is necessary to examine four key terms in the Convention. They are "îles", "*méridien du Paris 105°43' de longitude est*", "*la ligne nord-sud passant par la pointe orientale de l'île de Tch'a-Kou ou Quan-chan (Tra-co)*", and "*frontière*".

(1) - "îles"

With respect to paragraph 2 of Article II of the Convention, doubt has arisen as to whether this term would also encompass the adjacent waters to the islands.

In the Tresor de la langue française dictionnaire de la langue de XIX^e et du XX^e siècle (1789-1960), the term "îles" is defined as "étendue de terre entièrement entourée d'eau, émergeant dans un océan, une mer, un lac ou un cours d'eau". In physical geographical sense, the term may cause confusion.⁴⁵

⁴³Kao, Ting Tsz, THE CHINESE FRONTIERS, Palatine, Chinese Scholarly Publishing Company, 1980, appended map.

⁴⁴China Maritime Customs, TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES, Vol. I, 2nd Edition, Shanghai, Inspectorate General of Customs, 1917, at 946-949, in Chinese and French; TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA (1894-1919), Vol. II, Republican Period (1912-1919), ed. by John V. A. MacMurray, New York, Oxford University Press, 1921, at 128-130.

⁴⁵Centre National de la Recherche Scientifique, Institut de la Langue Française, Tresor de la langue française dictionnaire de la langue de XIX^e et du XX^e siècle (1789-1960), Tome Neuvième, Paris, 1981:

le term île s'applique a une étendue de terre de superficie très variable. Cette superficie doit être suffisamment petite pour que le climat qui y règne soit entièrement soumis à l'influence marine; ainsi les Amériques et l'Australie sont-elles considérées comme

In the 1887 Convention, the term "îles" was used in physical geographical sense, and the reference to these islands was a particular use of the term. If used in political geographical sense, the term might include the administrative and economic structure of the islands, for instance, the island of Hong Kong, Singapore island. But here the islands in the Gulf of Tonkin were clearly not possessive of the political independent character. The ordinary meaning of the term "îles" does not include the surrounding waters.

A potential argument against the above conclusion can be found in the Aegean Sea case.⁴⁶ The International Court took the view that the term "territorial status" was directly related to the delimitation of continental shelf in the Aegean Sea.⁴⁷ Specifically, the entitlement of islands to continental shelf was held to be the essence of the dispute and delimitation was only secondary.⁴⁸ Can Vietnam then argue that the entitlement of the islands referred in the Convention had already been accorded maritime spaces by meridian 105°43'E of Paris? It was made clear in the judgment that entitlement and delimitation were to be distinguished.⁴⁹ To use the allocation of islands as a justification for automatic allocation of surrounding maritime space would go beyond the distinction between entitlement and delimitation and would create difficulty in international relations.

But did the Parties specifically intend that the term "îles" in this particular Convention would include the surrounding waters. There is no textual or contextual evidence to prove that this is so. Indeed, all material evidence points to the contrary.⁵⁰

Paragraph 2 of Article II started with the allocation of areas east and northeast of Monkai to China. Then the next two sentences

des continents en raison de leurs dimensions. Aucun caractère vraiment spécifique ne différencie les petites îles des îlots ou de îlets, seule la coutume semble leur attribuer l'un de ces termes en particulier. S'il s'agit de simples affluements rocheux, on parle d'écueil ou de récif.

⁴⁶ICJ. Rep. 1978, para. 82.

⁴⁷ICJ Rep. 1978, paras. 83-85.

⁴⁸ICJ Rep. 1978, para. 83.

⁴⁹ICJ Rep. 1978, para. 85.

⁵⁰See Kao, Ting Tsz, THE CHINESE FRONTIERS, Palatine, Chinese Scholarly Publishing Company, 1980, at 284-288.

in the paragraph discussed about the allocation of islands in the area. Islands east of the line passing the eastern tip of Tra Co (Paris meridian 105°43'E and the red line) belonged to China. Island Go-cho and other islands west of the line went to Annam. Paragraph 3 dealt with the issue of pirates that penetrated the area. It was significant that no reference was made to the waters surrounding these islands.⁵¹ In the Chinese text, the second sentence of paragraph 2 of Article II began with the conjunction word "zhiyu", which literally meant "as to", "as far as is concerned". So the subject matter is clearly islands, not waters. The object and purpose of the paragraph is the allocation of islands in the area.

In the context of the Convention, there is no indication that the term "îles" should include their surrounding waters. The Convention recorded points of correction and points of discord in accordance with the six-point procedure agreed to by the two Commissioners.⁵² It was convenient to describe the boundary by each province. The Guangdong boundary was dealt with first. The Convention confirmed the boundary arrangement with regard to the disputed islands in the adjacent sea area by drawing a straight line.

In the report of the Chinese Commissioner to the Emperor, the two outstanding questions referred to were the ownership of Pei-Lung Wei and the ownership of islands. There was no reference to

⁵¹For details leading to the adoption of these paragraphs, see Kao, Ting Tsz, THE CHINESE FRONTIERS, Palatine, Chinese Scholarly Publishing Company, 1980, at 284-288.

⁵²Kao, Ting Tsz, THE CHINESE FRONTIERS, Palatine, Chinese Scholarly Publishing Company, 1980, at 287:

"1. As a preliminary step to begin field work of the Joint Commission, use maps provided by both sides to locate and compare with existing boundary.

2. Mark and record all points with description in both Chinese and French.

3. Classify those points of definition into three categories: (a) points of accord, (b) points of discord, (c) points of suggested correction.

4. Concerning all points of agreement, new maps with description shall be entered into record.

5. Concerning points of disagreement, owing to existing communication difficulties in the frontier, they may be deferred for future demarcation.

6. All points of suggested correction may be brought up for discussion in the Joint Commission, and all the six points enumerated above shall be referred to the respective governments for sanction before initialling to take place."

a maritime boundary.⁵³

In the 1895 Convention supplement to the 1887 Convention, no provision was made to separate the maritime boundary. If they wanted to delimit their respective territorial seas, the Parties would be free to do so.⁵⁴

It is also relevant to consider the subsequent practice by the Parties relating to the interpretation of the 1887 Convention. In the 1896 Regulations for Mixed Police on Sino-Annamite Frontier (May 7, 1896), section 6 of the regulations was entitled "carrying out of the police service in the Archipelago of Tonkin".⁵⁵ There was no mention of the 105°43' meridian line in the regulations. The "waters of Annam" was mentioned with regard to unauthorized sailing by Chinese boats. However, the reference to "waters of Annam" would be presumed to mean 3 nautical miles of territorial seas unless defined otherwise.

On the part of China, there were the 1958 Declaration on Territorial Seas and some offshore oil development. In the 1958 Declaration, China set its territorial seas as 12 miles by straight baselines. No mention was made at all of the 1887 Convention.⁵⁶ In the third draft of the Law on the Territorial Seas and Contiguous

⁵³COLLECTIONS OF LATE QING DYNASTY'S FOREIGN TREATIES, Vol. II, Guangxu Period, Guofeng Publisher, in Chinese, at 199. Commissioner Deng Chengxiu's report.

⁵⁴Clercq, de Jules, RECUEIL DES TRAITES DE LA FRANCE, Vol. 20, 1893-1896, at 239-241. Parry, Clive, ed., CONSOLIDATED TREATY SERIES, vol. 181, (1895), Dobbs Ferry, New York, Oceana Publications, Inc., 1978, at 376-378 (French). China Maritime Customs, TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES, Vol. 1, 2nd edition, Shanghai, Statistical Department of the Inspectorate General of Customs, 1917, at 942-945 (Chinese and French). de Martens, G. Fr., NOUVEAU RECUEIL GENERAL DE TRAITES ET AUTRES ACTES RELATIFS AUX RAPPORTS DE DROIT INTERNATIONAL, Vol. 23, at 94-96. Prescott, J.R.V., MAP OF MAINLAND ASIA BY TREATY, Melbourne, Melbourne University Press, 1975, at 454-456 (English translation).

⁵⁵Parry, Clive, ed., CONSOLIDATED TREATY SERIES, vol. 182, (1896), Dobbs Ferry, New York, Oceana Publications, Inc., 1978, at 450-452 (English translation).

⁵⁶Declaration on Territorial Seas, 1 Peking Review, No. 28 at 21 (September 9, 1958). See *infra*, Appendix I.

Zone of China, again the 108°3'E did not appear in the text.⁵⁷ In its offshore oil exploration and exploitation, China did not regard the 105°43' Paris meridian line as having established the maritime boundary in the Gulf of Tonkin.⁵⁸

In short, no persuasive evidence can be shown to the effect that the object and purpose of paragraph 2 of Article 2 of the Convention were the delimitation of maritime boundary (territorial seas at that time). The term "*îles*" did not include surrounding waters in its ordinary use, nor did the Parties intend so. If there was any maritime space implicitly intended by the Parties as the subject of the Convention, that must be the narrow territorial sea of 3 nautical miles. All material facts support the conclusion that the subject matter of paragraph 2 of Article 2 was the separation of islands in the vicinity of the land boundary terminus, that is the eastern point of Tra Co island.

(2) - Meaning of "*méridien du Paris 105°43' de longitude est*"

This line was expressly named in the Convention. But its exact scope of application has caused some confusion. First of all, there is no second after minute and degree in the named meridian. This leaves room for divergent interpretations. Secondly, the meridian has neither starting nor terminating point, which is unusual as a boundary to separate land or maritime territories (namely, territorial seas at that time). Thirdly, there is an uncertainty as to the relationship between the meridian line and the line passing through the eastern point of Tra-co.

Concerning the question of no second after minute and degree in the named meridian, one possible explanation is the poor surveying technology available then. After examination of the *travaux préparatoires* and the circumstances, a more cogent explanation can be found to reveal the real intention of the Parties. Unsuccessful in negotiating the Pei-Lung-Wei region adjacent to the sea on the Chinese shoreline, the French Commissioner Dillon raised the question of drawing a straight line of north-south direction, so that all land places and islands west of the line should belong to Annam. To this demand, the Chinese Commissioner Teng responded that all the places and islands east of the line, such as Chiang Ping which was disputed, should go to

⁵⁷Law on Territorial Seas and Contiguous Zone of China (third draft), October 1986, in Chinese.

⁵⁸Valencia, Mark J., SOUTH-EAST ASIAN SEAS: Oil under Troubled Waters -- Hydrocarbon potential, jurisdictional issues, and international relations, Singapore, Oxford University Press, 1985, 155p, at 91-101.

China.⁵⁹ In the Chinese Commissioner's report to the Chinese Government, the dispute in the Pei-Lung-Wei region was described in detail and all references to Paris meridian 105°43'E were made in terms of drawing a line to separate the coastal islands of Annam and Go-to (Kao Tao) Islands.⁶⁰

In fact, three versions of the Paris meridian 105°43' have been documented: Greenwich 108°3', 108°3'13" and 108°3'18". The first of these, Greenwich 108°3' was the natural translation from Paris 105°43'. Prescott⁶¹ and Kittichaisaree⁶² took this version as their choice in their works on South China Sea. Valencia and Morgan also used this version in their well-received atlas on South China Sea.⁶³

However, both the Chinese Government⁶⁴ and the Vietnamese Government⁶⁵ recognized Greenwich 108°3'13" as representing Paris

⁵⁹Kao, Ting Tsz, THE CHINESE FRONTIER, Palatine, U.S.A., Chinese Scholarly Publishing Company, 1980, 382p, at 287-288.

⁶⁰Guo, Tingyi and Wang, Yijun, eds., ZHONG FA YUENAN JIAOSHE DANG (Historical Documents of Relationship between China and France), Vol. 6, Central Institute on Modern History, Taiwan, at 3743-3748, in Chinese.

⁶¹Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 225.

⁶²Kittichaisaree, Kriangsak, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA, Singapore, Oxford University Press, 1987, at 43.

⁶³Valencia, Mark J. and Morgen Joseph R., eds., ATLAS FOR MARINE POLICY IN THE SOUTHEAST ASIAN SEAS, Berkeley, University of California, 1983, at 48.

⁶⁴Speech of Han Nianlong, head of the Chinese Delegation at the Fourth plenary meeting of the Sino-Vietnamese negotiations on 12 May 1979, UN Doc. A/34/235-S/13318, at 119; also in "The Truth About the Sino-Vietnamese Boundary Question", Beijing Review, No. 21 (1979), 14-23, at 16.

⁶⁵Memorandum dated 15 March 1979 of the Ministry of Foreign Affairs of the Socialist Republic of Vietnam concerning the Chinese Authorities' provocations and territorial encroachments in the border region of Vietnam, UN Doc. A/34/170-S/13234, at 22.

105°43'. Frequent writers on the South China Sea, Chiu,⁶⁶ Miyoshi,⁶⁷ Valencia,⁶⁸ and Zhao⁶⁹ also accepted this version as the separation line. A maritime handbook also used this version of interpretation.⁷⁰

The last version, Greenwich 108°3'18", appeared in the commentaries of Park,⁷¹ and Duiker.⁷² This version of Paris 105°43' also appeared in a very recent boundary map on Vietnam and China drawn by U.S. Central Intelligence Agency.⁷³

So far we have only considered the French text. Given that the Chinese text is also authentic and equally authoritative, some

⁶⁶Chiu, Hungdah, "The 1982 United Nations Convention on the Law of the Sea and the Settlement of China's Maritime Boundary Dispute", in Buergenthal, T., ed., CONTEMPORARY ISSUES IN INTERNATIONAL LAW -- Essays in Honour of Louis B. Sohn, Kehl, N.P. Engel, Publisher, 1984, 189-208, at 203-204.

⁶⁷Valencia, Mark J. and Miyoshi, Masahiro, "Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claim Areas?", 16 Ocean Development of International Law 211-254(1986), at 243.

⁶⁸Valencia, Mark J., SOUTH-EAST ASIAN SEAS: Oil under Troubled Waters -- Hydrocarbon potential, jurisdictional issues, and international relations, Singapore, Oxford University Press, 1985, 155p, at 94.

⁶⁹Zhao, Lihai, HAIYANGFA DE XINFAZHAN (New Development in the Law of the Sea), Beijing, Beijing University Press, 1984, 466p, at 47, in Chinese.

⁷⁰MARITIME AFFAIRS -- A World Handbook, Essex, U.K., Longman, 1985, at 204.

⁷¹Park, Choon-ho, "Vietnam, Kampuchea, and Law of the Sea", in Park, Choon-ho and Park, Jae Kyu, eds., THE LAW OF THE SEA: PROBLEMS FROM THE EAST ASIAN PERSPECTIVE, Proceedings, the Law of the Sea Institute, University of Hawaii, Honolulu, 1984, at 447, and 450 (Map 1).

⁷²Duiker, William J., VIETNAM SINCE THE FALL OF SAIGON, Athens, Ohio, U.S.A., Ohio University, Center for International Studies, 1985, at 128.

⁷³Map, U.S. CIA, 1988, Scale: 1:5,000,000.

lights can be shed on this confusion. In the Chinese text there was no mention of the Paris meridian 105°43' at all. The boundary line to separate the islands was referred to as the red line on the map which passes the eastern point of Tra-Co. So the line passing the eastern point of Tra-Co defines the boundary in the Chinese text. Another relevant circumstance is that in the annexed maps duly signed and sealed by the Chinese and French Commissioners, there was a sentence to elucidate the line used in the map (see Map 9):

Le méridien de Paris 105°43' qui passe par la pointe orientale de l'île Tra-co forme la frontière à partir du point où c'est arrêté le tracé de la Commission.⁷⁴

Again the Chinese text of this paragraph on the map made reference only to the red line on the map as the line passing through eastern point of Tra-co. As it is well-known, two authentic texts of a treaty should be interpreted in such a way as can be best reconciled. The best way to reconcile the difference between the Chinese text and the French text is to take the Paris meridian 105°43' as a secondary definition of the line passing through the eastern point of Tra-co because both Chinese and French texts used the line passing through the eastern point of Tra-co as one of the definitions in addition to the 105°43'E of Paris in the French text and the north-south straight red line in the Chinese text.

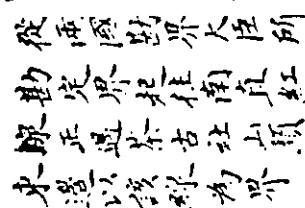
It is not possible to know why one, instead of another version of the translation, has been referred to, used, chosen, or implicitly accepted. Certainly, one would think that Greenwich 108°3'13" would carry more weight since this is the version recognized by both China and Vietnam. The more logical reason seems to be that this line (instead of the lines of Greenwich 108°3' or 108°3'18") passes through the eastern point of the island of Tra-co, which is the other definition of this boundary line.

Any doubt as to the precise point on the terrain through which Paris 105°43'E was to pass was greatly alleviated by the introduction of a further definition of the boundary line, that is "*la ligne nord-sud passant par la pointe orientale de l'île de Tch'a-Kou ou Quan-chan (Tra-co)*". For the purpose of the Convention, Paris meridian 105°43'E was legally and practically defined by the north-south straight line passing through the eastern point of Tra-co.

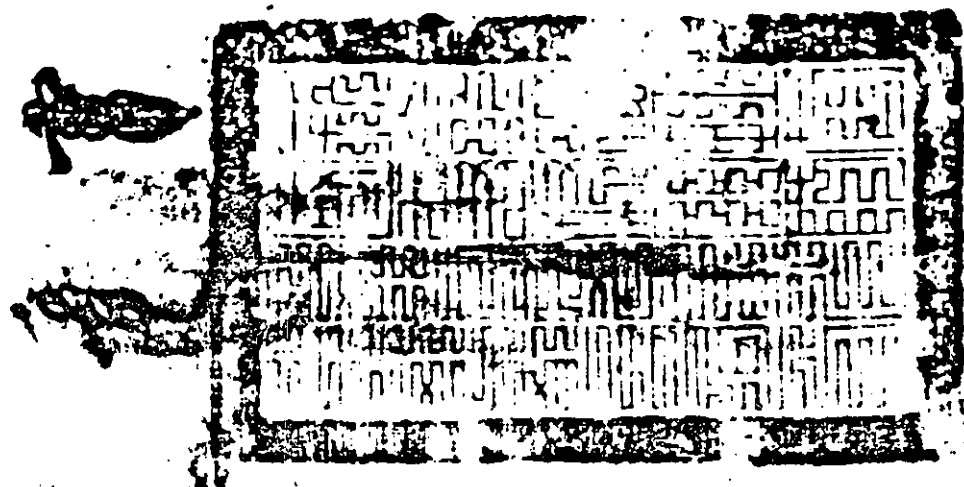
(3) - Meaning of "*la ligne nord-sud passant par la pointe orientale de l'île de Tch'a-Kou ou Quan-chan (Tra-co)*"

The general practice of States then indicated that the breadth of territorial seas was 3 nautical miles. On China's part, four accounts of history are relevant. In 1864, when Prussia detained a Danish ship in the Bohai Gulf, China protested on the basis that

⁷⁴Kao, Ting Tsz, THE CHINESE FRONTIERS, Palatine, Chinese Scholarly Publishing Company, 1980, appended map.



Le mûrier se sème
 vers 15° que nous pos
 la terre crasse de
 l'ile lors se pousse la
 frondine à partir du
 point ou se col attache
 le bœuf se la communique.



Mondai et de Tchouf-Sau.

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圖地帶一山竹街芒



the waters were Chinese internal waters and later the ship was released. The official report to the Emperor stated that 10 li (3 nautical miles) was the limit of territorial waters.⁷⁵ In 1874, the Chinese Viceroy Li Hung-chang ordered the Korean troops to fire at Japanese fishing boats if they came within 10 li (3 nautical miles).⁷⁶ The strongest evidence in this regard was the Convention for the lease of Kuang-chou Wan (May 27, 1898) between China and France. Article II(e) recognized the limits of territorial waters as 3 marine miles pertaining to the interior and exterior waters of the bay and islands in the leased territory.⁷⁷ Though in 1899 a Sino-Mexican treaty did specify the width of the territorial seas as 9 nautical miles.⁷⁸ But according to an authoritative study in Chinese, this provision meant the customs zone not the territorial sea.⁷⁹

Even if one accepts that the 105°43' meridian settled the maritime boundary in the Gulf of Tonkin, in what technically precise way can such a line be extended southward? As it is known that straight lines are defined by great circle arcs, small circle arcs, loxodromes or rhumb lines, and geodesics. The difference between them can be significant.⁸⁰

⁷⁵Chiu, Hungdah, "China and Territorial Sea", 13 The Annals of the Chinese Society of International Law 144-151(1976), at 145.

⁷⁶Chiu, Hungdah, "China and Territorial Sea", 13 The Annals of the Chinese Society of International Law 144-151(1976), at 145.

⁷⁷TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA (1894-1919), Vol. II, Republican Period (1912-1919), ed. by John V. A. MacMurray, New York, Oxford University Press, 1921, at 128-130.

⁷⁸Chiu, Hungdah, "China and Territorial Sea", 13 The Annals of the Chinese Society of International Law 144-151(1976), at 146.

⁷⁹Liu, Nanlai and others, GOJI HAIYANG FA (International Law of the Sea), Ocean Press, Beijing, 1986, 99-100, in Chinese.

⁸⁰Smith, Robert W., "Geographic Considerations in Maritime Boundary Delimitations", in Dallmeyer, Dorinda G. and DeVorse, Louis Jr., eds., RIGHTS TO OCEANIC RESOURCES -- Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989, 3-14, at 13. For a thorough analysis on the use of different methods, see Kapoor, D.C. and Kerr, Adam J., A GUIDE TO MARITIME BOUNDARY DELIMITATION, Toronto, Carswell, 1986, at 11-12.

Geographical conditions do change.⁸¹ What is the eastern point of the island of Tra-Co in 1887? Does it mean the low-water marks of the easternmost shoreline of Tra-co? Or does it mean the eastern mount of Tra-Co? The Chinese text stated that the line would pass through the eastern mount of Tra-Co.

Another difficulty with the straight line was that there are no starting or terminating points for this line. Boundary lines are almost invariably drawn with termini. The 1887 Convention line, if projected northward, would intersect the Chinese coasts and land territory. If extended southward, it would intersect the Vietnamese coastline between Hue and Da Nang. If it could be argued that the line was intended to stop at the closing line of the Gulf on its way south and start at the eastern point of Tra-co island, then still there was the difficulty of determining the closing line and there was no mention of the Gulf itself at all in the Convention text.⁸² Nor was there an entire picture of the Gulf in the annexed map to the Convention.⁸³ This was one of the legal arguments put forward by the Chinese.⁸⁴ As a matter of fact, there was only a very small portion of the Gulf of Tonkin in the accompanying map to the Convention covering southward up to only 21°N of parallel (see Map

⁸¹See Kapoor, D.C. and Kerr, Adam J., A GUIDE TO MARITIME BOUNDARY DELIMITATION, Toronto, Carswell, 1986, Chapter II - "Technical Review of Geodetic, Hydrographic, Cartographic and Geological Factors", at 9-24.

⁸²Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 225. See also Valencia, Mark J. and Morgen Joseph R., eds., ATLAS FOR MARINE POLICY IN THE SOUTHEAST ASIAN SEAS, Berkeley, University of California, 1983, at 48.

⁸³See map accompanying the Convention, source: Kao, Ting Tsz, THE CHINESE FRONTIER, Palatine, U.S.A., Chinese Scholarly Publishing Company, 1980, 382p.

⁸⁴Speech of Han Nianlong, head of the Chinese Delegation at the Fourth plenary meeting of the Sino-Vietnamese negotiations on 12 May 1979, UN Doc. A/34/235-S/13318, at 119. For complete text of the speech, see *infra* Appendix III, Document Number 7. Also in "The Truth About the Sino-Vietnamese Boundary Question", Beijing Review, No. 21 (1979), 14-23, at 16. For a more detailed discussion of the Chinese position see Zhao, Lihai, HAIYANGFA DE XINFAZHAN, Beijing, Beijing University Press, 1984, 466p, at 47-48, in Chinese.

9).⁸⁵

In addition, the map used to show the meridian line in the 1887 Convention was very sketchy and did not specify either datums or spheroid. Practical problems would arise as to the precise charts to be used to depict the line specified in the Convention if the meridian line were accepted and recognized as maritime boundary.⁸⁶

There is also a doubt in regarding this north-south red line as a maritime boundary because such a use cannot be distinguished from the practice to use a straight line as a geographical shorthand to separate islands in the 19th century. Prescott pointed out that "such lines were simply a form of geographical shorthand to avoid the need to name all the islands".⁸⁷ He then cited the following treaties which employed this technique: the 1867 Treaty between Russia and the United States to separate Siberia from Alaska, the 1898 Treaty between Spain and the United States to define the Philippine Islands, the 1899 Treaty between Britain and Germany to allocate their respective possessions in the Solomon Islands, and the 1930 Treaty between Britain and the United States to divide the Sulu Archipelago.⁸⁸ In the Guinea--Guinea-Bissau case, the Tribunal referred to the following treaties as example of using straight lines to define islands: 1783 Peace Treaty between the United States and Britain, the 1867 Russian-American Treaty on Alaska, the Non-Ratified Anglo-French Treaty of 1882 on Sierra Leone, and the 1898 Sino-British Treaty on Hong Kong. To this list one may add the 1825 Treaty between Russia and Britain to delimit their North American possessions.⁸⁹ Even in the remote cold region like the Arctic, these treaty lines, according to Professor

⁸⁵See attached map to the Convention, source: Kao, Ting Tsz, THE CHINESE FRONTIER, Palatine, U.S.A., Chinese Scholarly Publishing Company, 1980, 382p.

⁸⁶For example, Commander Beezley stressed the importance of the methods in drawing straight lines or general direction, or perpendicular to a general direction. See Beezley, Peter B., "Maritime Boundaries: A Geographical and Technical Perspective", in Brown, E.D. and Churchill, R.R., eds., THE UN CONVENTION ON THE LAW OF THE SEA: Impact and Implementation, Proceedings, 19th Annual Conference of the Law of the Sea Institute, Honolulu, 1986, 319-339, at 336.

⁸⁷Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 225.

⁸⁸Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 225.

⁸⁹Arbitral Award, 1985, para. 81.

Pharand, were not intended to delimit ocean boundaries between these countries.⁹⁰

The Brevie Line drawn between Vietnam and Kampuchea in the Gulf of Thailand by the then French Governor of Indochina in 1939 was to separate islands between Cambodia and Vietnam for administrative purposes. Vietnam has maintained the position that this line did not settle the maritime boundary between Vietnam and Cambodia (see Maps 10 and 11).⁹¹

It is also inconceivable then that France and China would carve up as immense ocean space as the Gulf of Tonkin when the only recognized national maritime regime was territorial seas with a breadth of 3 nautical miles. Most commentators agree that the only maritime zone subject to sovereignty in 1880s was territorial seas with a breadth of 3 nautical miles measured from the low-water mark of the coastline.⁹²

(4) - Meaning of "*frontière*"

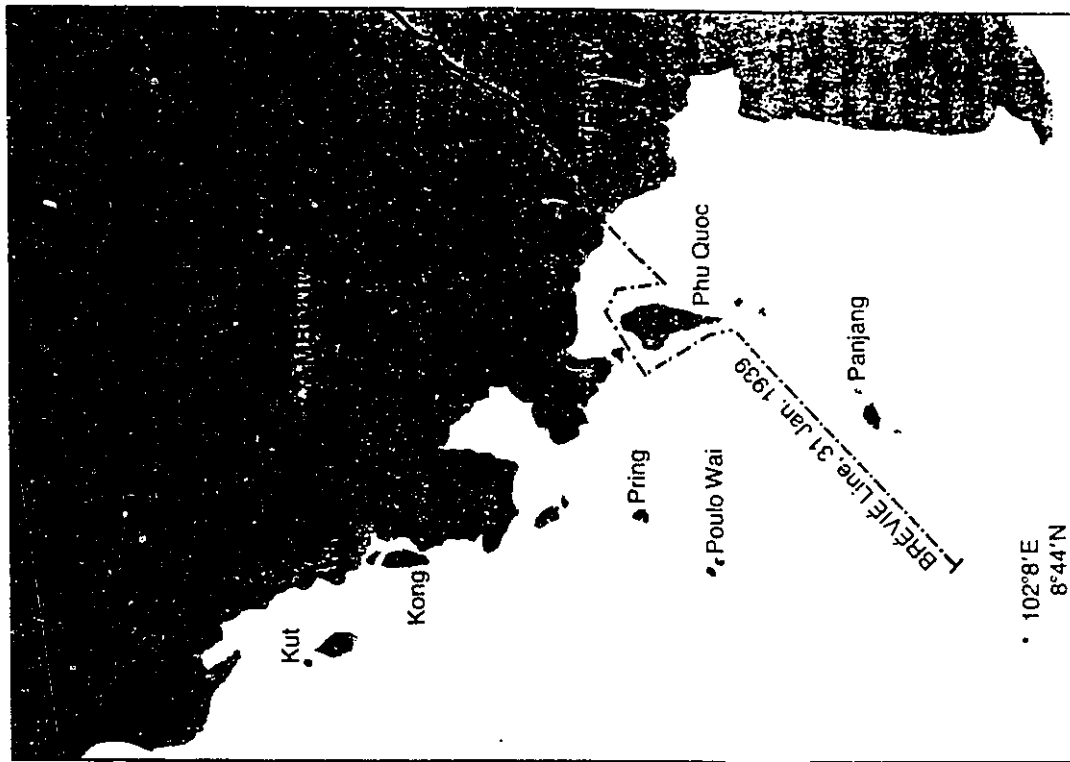
The fourth expression that requires clarification is "*frontière*". According to a French dictionary contemporaneous with the signature of the 1887 Convention, the Dictionnaire générale de la langue française du commencement du XVIIe siècle jusqu'à nos jours by Hatzfeld and Darmesteter, "*frontière*" was defined as "limite qui separe le territoire d'un Etat de celui d'un Etat voisin".

The Special Chamber of the ICJ in the Gulf of Maine Case made the observation that the use of the term "*frontière maritime*" (maritime boundary) in the French text of the Special Agreement might incorrectly imply the idea of a real "*frontière*" (boundary) between sovereign States. Such was not the case because only delimitation "between the different forms of partial jurisdiction, i.e. 'sovereign rights' outside the territorial sea limit was

⁹⁰Pharand, D., CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW, Cambridge, Cambridge University Press, 1988, 288p, at 12-27.

⁹¹Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 225-226.

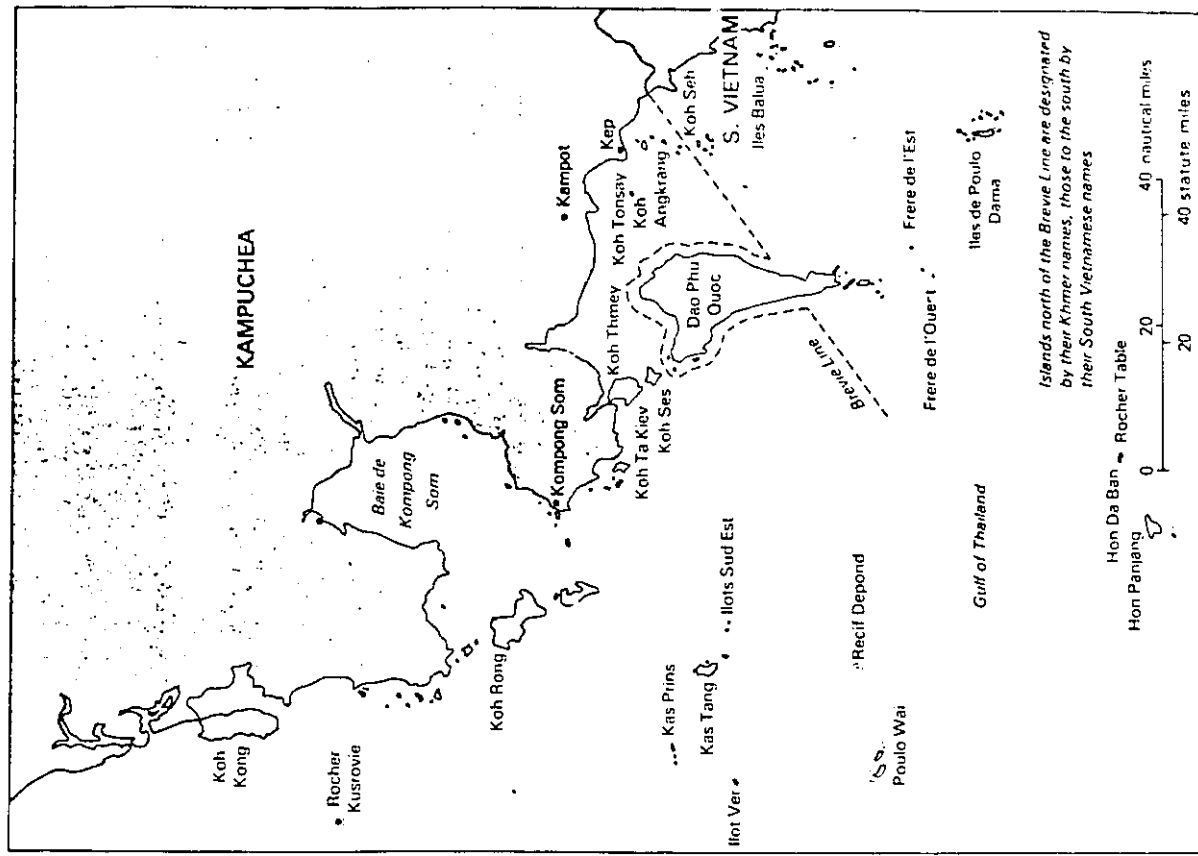
⁹²Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 225; Kittichaisaree, Kriangsak, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA, Singapore, Oxford University Press, 1987, at 43. Duiker, William J., VIETNAM SINCE THE FALL OF SAIGON, Athens, Ohio, U.S.A., Ohio University, Center for International Studies, 1985, at 128.



Source: Based on J. R. V. Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map*, EAP Research Paper No. 2, Jan. 1981, at 26, 29, East-West Center, Honolulu, Hawaii. The projection of the Brévié Line intersects the trijunction (*), which is equidistant between the nearest points on the Thai, Cambodian, and Vietnamese territories.

Map 10: The Brévié Line of 31 January 1939

Source: Kittichaisaree, Kriangsak, *THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA*, Singapore, Oxford University Press, 1987.



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Map 11: The Brévié Line of 31 January 1939

Source: Park, Ghoon-ho, "China and Maritime Jurisdiction: Some Boundary Issue", in Park, G.-H. and Pak, J.-K., eds., *THE LAW OF THE SEA -- Problem from East Asia*, Seoul, Korea, 1987.

involved.⁹³ In interpreting the 1886 Convention between Portugal and France in the Guinea--Guinea-Bissau Case, the Arbitral Tribunal was of the opinion that generally "*frontière*" had the function to separate two States.⁹⁴ The term "*frontière*" was associated with land and delimited a special zone over which a State had complete jurisdiction as explained in a French treatise on boundary.⁹⁵

A boundary has been defined as a clear division between sovereignties and can be marked as a line with length but not area on a map.⁹⁶ The term was used throughout the Convention. In the introduction to the Convention, the two parties decided to record the delimitation of the said boundary "*frontière*" which had been identified by the Chinese and French Commissioners through two years of work. Because the adjacent Chinese provinces to Tonkin were Guangdong and Yunnan, it was convenient to describe the boundary by each province. The Guangdong boundary was dealt with first. The Convention confirmed the boundary arrangement with regard to the disputed islands in the adjacent sea area by drawing a straight line.

As in the Guinea--Guinea-Bissau case, there was a complete absence of words such as, "*eaux*", "*maritime*", "*mer*", and "*mer territoriale*" in the 1887 Sino-French Convention. The Arbitral Tribunal was of the view that in the absence of these indicative words in the text of the 1886 Franco-Portuguese Convention, only land boundary was contemplated.⁹⁷

In the subsequent 1895 Convention supplement to the 1887 Convention, no provision was made to separate the maritime boundary. If they wanted to delimit their respective territorial

⁹³ICJ Rep. 1984, para. 19, at 265.

⁹⁴Tribunal Arbitral pour la Delimitation de la Frontiere Maritime Guinee/Guinee-Bissau (Sentence du 14 fevrier 1985), in 89 Revue Generale de Droit International Public 483-537(1985), para. 49, at 509; The English translation appeared in 25 International Legal Materials 251-309(1986), para. 49, at 277.

⁹⁵Lapradelle, Paul de, LA FRONTIERE, Paris, Les Editions internationales, 1928, 368 pages, at 11.

⁹⁶Chao, K.T., "Legal Nature of International Boundaries", 5 Chinese Yearbook of International Law and Affairs 29-89(1985), at 45-48.

⁹⁷Tribunal Arbitral pour la Delimitation de la Frontiere Maritime Guinee/Guinee-Bissau (Sentence du 14 fevrier 1985), in 89 Revue Generale de Droit International Public 483-537(1985), para. 56, at 511. The English translation appeared in 25 International Legal Materials 251-309(1986), para. 56, at 279.

seas, the Parties would be free to do so.⁹²

There is no convincing and unequivocal evidence to prove that the Parties intended that the term "frontiere" was given special meaning as to cover the maritime border in the Gulf of Tonkin.

3 - Summary

In order to succeed in using an existing treaty line as the maritime boundary, one must show either of two things. First, the treaty line has been expressly accepted by the State Parties concerned as having the effect of establishing maritime boundary. Secondly, the treaty line has been recognized as reflecting equity in the delimitation process. However, it is felt that pre-existing treaties do not normally divide the modern ocean zones under State's jurisdiction or sovereignty because these treaty lines were drawn out of considerations other than those relating to the modern law of the sea.

In accordance with the rules on treaty interpretation, it has been found that the 1887 Sino-French Convention was not intended to establish a maritime boundary in the Gulf of Tonkin. The Parties to the Convention had not expressly accepted it as having the effect of dividing the marine areas in the Gulf. The Convention line fails to reflect equity as understood in maritime delimitation.

After consideration of the four key terms crucial to the interpretation of the 1887 Convention, the above conclusion is confirmed. The term "îles" ordinarily do not include the surrounding waters. Nor did the Parties specially agree so. Even admitting that the term has been so used in the Convention, the only maritime boundary conceivable at the time of the conclusion of the Convention related to the territorial seas which had a breadth of 3 nautical miles.

There are two major problems with the Paris meridian 105°43'E.

⁹²Clercq, de Jules, RECUEIL DES TRAITES DE LA FRANCE, Vol. 20, 1893-1896, at 239-241. Parry, Clive, ed., CONSOLIDATED TREATY SERIES, vol. 181, (1895), Dobbs Ferry, New York, Oceana Publications, Inc., 1978, at 376-378 (French). China Maritime Customs, TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES, Vol. 1, 2nd edition, Shanghai, Statistical Department of the Inspectorate General of Customs, 1917, at 942-945 (Chinese and French). de Martens, G. Fr., NOUVEAU RECUEIL GENERAL DE TRAITES ET AUTRES ACTES RELATIFS AUX RAPPORTS DE DROIT INTERNATIONAL, Vol. 23, at 94-96. Prescott, J.R.V., MAP OF MAINLAND ASIA BY TREATY, Melbourne, Melbourne University Press, 1975, at 454-456 (English translation).

One is that it does not have either a starting nor a terminating point. The other is that it has three different versions of translation as to its exact seconds.

The line passing through the eastern point of Tra-co has a better appeal because it was referred to in both Chinese and French texts of the Convention. But again, it was not intended as establishing a maritime boundary in the Gulf of Tonkin. Nor has it been accepted as such by the Parties.

The term "*frontière*" was to separate the land territory of the two countries. In the absence of the words such as sea, territorial sea, waters, maritime, the Convention had as its object and purpose the delimitation of land boundary. No sea boundary was involved.

Chapter IX

RELEVANCE OF HISTORIC TITLE AND STATE CONDUCT

The relevance of historic title and State conduct to ocean boundary-making has been addressed by the International Court of Justice in Tunisia-Libya case.¹ From the Vietnamese official document on the dispute in the Gulf of Tonkin, it is apparent that in addition to the existing treaty line argument, Vietnam relied on both historic title and conduct of the Parties to support its position.² This chapter is to assess the strength of the Vietnamese arguments.

1 - Historic Titles as a Basis of Vietnam's Claim

Vietnam has claimed that the part of the Gulf of Tonkin "appertaining to Vietnam are historical waters and is subject to the juridical regime of internal waters".³ There are two possible grounds on which Vietnam can base its claim. One is the doctrine of historic bays. Of course, bays here will include gulfs. The second is the doctrine of historic title over waters in the Gulf. Each will be examined in turn.

1(a) - Historical bays

Though the subject of historical waters is still causing problems, the rules on bay or gulf which is abutted on by more than one State are fairly settled. In a well-known treatise on the subject of historic titles, Blum reached the conclusion that despite the Gulf of Fonseca case, bays bordered by more than one State were incapable of becoming historic bays. The waters beyond the marginal belt of territorial seas must be regarded as high

¹ICJ Rep. 1982, paras. 76, 93, 95-97, at 62, 70, 70-72.

²"Letter dated 9 April 1979 from the representative to of Vietnam to the Secretary-General", UN Doc. A/34/170-S/13234 of 12 April 1979. See *infra* Appendix I, Document Number 1.

³See Vietnam's 1982 Declaration on Straight Baselines, UN Doc. A/37/697. For complete text, see *infra* Appendix I.

seas.⁴ Almost contemporaneous with Blum's study, Bouchez and Strohl published their treatises on bays in general. Bouchez was of the opinion that bays enclosed by more than one State could only be subject to a sort of condominium if the coastal States so agreed.⁵ In Strohl's view, "the difference in attitude toward sovereignty probably lies in the fact that where two States occupy the littoral, the factors militating toward exclusive possession must be of a very high order of importance in the eyes of local inhabitants and decision makers".⁶

Not only it is very dubious that a bay bordered by more than one State can be subject to the regime of historic bays, but also there is much doubt that the Vietnamese claim has, in the first place, met the requirements of the historic bay claim. According to Bouchez, the requirements are:

- (1) The claimed water area ought to be adjacent to the coast of the claimant State.
- (2) The waters must be claimed by the coastal State *a titre de souverain*.
- (3) The pretended sovereignty has to be exercised effectively and for a sufficient long period.
- (4) The so created situation ought to be a matter of common knowledge, at least for the directly interested States.
- (5) The international community of States, and certainly the directly interested nations, must have acquiesced in the pretended territorial rights.⁷

Prima facie, Vietnam failed in effective exercise of authority. As argued by China, no nation has ever asked permission from Vietnam for their ships to sail in the waters of the Gulf.⁸

⁴Blum, Yehuda Z., HISTORIC TITLES IN INTERNATIONAL LAW, The Hague, Martinus Nijhoff Publishers, 1965, at 269-277.

⁵Bouchez, Leo J., THE REGIME OF BAYS IN INTERNATIONAL LAW, Leyden, A.W. Sythoff, 1964, at 198.

⁶Strohl, Mitchell P., THE INTERNATIONAL LAW OF BAYS, The Hague, Martinus Nijhoff, 1963, at 374.

⁷Bouchez, Leo J., THE REGIME OF BAYS IN INTERNATIONAL LAW, Leyden, A.W. Sythoff, 1964, at 281.

⁸Speech of Han Nianlong, head of the Chinese Delegation at the Fourth plenary meeting of the Sino-Vietnamese negotiations on 12 May 1979, UN Doc. A/34/235-S/13318, at 119. For a complete text of the speech, see *infra* Appendix III, Document Number 7. Also in "The Truth About the Sino-Vietnamese Boundary Question", Beijing Review, No. 21 (1979), 14-23, at 16. For a more detailed discussion of the Chinese position see Zhao, Lihai, HAIYANGFA DE XINFAZHAN, Beijing,

Also, the time is too short to permit the historic bay claim to mature. Vietnam's claim was made public only in 1982. To date, there is no indication that Vietnam has really enforced its claim.⁹ Furthermore, a number of States whose interests have been affected have made protests against the claim of Vietnam. They are China,¹⁰ Thailand,¹¹ France,¹² Singapore,¹³ and the United States.¹⁴ These protests cannot be lightly dismissed or ignored. Certainly, these States cannot be taken to have acquiesced in Vietnam's claim. Collectively, they have the effect of nullifying the Vietnamese claim.

Beijing University Press, 1984, 466p, at 47-48, in Chinese.

⁹For example, foreign oil exploration ships are coming and going through the vast water area in the Gulf in cooperation with China in the drilling operation in the Gulf. No apparent authority has been exercised consistently and continuously. See Valencia, Mark J., SOUTH-EAST ASIAN SEAS: OIL UNDER TROUBLED WATERS -- Hydrocarbon Potential, Jurisdictional Issues, and International Relations, Singapore, Oxford University Press, 1985, at 90-101.

¹⁰Statement by the Spokesman of the Ministry of Foreign Affairs of the People's Republic of China, 28 November 1982, UN Doc. A/38/97, S/15624. See *infra* Appendix III, Document Number 8.

¹¹Statement by the Ministry of Foreign Affairs of Thailand on the Vietnamese claims concerning the so-called historical waters and the drawing of baselines, 22 November 1985, UN Doc. A/40/1033. See *infra* Appendix IV, Document Number 2.

¹²Note de la France of 5 December 1983, in Office of the Special Representative of the Secretary-General for the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, New York, United Nations, 1987, at 153. See *infra* Appendix IV, Document Number 1.

¹³Note dated 5 December 1986 setting out the position of the Government of the Republic of Singapore on the Vietnamese claims concerning the so-called historical waters and the drawing of baselines, UN Doc. A/41/967. See *infra* Appendix IV, Document Number 3.

¹⁴Noted dated 17 June 1987 from the United States Mission to the United Nations referring to an accord entitled "Agreement on the historical waters of the Socialist Republic of Vietnam and the People's Republic of Kampuchea", Office of the Special Representative of the Secretary-General for the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, Vol. II, New York, United Nations, 1987, at 86. See *infra* Appendix IV, Document Number 4.

One should also not overlook the fact that as one of the two littoral States bordering the Gulf, China contests the validity of Vietnam's claim. And this fact alone will invalidate the historic bay claim.¹⁵ Finally, among the well-studied bays surrounded by more than one State, none appear to have a comparable size and dimension to the Gulf of Tonkin which has an entrance of more than 100 nautical miles with immense body of waters.¹⁶ The area of the Gulf of Tonkin is twice as large as that of the Gulf of Maine. It is inconceivable to enclose such a large body of water area as historic bays.

1(b) - Historic titles

On the second possible legal basis of Vietnam's claim, that is historic title claim over the waters appertaining to Vietnam, what has been said about historic bays will also be applicable. Historic title was deemed to provide sufficient equitable basis for departure from the treaty rule as set forth in the 1958 Geneva Continental Shelf Conventions in the International Law Commission's discussions.¹⁷

Historic titles were recognized in both the 1958 Territorial Seas Convention and the 1982 Law of the Sea Convention in relation to delimitation of territorial seas, but were not mentioned with respect to the EEZ or continental shelf delimitation.¹⁸ In the Tunisia-Libya case, Tunisia advanced the argument of historic title over a certain part of its offshore areas.¹⁹ The Court did not directly rule on the question because in its opinion these areas

¹⁵See analysis by Daniel J. Dzurek in LIMITS IN THE SEAS, No. 99, Straight Baselines: Vietnam, at 9-10.

¹⁶Strohl examined the Gulf of Fonseca, the Gulf of Aquaba, Gibraltar Bay, and the Bay of Fundy. See Strohl, Mitchell P., THE INTERNATIONAL LAW OF BAYS, The Hague, Martinus Nijhoff, 1963, at 376-386. Bouchez studied the Gulf of Fonseca, Bay of Granville, Gulf of Aquaba, Palk Bay, and the Gulf of Manaar. See Bouchez, Leo J., THE REGIME OF BAYS IN INTERNATIONAL LAW, Leyden, A.W. Sythoff, 1964, at 116-198.

¹⁷Yearbook of International Law Commission, 1953, Vol. II, at 300.

¹⁸Article 12 of the Territorial Seas Convention and Articles 10 and 15 of the Law of the Seas Convention.

¹⁹ICJ Rep. 1982, para. 76, 97, at 62-63, 71-72.

would be under Tunisian jurisdiction anyway.²⁰

The requirements of historic title are broadly similar to those of a historic bay.²¹ They were succinctly summarized in a treatise on the Arctic.²¹ According to Brown, the question of historic title to the delimitation of continental shelf or EEZ does not have the same significance as it does with the delimitation of the territorial seas.²² Evans reached the conclusion that economic dependency-unrelated historic claims "have no relevance unless they have been acquiesced in, or they are used to bolster the equitability of the solution put forward".²³ In his study on maritime delimitation, Johnston regarded that historic title have received little consideration in settling boundary lines. Only in conjunction with other relevant circumstances can it become relevant.²⁴

Even if we admit the validity of historic title claim of Vietnam, it is still problematic to define precisely the areas appertaining to Vietnam as constituting historic waters. Is it the Convention line or some other line? Does China's opposing position as a littoral State of the Gulf matter? These questions cannot be answered by Vietnam in maintaining the historic title argument. In fact, in a number of studies, Vietnam's drawing of straight baselines and claims of historic waters were presented as examples of abuse of the straight baselines and historic title.²⁵

²⁰ICJ Rep. 1982, para. 105, at 76-77.

²¹Pharand, Donat, CANADA'S ARCTIC WATERS IN INTERNATIONAL LAW, Cambridge, Cambridge University Press, 1988, at 105.

²²Brown, E.D., SEA BED ENERGY AND MINERAL RESOURCES AND THE LAW OF THE SEA, Vol. I, The Areas within National Jurisdiction, London, Graham & Trotman, 1984, at I.6 35.

²³Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 222-223.

²⁴Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 212.

²⁵See Alexander, L.M., "Baselines Delimitation and Maritime Boundaries", 23 Virginia Journal of International Law 503(1983), at 520; Shaw, Sandra H. and Dzurek, Daniel J., "Charts in the Law of the Sea", in Dallmeyer, Dorinda G. and DeVorse, Louis Jr., eds., RIGHTS TO OCEANIC RESOURCES -- Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989, 15-24, at 19; Kapoor, D.C. and Kerr, Adam J., A GUIDE TO MARITIME BOUNDARY DELIMITATION, Toronto, Carswell, 1986, at 105-107; Kittichaisaree, Kriangsak, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION

The Vietnamese claim of historic waters under either historic bay or historic title cannot be substantiated in international law. The claim must fail for the lack of consensus among the littoral States neighbouring the Gulf of Tonkin, the short lapse of time of the claim, the strong protests and non-acquiescence by affected States, and no effective exercise of authority.

2 - State Conduct as a Basis of Vietnam's Claim

Two questions have to be examined under this heading. One is whether the conduct of the Parties has manifested a common intention to recognize the Convention line as the maritime boundary. The other is whether the rectangular area enclosed by the 18th and 20th parallels and the 107th and 108th meridians has acquired any legal significance in the final settlement of the dispute in the Gulf of Tonkin.

2(a) - Conduct of the parties relating to the Convention line as a maritime boundary

In its official document, Vietnam asserted that: "since the signing of the conventions, successive administrations on both sides have been exercising their sovereignty on the land and in the Bac Bo Gulf areas delimited by this border."²⁶ China categorically rejected the claim and argued that:

everyone knows that the previous Governments in China and the French colonial authorities observed 3-nautical-mile principle in regard to the territorial sea. The Government of the People's Republic of China declared a 12-nautical-mile territorial sea in September 1958. China has never exercised sovereignty over or jurisdiction in the Beibu Gulf sea area beyond its territorial sea. In September 1964, the Vietnamese Government also declared its territorial sea to be 12 nautical miles wide and published a map showing its territorial sea boundary in the Beibu Gulf. If, as the Vietnamese side claims, the vast sea area in the Beibu Gulf west of 108°3'13"E was its inland sea long ago, why did it draw another

IN SOUTH-EAST ASIA, Singapore, Oxford University Press, 1987, at 43.

²⁶"Letter dated 9 April 1979 from the representative to of Vietnam to the Secretary-General", UN Doc. A/34/170-S/13234 of 12 April 1979.

territorial sea boundary within its own island sea?²⁷
Has the conduct of the Parties validated the Convention line which was not meant to establish a maritime boundary initially?

2(a)(i) - International jurisprudence

The conduct of the Parties, if it is undertaken under certain circumstances and has produced some tangible results, can be a relevant circumstance in delimitation of maritime boundary.

In the Tunisia-Libya case, the Court held that the conduct of Tunisia and Libya had evidenced a common respect for a "de facto line dividing concession areas which were subject to active claims".²⁸ The six-year period of peaceful development of oil concessions and respect for the line was said to be sufficient, while eight-year in the Gulf of Maine case was held to be "too brief to have produced a legal effect of this kind".²⁹ However, the essence of this claim lies in the fact that the Parties themselves have reached a consensus on a particular line as to be acceptable, notwithstanding the *modus vivendi* nature of the line respected by their conduct.

The North Sea cases defined another use of the State conduct doctrine. The conduct of one Party to a dispute may give rise to estoppel if the conduct evinced acceptance of a boundary line and such acceptance has caused the other Party detrimentally or prejudicially to change its attitude.³⁰ In the Gulf of Maine case, Canada argued that the conduct of the United States had given rise to estoppel by the latter's acquiescence in the median line ("Bureau of Land Management" line).³¹ The Chamber rejected the argument by stating that "because of its unclear nature", the conduct of the United States "does not satisfy the conditions either for estoppel or for acquiescence".³²

Furthermore, State conduct in selection of a particular set of relevant circumstances or practical methods will be taken into account as an aspect of the principle of agreement to delimit

²⁷"Letter dated 14 May 1979 from the representative of China to the Secretary-General", UN Doc. A/34/235-S/13318 of 14 May 1979. See *infra* Appendix III, Document Number 7.

²⁸ICJ Rep. 1982, para. 117, at 84.

²⁹ICJ Rep. 1984, para. 151, at 311.

³⁰ICJ Rep. 1969, para. 30, at 26.

³¹ICJ Rep. 1984, paras. 128, 149, at 304, 310.

³²ICJ Rep. 1984, para. 145, at 309.

maritime boundaries and as a reflection of equity as the Parties conceive. For example, in the Anglo-French case, equidistance was selected not only because of its equitableness in light of the relevant circumstances of the case, but also because of the agreement of Britain and France on its application in the case.³³

Fishing and resource development activities tend to be denied much relevance by international jurisprudence on maritime delimitation. With respect to the U.S. argument that fishing patterns should be respected, the Chamber had this to say: "the respective scale of activities connected with fishing - or navigation, defence or, for that matter, petroleum exploration and exploitation - cannot be taken into account as a relevant circumstance".³⁴ The acceptance by the Court of the relevance of the oil concessions and petroleum licensing legislations in the Tunisia-Libya case was not because of the intensity or scale of the activity itself but rather because of the Parties' respect for a particular line.³⁵ It is also important to remember the preference of neutral factors by the Chamber in the Gulf of Maine case that are "of neutral character, are best suited for use in a multi-purpose delimitation" over other factors.³⁶

Some writer holds the view that State conduct in the form of fishing activities is relevant to boundary delimitation and should be taken into account.³⁷ But the majority of jurists do not regard fishing activities as a relevant circumstance on its own.³⁸

2(a)(ii) - Actual conduct of the Parties

After the signing of the 1887 Convention, China's conduct has shown that the Convention line has not been respected as the general maritime boundary line by China. First of all, China was generally receptive to 3-mile territorial seas. In 1864, when

³³Arbitral Award, 1977, paras. 87, 103, 146.

³⁴Gulf of Maine case, ICJ Rep. 1984, para. 237, at 342.

³⁵ICJ Rep. 1982, paras. 117-118, at 83-84.

³⁶Gulf of Maine case, ICJ Rep. para. 194, at 327.

³⁷Attard, David, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW, Oxford, Clarendon Press, 1987, at 267-269.

³⁸See for example, Evans, Malcolm, D, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 209-212; Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 123; Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, Cambridge, Grotius Publications Limited, 1989, at 216.

Prussia detained a Danish ship in Bohai Gulf, China protested on the basis that the waters were Chinese internal waters and later the ship was released. The official report to the Emperor stated that 10 li (3 nautical miles) was the limit of territorial waters.³⁹ In 1874, the Chinese Viceroy Li Hung-chang ordered the Korean troops to fire at Japanese fishing boats if they came within 10 li (3 nautical miles).⁴⁰ When China and France signed the Convention for the lease of Kuang-chou Wan (May 27, 1898), they explicitly applied 3 marine miles to the leased territory.⁴¹ The 9-nautical-mile limit prescribed in 1899 Sino-Mexican treaty should be viewed rather as a contiguous zone, rather than the territorial sea.⁴² At the 1930 Hague Conference, the Republic of China took the position that the breadth of the territorial seas should be 3 miles.⁴³ When the United States proclaimed a "combat zone" off the Vietnamese coast, one official observer of China stated that the inclusion of Vietnamese and Chinese territorial waters and part of the high seas violated international law.⁴⁴

³⁹Chiu, Hungdah, "China and Territorial Sea", 13 The Annals of the Chinese Society of International Law 144-151(1976), at 145.

⁴⁰Chiu, Hungdah, "China and Territorial Sea", 13 The Annals of the Chinese Society of International Law 144-151(1976), at 145.

⁴¹TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA (1894-1919), Vol. II, Republican Period (1912-1919), ed. by John V. A. MacMurray, New York, Oxford University Press, 1921, at 128-130.

⁴²Chiu, Hungdah, "China and Territorial Sea", 13 The Annals of the Chinese Society of International Law 144-151(1976), at 146. The provision reads:

The two Contracting Parties agree upon considering a distance of 3 marine leagues (approximately 9 nautical miles), measured from the line of low tide, as the limit of their territorial waters for everything relating to the vigilance and enforcement of the Custom-house Regulations and the necessary measures for the prevention of smuggling.

One possible explanation is that the provision contemplates the regime of contiguous zone rather than territorial seas. See Liu, Nanlai and others, GUOJI HAIYANG FA (International Law of the Sea), Beijing, Ocean Press, 1986, pp. 99-100, in Chinese.

⁴³Cohen, Jerome Alan and Chiu, Hungdah, PEOPLE'S CHINA AND INTERNATIONAL LAW -- A Documentary Study, Princeton, Princeton University Press, 1974, at 468.

⁴⁴Cohen, Jerome Alan and Chiu, Hungdah, PEOPLE'S CHINA AND INTERNATIONAL LAW -- A Documentary Study, Princeton, Princeton University Press, 1974, at 546.

France, as the metropolitan power over Indochina before 1954, did not practice a wider territorial sea than 3 miles. The Brevie Line was drawn by the French Governor of Indochina between Vietnam and Kampuchea in the Gulf of Thailand in 1939 to separate the islands not the sea itself.⁴⁵ In the 1964 Gulf of Tonkin incidents, the sole concern of both Vietnam and the United States was whether the American warships U.S.S. *Maddox*, U.S.S. *Ticonderoga*, and *C. Turner Joy* were operating in international waters or territorial seas of Vietnam.⁴⁶ In fact, the U.S. destroyers went at least eleven miles in order to show that the United States did not recognize the 12-mile territorial seas limit of Viet Nam.⁴⁷

When China declared its 12-mile territorial seas in 1958, no mention was made to either the 1887 Convention or the 108°43'13"E meridian line.⁴⁸ The 3rd draft of the Law on the Territorial Seas and Contiguous Zone of China, nothing was said about the Convention line.⁴⁹ In 1964, Vietnam also declared a 12-mile territorial sea and drew a line on the official map. As pointed out by China, if the 108°43'13"E had established a general maritime boundary and the waters enclosed were internal waters of Vietnam, why drew another line in the internal waters?⁵⁰

Both China and Vietnam depend heavily on the living resources,

⁴⁵Prescott, J.R.V., THE MARITIME POLITICAL BOUNDARIES OF THE WORLD, London, Methuen, 1985, at 225-226.

⁴⁶"United States Takes Measures to Repel Attack Against U.S. Forces in Southeast Asia", 51 Department of State Bulletin 258-274(1964), No. 1313.

⁴⁷Stone, I.F., "International Law and the Tonkin Bay Incidents", in Raskin, Marcus G. and Fall, Bernard B., eds., THE VIET-NAM READER -- Articles and Documents on American Foreign Policy and the Viet-Nam Crisis, New York, Random House, 1965, 307-315.

⁴⁸Declaration on Territorial Seas, 1 Peking Review, No. 28 at 21 (September 9, 1958). For the text of the declaration, see *infra* Appendix I. Generally see Cheng, Tao, "The law of the Sea", in Leng, Shao-Chuan and Chiu, Hungdah, LAW IN CHINESE FOREIGN POLICY: Communist China and Selected Problems of International Law, Dobbs Ferry, Oceana Publications, Inc., 1972, 79-114.

⁴⁹Law on Territorial Seas and Contiguous Zone of China (third draft), October 1986, in Chinese.

⁵⁰"Letter dated 14 May 1979 from the representative of China to the Secretary-General", UN Doc. A/34/235-S/13318 of 14 May 1979. See *infra* Appendix III, Document Number 7.

mainly fisheries, in the Gulf of Tonkin.⁵¹ In 1957, the two countries signed an agreement by which fishing activities were regulated in the Gulf. By applying the principle of sovereign equality, it required that Chinese fishing boats would not operate on the fishing grounds of Vietnam from Con Co island to Danaoweixi Dao; on Ching Lan Xan, Sui Lang Zhou, and Li Tou Shan fishing banks, fishermen from both countries can operate; and on fishing grounds from the mouth of Dongxin River to the west coast of Leizhou Peninsula and Hainan Island, the number of the Vietnamese fishing vessels should not exceed the number of the Chinese fishing vessels operating in the adjacent coastal waters of Vietnam.⁵² There was no indication that the Parties had a boundary line in mind or in fact respected any line. The arrangement is typical of bilateral cooperation in fisheries.

The offshore oil development in the Gulf of Tonkin offers little to Vietnam's claim. Both Vietnam and China have cooperated with foreign oil companies to explore, prospect, exploit and develop offshore oil and gas in the Gulf. On balance, however, the Chinese activities are more intensive and penetrating. So far, five oil consortia have been awarded concession blocks by China in the Gulf of Tonkin: Total, ARCO, Idemitsu, Pennzoil, and Sun.⁵³ When one concession block bordering on the 108th meridian E was awarded to a foreign company in September 1979 by China, Vietnam protested against such intrusion.⁵⁴ However, these activities took place after the dispute arose in 1974 when Vietnam and China held opposing views on the delimitation of the Gulf area.

2(b) - Conduct of the Parties Relating to a Joint Regime

2(b)(i) - Use of joint regime in maritime dispute

⁵¹See Chapter II, section 5.

⁵²Ministry of Foreign Affairs, China, ZHONGHUA RENMIN GONGHEGUO TIAOYUE JI (Treaty Series of People's Republic of China), Vol.6, Beijing, Law Press, 1958 in Chinese.

⁵³THE PEOPLE'S REPUBLIC OF CHINA -- Law and Investment, Arthur Anderson & Co. (Accounting firm), 1986, at 123-126.

⁵⁴Valencia, Mark J., SOUTH-EAST ASIAN SEAS: Oil Under Troubled Waters -- Hydrocarbon Potential, Jurisdictional Issues, and International Relations, Singapore, Oxford University Press, 1985, at 96.

As a concept, joint regime has received growing attention in maritime delimitation.⁵⁵ There are several examples on the use of joint regime.⁵⁶ The most complex and substantial bilateral agreement on the joint regime is the Australia-Indonesia agreement on the

⁵⁵Miyoshi, Masahiro, "Some Comments on Legal Aspects of Precedents for Joint Development", 6 Energy 1359-1362(1981); Park, Choon-Ho, "Joint Development of Mineral Resources in Disputed Waters: the Case of Japan and South Korea in the East China Sea", 6 Energy 1335-1341(1981); Valencia, Mark J. and Miyoshi, Masahiro, "Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claims?", 16 Ocean Development and International Law 211-254(1986); Miyoshi, Masahiro, "The Japan-South Korea Agreement on Joint Development of the Continental Shelf", 10 Energy 545-553(1985); Valencia Mark J., "Joint Jurisdiction and Development in Southeast Asian Seas: Factors and Candidate Areas", 10 Energy 545-553(1985); Miyoshi, Masahiro, "The Basic Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf", 3 International Journal of Estuarine and Coastal Law 1-18 (1988); Richardson, Elliot L., "Jan Mayen In Perspective", 82 American Journal of International Law 443-458(1988).

⁵⁶They are Kuwait-Saudi Arabia Agreement on the Partition of the Neutral Zone of 1965, in 60 American Journal of International Law 744-749(1966); Malaysia-Thailand Memorandum of Understanding on the Joint Development Zone, in Prescott, J.R.V., MARITIME JURISDICTION IN SOUTHEAST ASIA: A Commentary and Map, Research Report No.2, East-West Environment and Policy Institute, East-West Centre, Honolulu, Hawaii, January 1981; Japan-South Korea Agreement on the Joint Development Zone, in LIMITS IN THE SEAS, No.75(1977); Saudi Arabia-Sudan Agreement on the Joint Exploitation of the Common Zone, in UN Doc. ST/LEG/SER.B/18, pp.452-455; Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen by Elliot L. Richardson, Hans G. Andersen, and Jens Evensen. May 1981. 20 International Legal Materials 797-842(1981); Iceland and Norway: Agreement on the Continental Shelf between Iceland and Jan Mayen (entered into force June 2, 1982) 21 International Legal Material 1222-1226(1982); United Kingdom-Norway Frigg Field Agreement of May 10, 1976, 113 Great Britain Treaty Series, 1977 (Cmd 7043); France-Spain Bay of Biscay Agreement of January 29, 1974, 80 Revue Generale de Droit International Public 368 (1976); Australia-Indonesia: Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, done over the zone of cooperation, December 11, 1989, 29 International Legal Materials 469-537(1990).

Timor Gap.⁵⁷ Instead of establishing a permanent line of delimitation, the two countries set up a zone of cooperation which is further subdivided into three areas: A, B, and C. In Area A, the exploration for and exploitation of petroleum resources shall be jointly controlled so as to achieve optimum commercial utilization and equal sharing. In Areas B and C, the State which undertakes oil production shall have the obligations to notice the other State and share tax collections from the production.⁵⁸

In the Jan Mayen conciliation, the Commission opted for the adoption of a joint regime by giving considerations to the following factors: (a) Iceland is totally dependent on imports of hydrocarbon products; (b) the shelf surrounding Iceland is considered by scientists to have very low hydrocarbon potential; (c) the Jan Mayen Ridge between Jan Mayen and the 200-mile economic zone of Iceland is the only area which is considered to have the possibility of finding hydrocarbons; and (d) the great depth of superjacent waters over Jan Mayen Ridge and the distance of natural markets for hydrocarbons require large discoveries in order to be commercially sensible.⁵⁹

Articles 74 (3) and 83 (3) of the 1982 United Nations Convention on the Law of the Sea provides:

Pending agreement as provided in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

Encountering difficulties in dividing sea areas, States are legally encouraged to enter into such arrangements which encompass the option of establishing a joint development zone. Indeed, the provision obliges the Parties to negotiate in good faith, and to exercise mutual restraint in the process of settling their

⁵⁷"Australia-Indonesia: Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia", done over the zone of cooperation, December 11, 1989, 29 International Legal Materials 469-537(1990).

⁵⁸Article 2(2), "Australia-Indonesia: Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia", done over the zone of cooperation, December 11, 1989, 29 International Legal Materials 469-537(1990), at 478.

⁵⁹Report and Recommendations to the Governments of Iceland and Norway on the Continental Shelf Area between Iceland and Norway, 19-20 May 1980, 62 International Law Reports 108-137(1982), at 126-127.

dispute.⁶⁰ The Australia-Indonesia agreement on the Timor Gap expressly states in its preamble the above provision and presents a good example on the use of the joint regime under the idea of provisional arrangement.⁶¹

The components of a provisional arrangement are the entering into agreements between the disputing Parties, the specific area of application, the practical nature of the solution, the preliminary and preparatory nature of the arrangement, and the non-prejudice to the final settlement.⁶² The success of a joint regime will largely depend on the adaptability of the resources to joint management, the cooperative relationship between the Parties, and the share of technology. Strategic location or strained relationship will be hostile to the joint regime.⁶³

Commenting on the condominium arrangements in sea boundary delimitation before World War II, Professor Rhee reached the conclusion that:

it is one way of solving disputes in cases where mere division would not provide convenience and efficiency in the use of the sea, and where interests in the sea could be exploited more equitably and effectively than by dividing them in terms of maritime space.⁶⁴

Professor Miyoshi considered that the strongest motivation for States to enter into joint development would be a sense of urgency

⁶⁰Lagoni, Rainer, "Interim Measures Pending Maritime Delimitation Agreements", 78 American Journal of International Law 354-368.

⁶¹Paragraph 1 of the Preamble, "Australia-Indonesia: Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia", done over the zone of cooperation, December 11, 1989, 29 International Legal Materials 469-537(1990), at 475.

⁶²Lagoni, Rainer, "Interim Measures Pending Maritime Delimitation Agreements", 78 American Journal of International Law 354-368, at 358-360.

⁶³Richardson, Elliot L., "Jan Mayen In Perspective", 82 American Journal of International Law 443-458(1988), at 448-453.

⁶⁴Rhee, Sang-Myon, "Sea Boundary Delimitation Between States before World War II", 76 American Journal of International Law 555-588(1982), at 585.

and obligation to protect its interests in oil or gas deposits.⁶⁵ The Chairman of the Conciliation Commission in the Jan Mayen Conciliation, Elliot L. Richardson strongly endorsed the idea of joint management approach to maritime boundary dispute. According to his view, the merit of a joint development zone "lies in minimizing the potential for conflict, often by eliminating competition over the ownership of resources". It also "promotes international cooperation" in the management and use of ocean resources, and it gives the Parties a more flexible approach to deal with the problem.⁶⁶

Two long-time researchers on the South China Sea recommended the scheme of joint development in Southeast Asian seas. The broad conclusion Valencia and Miyoshi reached was that the effort of States to enter into provisional arrangements not to jeopardize or hamper the final solution had been increasingly regarded as an obligation "when some specific rights and interests of neighbouring States are at stake".⁶⁷ Indeed, on a theoretical basis, it was suggested that if the political climate changes between Vietnam and China, the disputed areas in the Gulf of Tonkin may very well be qualified for consideration of joint development.⁶⁸

Although it is premature to state that the scheme of joint development has become part of customary international law on maritime boundary delimitation, there is certainly no legal hindrance barring States from taking this option, especially for difficult cases such as that in the Gulf of Tonkin, and for reasons of effective utilization and management of the resources.

2(b)(ii) - Application of joint regime in the Gulf of Tonkin

Two issues must be examined with respect to application of the joint regime in the Gulf of Tonkin. First, has a provisional arrangement been in place? Second, is the joint regime applicable to the Gulf of Tonkin?

⁶⁵Miyoshi, Masahiro, "Some Comments on Legal Aspects of Precedents for Joint Development", 6 Energy 1359-1362(1981), at 1359.

⁶⁶Richardson, Elliot L., "Jan Mayen In Perspective", 82 American Journal of International Law 443-458(1988), at 448-449.

⁶⁷Valencia, Mark J. and Miyoshi, Masahiro, "Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claims?", Ocean Development and International Law 211-254(1986), at 213.

⁶⁸Valencia, Mark J. and Miyoshi, Masahiro, "Southeast Asian Seas: Joint Development of Hydrocarbons in Overlapping Claims?", Ocean Development and International Law 211-254(1986), at 242-244.

(1) - The Moratorium Zone

In January 1974, China and Vietnam appeared to have agreed that the rectangular area encircled by the 107th and 108th meridians and 18th and 20th parallels should not be subject to exploration until an agreement on the delimitation in the Gulf can be reached.⁶⁹ On China's insistence, it was also agreed that no third country was being allowed to explore the Gulf (see Map 12).

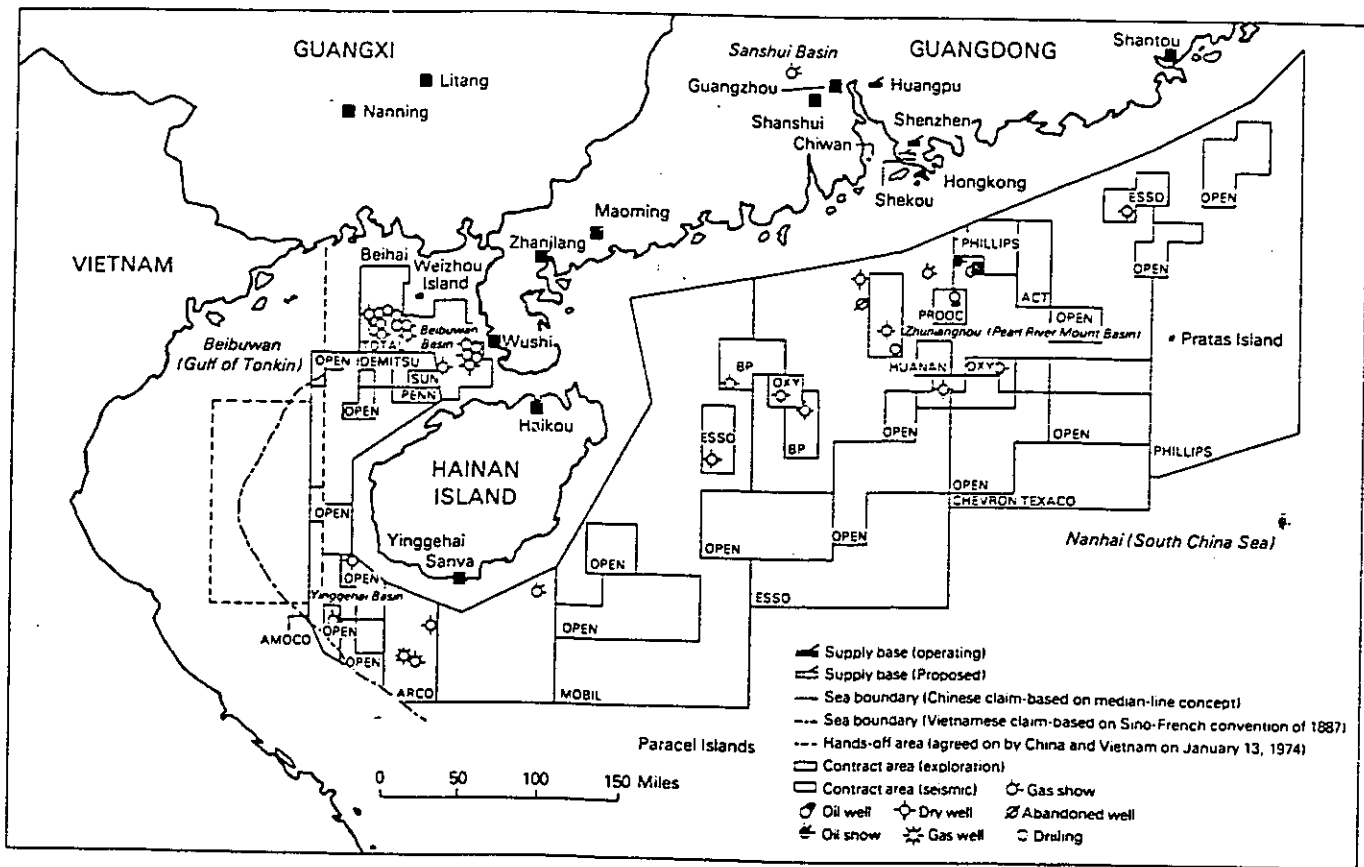
The Moratorium Zone was respected by China in its concession bidding activities. For example, no block is marked or offered inside the rectangular area.⁷¹ However, Vietnam challenged the 108th meridian as the west limit of the Moratorium Zone.⁷² One of the components of a provisional arrangement, namely, the area of application, is lacking because the Parties disagreed with each other. Secondly, the nature of the Moratorium Zone was to exercise mutual restraint from prospecting, exploring, and exploiting. Such prohibitory ban on all activities arguably does not fall into the "practical solution" category of paragraph 3 of Articles 74/83 of the Law of the Sea Convention. Thirdly, the rectangular area constituting the Moratorium Zone does not cover the whole overlap of claims of Vietnam and China. In any event, the arrangement seems to have been repudiated by Vietnam when it charged that China did not respect the 108°3'13"E Convention line in offshore oil

⁶⁹"Letter dated 9 April 1979 from the representative to of Vietnam to the Secretary-General", UN Doc. A/34/170-S/13234 of 12 April 1979; "Letter dated 14 May 1979 from the representative of China to the Secretary-General", UN Doc. A/34/235-S/13318 of 14 May 1979.

⁷⁰"Letter dated 9 April 1979 from the representative to of Vietnam to the Secretary-General", UN Doc. A/34/170-S/13234 of 12 April 1979; "Letter dated 14 May 1979 from the representative of China to the Secretary-General", UN Doc. A/34/235-S/13318 of 14 May 1979.

⁷¹China awarded concession blocks to AMOCO for seismic survey to the west of Hainan Island bounded in the west by 108°E, so as not to breach the agreed rectangular zone. See, Valencia, Mark J., SOUTH-EAST ASIAN SEAS: Oil Under Troubled Waters -- Hydrocarbon potential, jurisdictional issues, and international relations, Singapore, Oxford University Press, 1985, at 96.

⁷²See Valencia, Mark J., SOUTH-EAST ASIAN SEAS: Oil Under Troubled Waters -- Hydrocarbon potential, jurisdictional issues, and international relations, Singapore, Oxford University Press, 1985, at 96.



Source: *Petroleum News* reprinted in *Far Eastern Economic Review*, 28 June 1984.

Map 12 : The Moratorium Zone and China's Activities

concessions.⁷³

(2) - A joint regime

Nevertheless, the zone may serve as a potential candidate area for a joint regime between Vietnam and China. The hydrocarbon resources in the disputed area are largely unknown. With the dramatic change of Soviet policy and the end of cold war, the political hostility between China and Vietnam has begun to thaw. With the assistance and cooperation of foreign oil companies, both Vietnam and China would benefit more from a joint regime than the present moratorium situation in the rectangle. The Gulf of Tonkin occupies a strategic position for both Vietnam and China. But such a consideration should not be allowed to unduly hamper the establishment and operation of a joint regime if the military threat can be eliminated.

Two kinds of joint arrangement can be envisaged. One will take the whole Gulf as a joint regime area, and the other only applies to the rectangle as agreed previously by the Parties. To make the whole maritime boundary area subject to a joint regime is seldom warranted when other parts of the boundary are not as intractable as the rectangular area. Indeed, a wholesale solution is questionable in reaching an equitable result in light of the relevant circumstances in the area, such as, the presence of coastal islands, the adjacent situation at the land boundary terminus, and the uncertainty surrounding the closing line of the Gulf. A more practical approach is to treat the rectangular area as the joint zone subject to joint management. Areas outside the enclosure will be delimited according to international law.

3 - Summary

The Vietnamese claim has failed on either historic bay or historic title. The reasons are: too brief a period, no effective exercise of authority, China's objection, other countries' protests, and the practical problem of dividing the historic waters in the Gulf. In addition, the immense size and dimension of the Gulf of Tonkin make it unlikely to become subject to historic waters.

State conduct can be taken into account in maritime delimitation if it respects a *de facto* line or a *modus vivendi* line for a reasonable period of time. If any detrimental effect happens to the other Party as a result of reliance on the said conduct, a

⁷³See Valencia, Mark J., SOUTH-EAST ASIAN SEAS: Oil Under Troubled Waters -- Hydrocarbon potential, jurisdictional issues, and international relations, Singapore, Oxford University Press, 1985, at 96.

claim of estoppel can arise. State conduct evincing acceptance of a particular set of equitable criteria, relevant circumstances, and practical methods will be relevant in the delimitation process. Fishing activities have been rejected as relevant by the court. Offshore oil concessions can only play a supportive role and in light of the growing trend to use a single line to delimit two or more zones, their relevance has been reduced considerably.

China and Vietnam have not respected in their practice the Convention line of 1887 for purposes of territorial seas, marine fisheries, and offshore petroleum development. Nor have they accepted any set of equitable criteria, relevant circumstances, and practical methods in dividing the ocean space in the Gulf of Tonkin.

When facing difficulties in settling maritime boundary disputes, coastal States can turn to the idea of joint regime. The practice of employing joint regime is growing often as part of the overall solution to the delimitation problem. The principal purposes of having continental shelf and exclusive economic zone are to untap the resources contained therein. Joint regime may be the best device to secure an effective management of the resources. As a real alternative to drawing a boundary line, a joint regime offers a number of advantages: avoidance of conflict, effective and cooperative management, and flexibility in settling the dispute.

The Moratorium Zone does not qualify as a provisional arrangement under paragraph 3 of Articles 74/83 of the Law of the Sea Convention due to a lack of consensus on the limits of the Zone, the nature of mutual restraint of the arrangement, and the repudiation by Vietnam. However, the Zone may be used as a potential candidate for a joint regime in an overall settlement of the maritime boundary problem in the Gulf of Tonkin.

CHAPTER X
GEOGRAPHICAL FEATURES OF
THE RELEVANT COASTS

The coasts, which mark the division between land and sea, also serve as the starting line to delimit a State's maritime zones, such as continental shelf and exclusive economic zone. The development of customary international law in this field has the tendency of taking the geography of the coasts as the most important and relevant circumstance to be reckoned with in maritime delimitation.

The International Court in the North Sea cases stated that "it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited."¹ In its operative part, the Court concluded that the "general configuration of the coasts of the Parties, as well as the presence of any special or unusual feature" should be considered as a relevant circumstance.² The Court of Arbitration in the Anglo-French case agreed with the ICJ by saying that "it is the geographical situation which indicates the applicable method of delimitation."³ The Court of Arbitration noted the approximate equality existing between the mainland coasts of United Kingdom and France in the English Channel.⁴

The ICJ, in its 1982 Tunisia-Libya case, regarded the coasts as constituting the "starting line" for one to ascertain how far the extension can go, as well as its relations with neighbouring coasts.⁵

1 - Principal Elements of the Geography of the Coasts

1(a) - Concavity, convexity and irregularity

¹ICJ Rep. 1969, para. 96.

²ICJ Rep. 1969, para 101 (D), (1).

³Arbitral Award, 1977, para. 87, at 63.

⁴Arbitral Award, 1977, para. 181, at 96.

⁵ICJ Rep. 1982, para. 73-74, at 60-61.

Because of the concave nature of the German coast facing the North Sea, the equidistance method was declared inapplicable by the Court. This point was eloquently summarized by the Court of Arbitration in the Anglo-French case:

it is the combined effect of the side-by-side relationship of the two States and the prolongation of the lateral boundary for greater distances to seawards which may be productive of inequity and is the essence of the distinction between "adjacent" and "opposite" coasts situation.⁶

There were marked convexity and concavity in the North Sea case in that "in the one case the coastline is roughly convex in form and in the other it is markedly concave."⁷ The situation was characterized by the Court as "quasi-equality" with the coastlines "comparable in lengths" (see Map 13).⁸

The Arbitral Tribunal, after examining the coastlines of Guinea and Guinea-Bissau, as well as their neighbouring countries, drew two observations. One was that the coastlines of Guinea and Guinea-Bissau, and Sierra Leone follow a concave line, the other was that the West African coastline in general is undoubtedly convex.⁹ Henceforth, it was decided that the direction of the delimitation lines should be divergent (see Map 14),¹⁰ unlike the convergent lines in the North Sea cases.¹¹

During the proceedings in the 1982 Tunisia-Libya case, Tunisia submitted that the concavity and convexity of its coastlines as well as the fairly regular coastlines of Libya should be regarded as relevant circumstances.¹² The Court gave weight to the change of direction in the Gulf of Gabes though, not overlooking the general configuration of the relevant coasts.¹³

In State agreements and treaties concerning maritime

⁶Arbitral Award, 1977, para. 95, at 66.

⁷ICJ Rep. 1969, para. 91.

⁸ICJ Rep. 1969, paras. 8, 91.

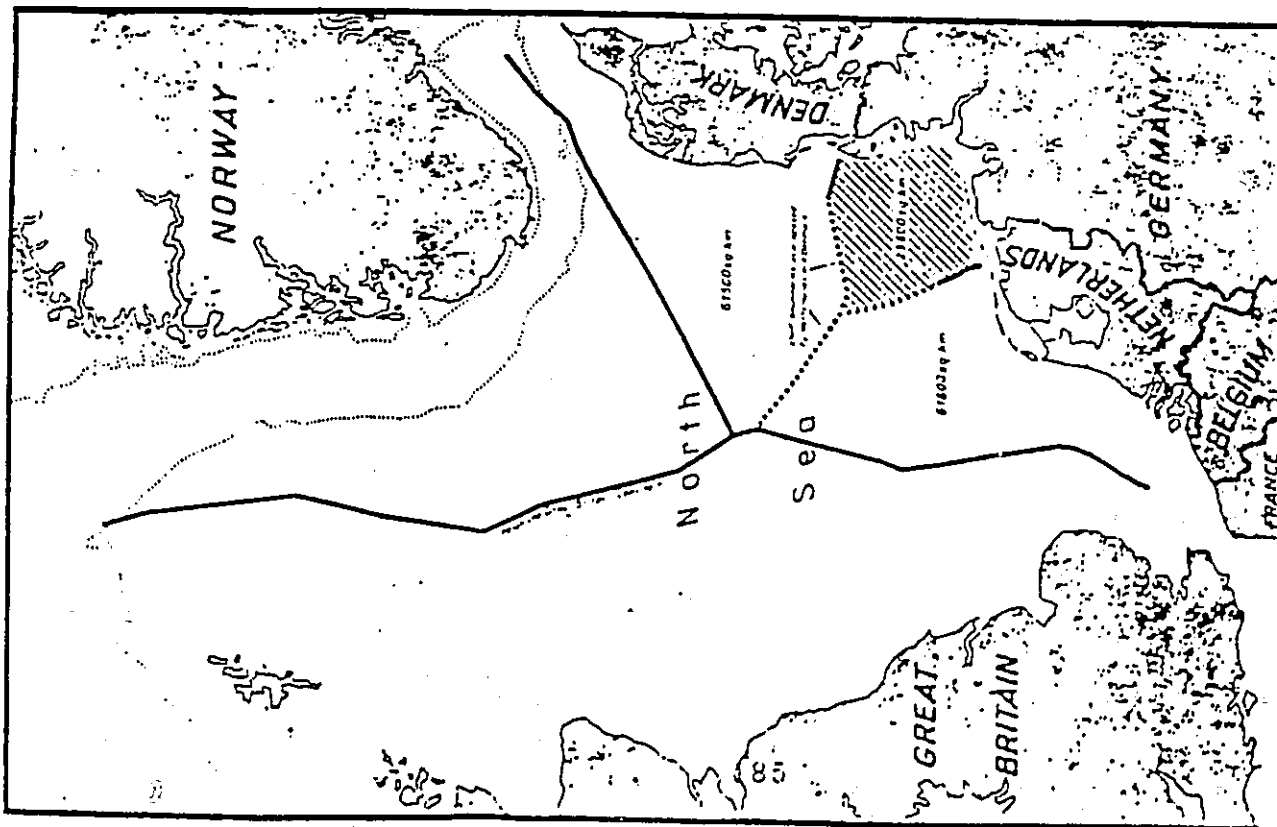
⁹Guinea--Guinea-Bissau case, Arbitral Award, 1985, para. 104, 108, at 295, 297.

¹⁰Arbitral Award, 1985, para. 108, at 297.

¹¹ICJ Rep. 1969, paras. 4-5, and accompanying maps.

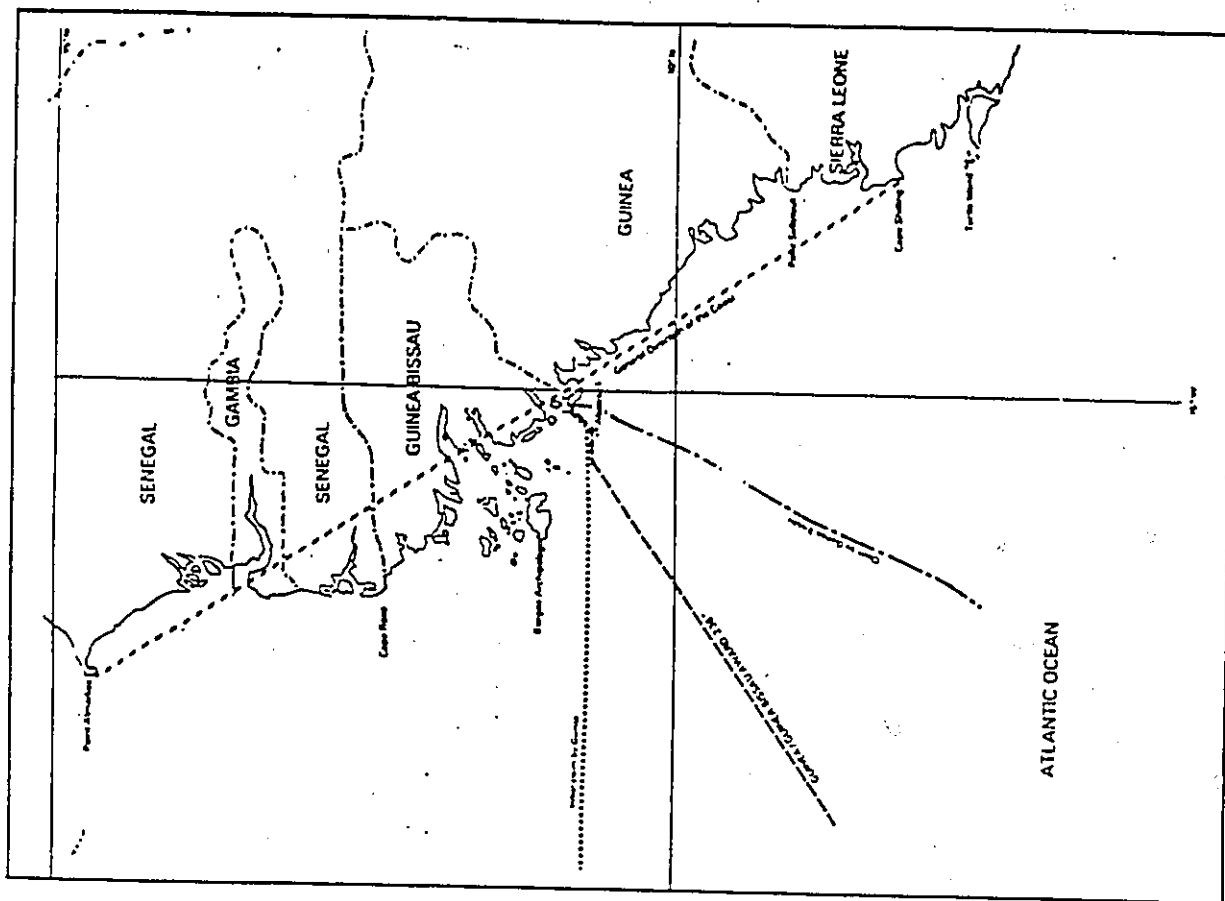
¹²ICJ Rep. 1982, para. 15, at 26.

¹³ICJ Rep. 1982, para. 122, AT 86.



Map 13: Convergence and Equidistance Lines in the North Sea cases

Source: Willis, I.A., "From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries", 24 Canadian Yearbook of International Law 3-52 (1986)



Map 14: Guinea--Guinea-Bissau Case

delimitation, the concavity or convexity of the coastline are admittedly recognized as a very pertinent circumstance to be taken into account. For example, following the decision by the Court, the Federal Republic of Germany concluded agreements with the United Kingdom, Denmark, and the Netherlands, taking into consideration the concave nature of the German coast in the North Sea.¹⁴

To sum up, one is left with little doubt that the configuration of the coasts which constitutes one of the main geographical aspects of the coast, is a relevant circumstance in maritime delimitation. The weight to be attributed to concavity or convexity varies, depending on the geographical circumstances from locality to locality. In some cases, such as the Anglo-French case, the concavity and convexity did not carry legal weight at all, as explained by the Arbitration Court:

Each country has some promontories on its coast and the general result is that the coastlines of their mainlands face each other across the Channel in a relation of approximate equality.¹⁵

It becomes more significant if the concave or convex coastlines occur in an adjacent situation where the application of equidistance line may result in inequity. However, the assessment of such a feature is difficult with little guidance from the jurisprudence on maritime boundary delimitation. Questions, such as how concave or convex must the coastlines be in order to be relevant in a given situation and by what criteria are they to be assessed, remain unanswered.

1(b) - Lengths

When declaring the inequitable character of the use of equidistance line in a concave coastline from Denmark through Federal Republic of Germany to the Netherlands, the Court noted that the coastlines of each country were "comparable in length".¹⁶ The length of coastlines of Federal Republic Germany, the Netherlands and Denmark were 152, 189, and 203 nautical miles respectively.¹⁷

In the Anglo-French case, the Court of Arbitration elaborated in several paragraphs the broad equality between the lengths of the coastlines of the United Kingdom and France. Therefore, it was felt

¹⁴Jagota, S. P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 111-114.

¹⁵Arbitral Award, 1977, para. 181, at 96.

¹⁶North Sea cases, ICJ Rep. 1969, para. 91.

¹⁷Jagota, S. P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 130.

that the median line be adopted and the areas on each side of the line be broadly equal or at least broadly comparable.¹⁸

By omitting small inlets, creeks and lagoons, the Court calculated the coastline for Libya from Ras Tajoura to Ras Ajdir as 185 kilometres, in a similar way, the coastline of Tunisia 42 kilometres. The ratio between the two was 31:69, which was accepted as equitable.¹⁹

The length of coast as an equitable criterion, received lengthy and fair treatment in the Gulf of Maine case. The difference in length of the respective coastlines in the measurement of 284 nautical miles for the United States and 206 nautical miles for Canada with the ratio standing as 1.38:1.²⁰ In view of this ratio, the median line was adjusted in favour of the United States. The ratio stands as 1.32:1 after adjustment.

In the Libya-Malta case, the Court drew a clear distinction between "the relevance of coastal lengths as a pertinent circumstance for a delimitation, and use of those lengths in assessing ratios of proportionality."²¹ It went further to explain the difference at some length:

Consideration of the comparability or otherwise of the coastal lengths is a part of the process of determining an equitable boundary on the basis of an initial median line, the test of a reasonable degree of proportionality, on the other hand, is one which can be applied to check the equitableness of any line, whatever the method used to arrive at that line.²²

Measured in their general direction and straight lines, the lengths of coasts for Malta and Libya respectively are 24 and 192 nautical miles. And this ratio was taken into account by transposing the median line closer to Malta.²³

Measured in the general direction of the coasts, the lengths of the respective coastlines of Guinea and Guinea-Bissau were calculated as the same with 154 nautical miles. For Guinea-Bissau, a 20% coefficient was added due to the presence of the Bijagos

¹⁸Arbitral Award, 1977, paras. 181-183, at 96.

¹⁹Tunisia-Libya case, ICJ Rep. 1982, para. 131, at 91.

²⁰ICJ Rep. 1984, para. 184, 196, 221, 222, at 322, 328, 336.

²¹ICJ Rep. 1985, para. 66, at 48.

²²ICJ Rep. 1985, para. 66, at 48.

²³ICJ Rep. 1985, para. 68, at 50.

Islands and the importance accorded to it.²⁴

In an agreement signed in 1974, France and Spain delimited their respective continental shelves in the Bay of Biscay. In that agreement, the length of the coast measured from specific points was taken into consideration.²⁵

To conclude, coastal length is closely related to maritime delimitation and plays important role in three ways. First, if the lengths of the respective coasts of the Parties are comparable, or with approximate equality, there should be a broadly equal or comparable maritime extension from these coasts.²⁶ Secondly, if, in an opposite situation, there is a marked difference in the lengths of the respective coasts, the median line, which is generally called for in such a situation, will be shifted from its original position so as to reflect this difference.²⁷ Thirdly, the length of coasts may not be directly involved in the delimitation process, but will be taken as one aspect of the proportionality test.²⁸

1(c) - General direction of the coasts

What direction a relevant segment of coast takes and where the change occurs have great bearing in the division of sea areas. Except in situation where the coastline runs straight or almost straight, in most other cases, the direction of a relevant coast changes frequently and its general direction has to be assessed accordingly.

The first appearance of the notion of general direction of the coast was found in the 1909 Grisbadarna case between Norway and Sweden.²⁹ The Arbitration Tribunal rejected the median line solution as advocated by the disputants and instead adopted a very different

²⁴Guinea--Guinea-Bissau case, Arbitral Award, 1985, para. 97, at 292-293.

²⁵LIMITS IN THE SEAS, No. 83, 1979; also see Jagota, S. P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 114-115.

²⁶See North Sea cases, para. 91; Anglo-French case, paras. 181-183; and Guinea--Guinea-Bissau case, para. 97.

²⁷See Gulf of Maine case, paras. 184, 196, and 221-222; and Libya-Malta case, paras. 71-72.

²⁸See Tunisia-Libya case, para. 131.

²⁹4 American Journal of International Law 226(1910); Scott, James Brown, ed., THE HAGUE COURT REPORTS, New York, Oxford University Press, 1916, 121-133.

approach whose impact has now begun to be felt:
in order to arrive at a just and lawful determination of the boundary... delimitation should be made to-day by tracing a line perpendicularly to the general direction of the coast...³⁰

In 1951, the International Court of Justice elaborated the idea of general direction of the coast in the context of the drawing of straight baselines for territorial seas. The conclusion of the Court was "that the belt of territorial waters must follow the general direction of the coast."³¹ One of the criteria to be followed was that the delimitation ought not to appreciably depart from the general direction of the coast.³²

In the North Sea cases, the Court, when referring to the test of proportionality, used the general direction to measure the coastlines.³³ In the context of assessing legal weight to the Channel Islands, the Court of Arbitration in the Anglo-French case, took cognizance of the west southwesterly direction of the English Channel and the 300 miles long coasts on each side of the Channel with the resultant approximate equality between the two coastlines.³⁴

The most conspicuous use of the general direction of the coast and its change is found in the Tunisia-Libya case. The change of direction of the Tunisian coast was said to be "legally significant" so as to "modify the situation of lateral adjacency of the two States, even though it clearly did not go so far as to place them in a position of legally opposite States".³⁵ Therefore, on the reflection of this change of coastal direction, a line was drawn which took a different angle from the first segment line of delimitation.³⁶ One difficulty was how to locate the precise point of reference for the change of direction. It was decided that "the most westerly point of the Tunisian coastline between Ras Kaboudia and Ras Ajdir, that was to say, the most westerly point on the

³⁰4 American Journal of International Law 226(1910), at 232; Scott, James Brown, ed., THE HAGUE COURT REPORTS, New York, Oxford University Press, 1916, 121-133, at 129.

³¹ICJ Rep. 1951, Fisheries case, para. 129.

³²ICJ Rep. 1951, Fisheries case, para. 133.

³³ICJ Rep. 1969, para. 101, (D) (3).

³⁴Arbitral Award, 1977, para. 181, at 96.

³⁵ICJ Rep. 1982, para. 78, at 63.

³⁶ICJ Rep. 1982, paras. 122-128, at 86-89.

shoreline (low-water mark) of the Gulf of Gabes", be that point.³⁷ In his separate opinion, Judge Jimenez de Arechaga made the comment that the selection of reference point did not change the relation from adjacency to opposite. If the change of direction of Tunisian coast was ignored, an encroachment might occur. The east southeasterly inclination of the Libyan coast was not taken into consideration because that would give rise to a result which would be the same as using the equidistance line.³⁸

In the Gulf of Maine case, although the Special Chamber repudiated the classification of "primary" and "secondary" coasts based on the inclination with or deviation from the general direction of the coast,³⁹ it did make use of the concept of general direction in its description of the delimitation area⁴⁰ and on that basis selected the method of application.⁴¹

The only use of general direction of the coast in the Libya-Malta case relates to the measurement of coastal length for purposes of evaluating the relevance of coastal lengths and proportionality requirement.⁴² The same is true with the Guinea/Guinea-Bissau case.⁴³

In summary, the concept of general direction of the coast can be relevant to maritime boundary delimitation in three ways. First, it can be used in measurement of the length of the coasts for the purposes of either evaluating coastal length as a relevant circumstance or initiating the proportionality test. Secondly, it can assist in simplifying the delimitation area in a geometric form in order to arrive at an equitable solution as amply exemplified by the Gulf of Maine case. Thirdly, significant change of the course of the coastlines in terms of its general direction may well constitute a pertinent geographical feature in a given case. However, there is one huge obstacle, and that is how to decide when a change of direction occurs and how to measure it.

³⁷ICJ Rep. 1982, para. 124, at 87.

³⁸ICJ Rep. 1982, Separate Opinion of Arechaga, para. 115, at 136-137.

³⁹ICJ Rep. 1984, paras. 108, 176, at 298, 320.

⁴⁰ICJ Rep. 1984, paras. 28-35, at 268-271.

⁴¹ICJ Rep. 1984, para. 213, at 333.

⁴²ICJ Rep. 1985, para. 68, at 50 and para. 79 (B) (3), at 57.

⁴³Arbitral Award, 1985, para. 97, at 292.

2 - Coastal Geographical Circumstances in the Gulf of Tonkin

Several geographical features call for equitable treatment in the Gulf of Tonkin. One is concerned with the marked concavity of Chinchou Wan east of Tra-co. The other is the ratio of the lengths of coasts. And finally, the changes of general directions of the coasts in the Gulf have significance in laying down the boundary lines.

2(a) - Concavity of Chinchou Wan

This part of the coast is fraught with lagoons, peninsulas, and fjords. Sea waters cut into land as deep as 27.9 miles from the line between Tra-co and Kuantou Chiao. In a recent study on straight baselines, the deeply indented coast is allowed to have straight baselines in order to eliminate the complexity (enclave or deep pocket of non-territorial seas).⁴⁴

In another excellent analysis concerning the drawing of straight baselines, the authors were of the view that "deeply indented" should reflect the purpose of the lines to be drawn.⁴⁵ They then proposed a three-step test. First, within the particular locality being considered, baseline segments accounting for at least 70% of the total length of the relevant baselines should each have at minimum a 6:10 ratio of coastal penetration to segment length. Secondly, a coastline must have at least three significant indentation in any given locality. And finally, no individual straight line segment should exceed 48 nautical miles in length.⁴⁶

Of course, one must not overlook that these criteria are put forward in the context of drawing straight baselines to be delineated. They may not be suitable for drawing straight lines for the purpose of measuring the general direction of the coast, and calculating the length of coast so measured. Even using this stringent test to examine Chinchou Wan, Chinchou Wan can still meet these requirements. The closing line linking the two natural entrance points (Pailung Wei and Kuantou Chiao) is 47.5 miles long. There are three major penetrations, the deepest of which reaches

⁴⁴Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Baselines: An examination of the relevant provisions of the United Nations Convention on the Law of the Sea, New York, United Nations, 1989, at 18-21.

⁴⁵Limits in the Seas, No. 106, Developing Standard Guidelines for Evaluating Straight Baselines, by J. Peter Bernhardt, Robert W. Smith, Geoffrey Greiveldinger and Dan Kiser, 1987.

⁴⁶Limits in the Seas, No. 106, Developing Standard Guidelines for Evaluating Straight Baselines, by J. Peter Bernhardt, Robert W. Smith, Geoffrey Greiveldinger and Dan Kiser, 1987, at 5.

27.9 miles. 70% of 47.5 is 33.3 miles. The ratio between 27.9 and 33.3 is 8:10. The requirements for a straight line for measurement of general direction of coasts are expected to be relaxed somewhat. By any standard, Chinchou Wan is well qualified for a straight line across its two headlands.

2(b) - Ratio of the lengths of coasts

The total length of Vietnamese coast by its general direction is 461.6 miles from Tra-co to Mui Da Nang. The calculation is as follows (see Map 15):⁴⁷

1.	Tra-co -- Hon Dau	.....	86.1
2.	tangent line of Archipelago des Fai Tsi Long	.....	24.6
3.	Hon Dau -- Cap Chao	.....	77.7
4.	Cap Chao -- Mui Ga	.....	52.5
5.	Mui Ga -- Cap Lay	.....	131.3
6.	Cap Lay -- Mui Da Nang	.....	89.4
7.	Total length	.....	461.6

The total length of Chinese coast by its general direction is 464.5 miles from Tra-co to Nuipi Chiao, from Mulan Tou to Yingge Tsu. The breakdown calculation is as follows:⁴⁸

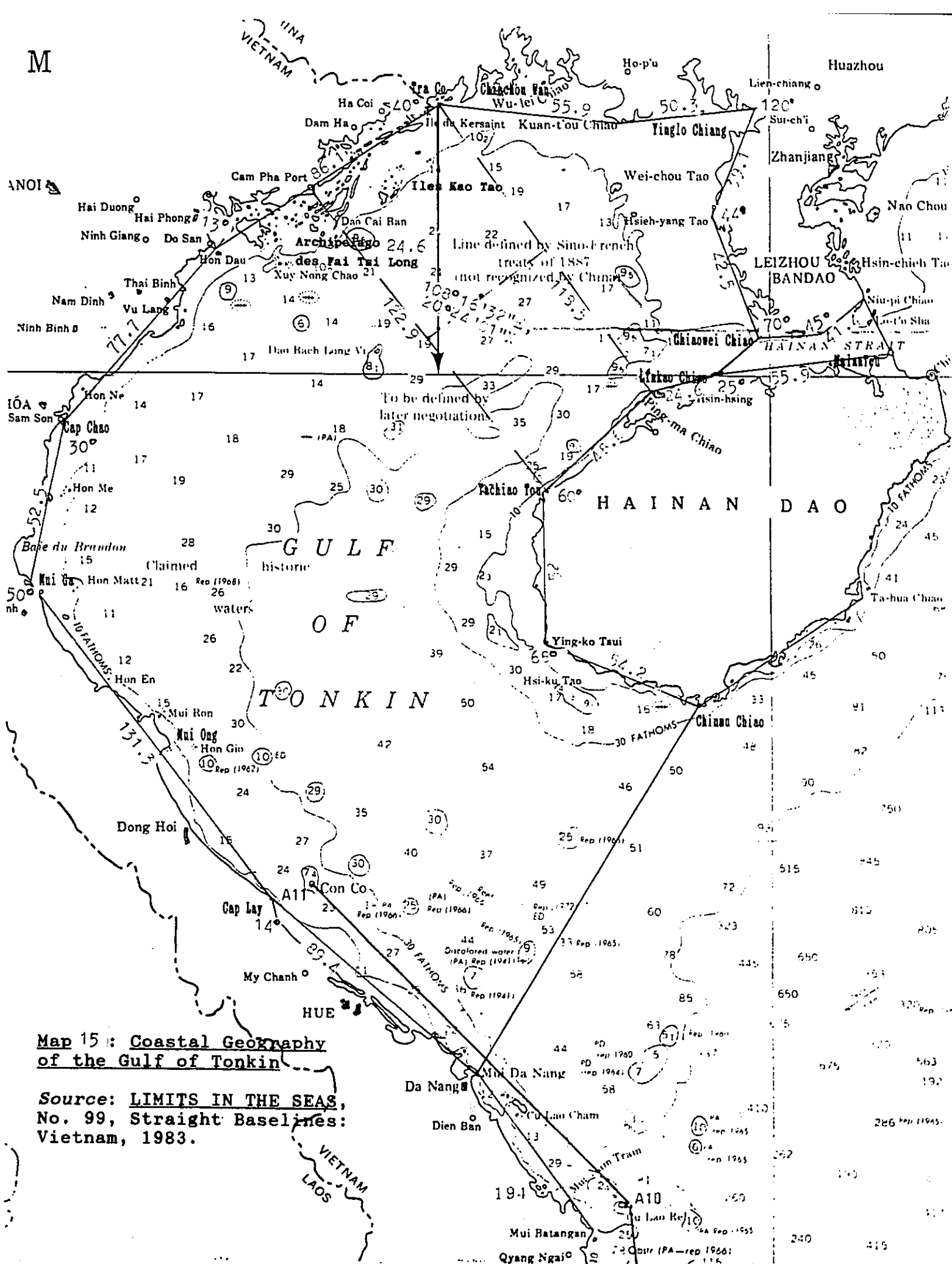
1.	Tra-co -- Kuantou Chiao	.....	55.9
2.	Kuantou Chiao -- Yinglo Chiang	.....	50.3
3.	Yinglo Chiang -- closest tip to Xieyang Dao	.....	39.1
4.	closest tip to Xieyang Dao -- Chiaowei Chiao	.....	42.5
5.	Chiaowei Chiao -- Peiwei Chiao -- Nuipi Chiao	.....	41.4
6.	Mulan Tou -- Linkao Chiao	.....	55.9
7.	Linkao Chiao -- Pingma Chiao	.....	24.6
8.	Pingma Chiao -- Tachiao Tou	.....	48.6
9.	Tachiao Tou -- Yingge Tsu	.....	52
10.	Yingge Tsu -- Chinmu Chiao	.....	54.2
11.	Total length	.....	464.5

The above lengths of coasts take the line between Mui Da Nang and Chinmu Chiao as the closing line of the grand entrance of the Gulf, and the line between Nuipi Chiao and Mulan Tou as the closing

⁴⁷These calculations and measurements are made by the author according to the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

⁴⁸These calculations and measurements are made by the author according to the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

M



Map 15: Coastal Geography of the Gulf of Tonkin

Source: LIMITS IN THE SEAS, No. 99, Straight Baselines: Vietnam, 1983.

line of Qongzhou Strait. Archipelago des Fai Tsi Long is taken into account as an element in the length of coast. As elucidated in the next Chapter on islands, the coefficient length so obtained is 24.6 miles. The Vietnamese total length after this adjustment is 461.6 miles. The ratio between these two total lengths is 1:1.006. Such a ratio should be judicially regarded as equal.

Under these circumstances, the basic equitable criterion that the overlapping extension should be equally divided is applicable. This criterion found its application in North Sea cases,⁴⁹ Anglo-French case,⁵⁰ Gulf of Maine case,⁵¹ and Guinea--Guinea-Bissau case.⁵²

In the Gulf of Tonkin, then the basic equitable criterion directly applicable is the equal division of the overlapping projections of respective coasts. The ratio between the two total lengths of coasts has achieved the degree of approximate equality. The best methods to achieve the above result are through the employment of the bisector line from Tra Co to the median line and through the employment of median line when the coasts are in a complete opposite situation till the closing line of the Gulf.

2(c) - Changes of the general directions

Several significant changes of the general directions of coasts occur in the Gulf of Tonkin. In the Tunisia-Libya case, the change of direction is easily discernible between Ras Kaboudia and Ras Ajdir because the angle reaches a bearing of 90° from the general direction of the coast. The difficulty is to locate the precise point of change.⁵³ Similar problems exist with respect to the configuration in the Gulf of Tonkin. The following points are selected as the points of change. Along Chinese coasts (see Map 15):⁵⁴

1. Yinglo Chiang 120°

⁴⁹ICJ Rep. 1969, para. 99.

⁵⁰Arbitral Award, 1977, para. 181, at 96.

⁵¹ICJ Rep. 1984, para. 195, at 327.

⁵²Arbitral Award, 1985, para. 97, at 292-293.

⁵³ICJ Rep. 1982, para. 124, at 87.

⁵⁴These calculations and measurements are made by the author according to the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

2.	closest tip to Xieyang Dao	.....	44°
3.	Chiaowei Chiao	.....	70°
4.	Peiwei Chiao	.....	45°
5.	Linkao Chiao	.....	25°
6.	Tachiao Tou	.....	60°
7.	Yingge Tsu	.....	68°
Along Vietnamese coast:			
1.	Tra-co	.....	40°
2.	Hon Dau	.....	13°
3.	Cap Chao	.....	30°
4.	Mui Ga	.....	50°
5.	Cap Lay	.....	14°

The most significant change of direction occurs at Yinglo Chiang on Chinese coasts. Changes at Tachiao Tou and Yingge Tsu also have material importance. The change of coastal direction at Tra-co which is also the land boundary terminus interfacing with coastline must be taken into consideration. The changes at Cap Chao and Mui Ga have some relevance as well.

The change of direction at Tra-co invites the application of a line dividing the angle formed by the lines representing general directions of the coasts. Taking into account the presence and location of Iles Kao Tao and Weizhou Dao and Xieyang Dao, the boundary line should be a bisector line commencing at Tra-co and terminating at the median point where the coast of Vietnam is opposite to that of China.

The Chinese coastline changes from east-west to south southwest direction at Yinglo Chiang. If a hypothetical line is drawn from Pingma Chiao to Tra-co, the waters inside the line are enclosed on three sides by Chinese coasts with Weizhou Dao and Xie Yang Dao at the centre. This circumstance becomes quite relevant if one considers that only on the southwest of Tra-co does the Vietnamese coast start. It seems that this is an almost textbook example of applying the equitable criteria of avoidance of cut-off effect and non-encroachment whenever possible. Therefore, the delimitation line extending from Tra-co must avoid producing a cut-off or encroachment on this extension of the Chinese coasts.

At Cap Chao and Mui Ga, the southwestern direction of the Vietnamese coast gives way to a northwest coastline. On Hainan Island, changes of the general direction of coastlines by and large correspond to those on the Vietnamese coast. However, one must bear in mind that the relationship of relevant coasts transfers from adjacency to oppositeness at a point on the line between the midpoints of the two lines between Tra Co and Pingma Chiao and between Cam Pha Port and Tachiao Tou. This point will then further be defined by giving Iles Kao Tao 1/4 effect and Weizhou Dao and Xieyang Dao 1/2 effect. This would achieve an equitable result that would satisfy the equitable criteria and relevant circumstances.

The distance between Tra Co and Pingma Chiao is 118.5 miles and between Cam Pha Port and Tachiao Tou 122.9 miles. The midpoints are 59.25 miles ($108^{\circ}1'51''$ E, $20^{\circ}11'45''$ N) and 61.45 miles ($108^{\circ}39'40''$ E, $20^{\circ}42'51''$ N) respectively. The point where the delimitation line would end will be decided by the line bisecting the angle formed by the adjusted lines at bearings of 20° and 164° of parallel. The coordinates of the point is $108^{\circ}16'32''$ E, $20^{\circ}24'01''$ N (see Map 15).

3 - Summary

The three principal aspects of the coastal geography are the concavity, convexity and irregularity, the length of coasts, and the general direction of coasts. They have been held to be relevant in maritime delimitation.

In adjacent situations, a marked concave or convex coast will not be amenable to the use of equidistance line because it can produce an inequitable result. In the Gulf of Tonkin, the marked concave Chinchou Wan on the east side of Tra-co calls for some consideration. The bay is deeply cut into and well qualified to be enclosed by a straight line across its mouth to draw a general direction of coastline.

There are two situations of the ratio of the lengths of the respective coasts. If the respective coasts are comparable or equal in length, the equitable criterion of equal division will be appropriate and the better methods to effect the delimitation are a bisector line in adjacent situation and median line in opposite situation. If the respective coasts have marked difference in length, an adjustment is necessary after the initial provisional line has been drawn. In the Gulf of Tonkin, the lengths of Chinese and Vietnamese coasts achieve a degree of approximate equality and are broadly comparable. The equitable criterion of equal division can best be implemented by bisector line from Tra-co to the median line where adjacency, partial adjacency and partial oppositeness prevail, and by median line where complete oppositeness occurs. The median line can be drawn by a simplified equidistance method.

The general direction of coasts are important in three ways. First, it can be used as a tool to measure the length of coasts for the purpose of evaluating the coastal length as a relevant circumstance or initiating the proportionality test. Secondly, the general direction can be of assistance in determining the geometric shape of the delimitation area. Thirdly, the general direction can be a relevant circumstance itself. However, the practical difficulty of deciding the change of direction has seriously undermined its value.

The sides of the polygon shape of the Gulf of Tonkin are all marked by changes of coastal directions. The selection of points

of change has some arbitrariness. All three usages of the general direction have found their application in the Gulf of Tonkin delimitation. The changes at Tra-co, Yinglo Chiang, and Chiaowei Chiao and Linkao Chiao are relevant circumstances to be taken into account.

CHAPTER XI
THE QUESTION OF ISLANDS
IN THE GULF OF TONKIN

The question of islands has been one of the major obstacles in settling maritime boundary problems.¹ Due to the existence of a good many varieties of islands in terms of size, location, human inhabitation, political status, economic activities, and natural resources, it is impossible to have a uniform treatment of islands in dividing sea areas between States. Rather, what legal weight would be attributed to an island or a group of islands will be dependent upon the particular circumstances in a given case.

1 - Effects of Islands in Maritime Delimitation

1(a) - State practice

The International Law Commission, in its commentary to the draft articles on the delimitation question for the 1958 Geneva Law of the Sea Conference, merely made the following observation:

As in the case of the boundaries of the territorial sea, provision must be made for departures necessitated by any exceptional configurations of the coast, as well as the presence of islands or navigable channels. This case may arise fairly often so that the rule adopted is fairly elastic.²

In spite of objections to the phrase "special circumstances" by Yugoslavia and Portugal, Article 12 of the Territorial Sea Convention and Article 6 of the Continental Shelf Convention were retained and adopted by the Conference.³ Special circumstances thus covered the question of islands in maritime delimitation.

This approach was later confirmed by State practice. For instance, in the Persian Gulf, the presence of islands was viewed as a relevant circumstance and different legal weights have been accorded. In the 1969 Iran-Qatar agreement on the continental

¹Kapoor, D.C., "The Delimitation of Exclusive Economic Zones",
⁴ Marine Policy Management 255 (1979), at 259.

²ILC Yearbook, 1956, Vol. II, at 300.

³UN Doc. A/Conf. 12/C. 1/L. 101; UN Doc. A/Conf. 13/C. 1/L. 60.

shelf, all islands on both sides of the delimitation line were ignored and the line was drawn in accordance with the directions of the coastlines of the mainlands.⁴ Abu Dhabi and Qatar agreed on only a three-mile arc for three islands out of five situated close to the median line.⁵ In the Bahrain-Saudi Arabia agreement, some islands were used for establishing boundary lines while others were completely discounted.⁶ In the Iran-Saudi Arabia agreement, Kharg Island, sitting roughly 17 nautical miles from Iranian coast, was given only half-effect in the delimitation.⁷

It can be seen from the foregoing that different legal weights have been accorded to the islands in question. Some islands have been completely ignored in the delimitation process. Some islands have been given full effect because of their proximity to the mainland coasts or other special justifications. Others have played restricted role in determining maritime boundaries due to their distance from the mainland coast or their close location to the median line in opposite situation.

State practice in other regions follows a similar route. In 1978, after its independence, Papua New Guinea signed a comprehensive treaty with Australia concerning seabed and fishery boundaries. Fifteen Australian islands sitting on the northern side of the seabed boundary line were enclosed by a 3-mile territorial sea except in the overlapping area close to the mainland of Papua New Guinea where the territorial sea boundary follows the median line.⁸ In the Italy-Tunisia agreement, four islands close to or across the median line were given a maritime zone of 12 miles for one and 13 miles for three. The agreement also took into account of the coastal islands, islets and low-tide elevation.⁹ In the Adriatic Sea, the coastal islands of Yugoslavia were accorded full weight in establishing the median line with Italy. However, the three Yugoslavian islands, Pelagruz, Kajola and Jabuka were either enclosed by a 12-mile territorial sea or attributed a limited effect.¹⁰

From the above survey, it can be seen that various legal

⁴LIMITS IN THE SEAS, No. 25, 1970.

⁵LIMITS IN THE SEAS, No. 18, 1970.

⁶LIMITS IN THE SEAS, No. 12, 1970.

⁷LIMITS IN THE SEAS, No. 24, 1970.

⁸NEW DIRECTIONS IN THE LAW OF THE SEA, Vol. VIII, at 215-282.

⁹LIMITS IN THE SEAS, No. 89, 1980.

¹⁰LIMITS IN THE SEAS, No. 9, 1970.

weights were attributed to islands along the coast, near or across the median line, and far off from the coast. Partial effect was given to those lying far off from the coast as in the case of Iranian island Kharg, and to those close to or across the median line. Full effect was given to coastal islands that are assimilated with the mainland.

1(b) - International arbitral or judicial decisions

International judicial and arbitral decisions also follow a similar approach in their treatment of islands in ocean boundary adjudication. Due to the general and often theoretical nature of the most reasonings in the 1969 North Sea cases, the question of islands was merely implicitly subsumed under the factor "the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features."¹¹ In fact, the German island Heligoland lying about 27 miles from the coast was disregarded in delimiting the shelf boundary.¹²

The question of islands was substantially explored in the Anglo-French case because of the presence and location of the Channel Islands, Eddystone Rock, Scilly and Ushant islands. Because of the location of the Channel Islands, how to treat these islands was essential. Britain maintained that the Channel Islands have their own continental shelf and the line of delimitation run between the Channel Islands and the French coast with a southward loop.¹³ To support its position, Britain invoked the legislative, administrative, political and economic independence of the Channel Islands.¹⁴ Besides citing the geographical and geological circumstances, France rested its position on considerations of security, defence and navigational interests.¹⁵ The solution provided by the Arbitration Court is to enclose the Channel Islands by an enclave of 12 miles.¹⁶ The reason was that the Channel Islands were "wholly detached" from the U.K. and on the wrong side of the

¹¹ICJ Rep. 1969, para. 101. (D). (1).

¹²GERMAN MEMORIAL, para. 18, at 18; DENMARK COUNTER-MEMORIAL, para. 10, at 160; NETHERLANDS COUNTER-MEMORIAL, para. 9 (c), at 310.

¹³Arbitral Award, 1977, para. 169, at 91.

¹⁴Arbitral Award, 1977, para. 171, at 92.

¹⁵Arbitral Award, 1977, para. 175, at 94.

¹⁶Arbitral Award, 1977, para. 201-202, at 101-103.

median line.¹⁷ Therefore, "not only should the boundary in normal circumstances be the median line but the areas of shelf left to each Party on either side of median line should be broadly equal or at least broadly comparable".¹⁸

With regard to the delimitation in the Atlantic Region, the Arbitral Court considered that the position of British Scilly Isles and French Ushant Islands constituted a special circumstance to be addressed. Ushant is 10 miles from the coast of Finistere and Scilly 21 miles from Land's End. Henceforth, the Court held that: the further projection westwards of the Scilly Isles, when superadded to the greater projection of the Cornish mainland westwards beyond Finistere, is much of the same nature for present purposes, and has much the same tendency to distortion of the equidistance line, as the projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of "special circumstance".¹⁹

The method to abate the inequities created by the Scilly was to give partial effect to its perceived role in the delimitation.²⁰ The importance of islands in delimiting maritime boundary was evidently clear in the Tunisia-Libya case, in which the island of Jerba was not given any weight due to the consideration of the conduct of State and historical lines.²¹ The Kerkennah Islands, however, were accorded half effect without providing sufficient explanation,²² as criticized by Judge Schwebel.²³

The Libya-Malta case was an interesting one because Malta is an island State. To support its claim, Malta invoked the principle of sovereign equality, whereas Libya employed the concept of landmass to bolster its case.²⁴ The Islet Filfla, uninhabited, was discounted in setting up the provisional median line.²⁵ In consideration of the great disparity of the coastal lengths between

¹⁷Arbitral Award, 1977, para. 199.

¹⁸Arbitral Award, 1977, para. 182, at 96.

¹⁹Anglo-French case, Arbitral Award, 1977, para. 244, at 121.

²⁰Arbitral Award, 1977, para. 249, at 123; para. 251, at 124.

²¹ICJ Rep. 1982, para. 79, at 64.

²²ICJ Rep. 1982, paras. 127-129, at 88-89.

²³ICJ Rep. 1982, at 99.

²⁴ICJ Rep. 1985, paras. 49, 53, at 40, 43.

²⁵ICJ Rep. 1985, para. 64, at 48.

Libya and Malta as well as the distance between their coasts, the Court determined that the provisional median line be transposed 24' northward so as to make the solution equitable (see Map 16).²⁶

Although the question of islands did not constitute the main theme in the Gulf of Maine case, the Special Chamber adjusted the second segment line by giving half effect to Seal Island of Canada in addition to the consideration of the difference in the lengths of respective coasts (see Map 17).²⁷

The Arbitration Tribunal in the Guinea--Guinea-Bissau case, took into account of the Bijago Archipelago by adding a coefficient of 20% in calculating the length of the Guinea-Bissau coast.²⁸ Because of the geographical similarities between the Bijago Archipelago and the Archipelago des Fai Tsi Long along the Vietnamese coast south of the international boundary termini, the treatment of the Bijago has some application in the present case.²⁹

The Aegean Sea case (see Map 18)³⁰ and the Beagle Channel Arbitration (see Map 19)³¹ all have difficulties caused by islands. The Jan Mayen Conciliation arrived at a solution by permitting Iceland to extend its jurisdiction to the full length of 200 miles and setting up of joint development area of 45,475 square kilometres; of which 32,750 square kilometers is north of the 200-mile line and 12,725 square kilometers south of the line.³² Geomorphological, geological, and economic considerations played some role in this arrangement.

²⁶ICJ Rep. 1985, para. 720, at 51-52.

²⁷ICJ Rep. 1984, para. 222, at 336-337.

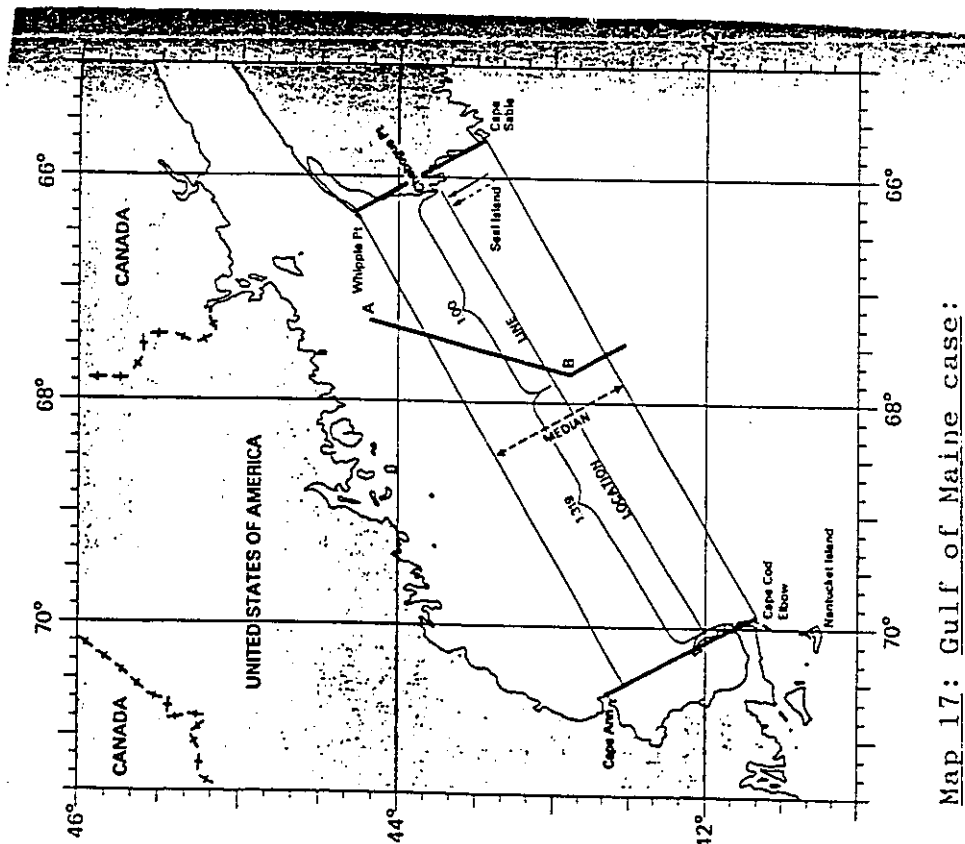
²⁸Arbitral Award, 1985, para. 97, at 292-293.

²⁹Guinea--Guinea-Bissau case, 1985, para. 21, at 264-265.

³⁰Aegean Sea Continental Shelf case, Judgment, ICJ Rep. 1978, p.3.

³¹Beagle Channel Arbitration Award, Court of Arbitration, April 18, 1977.

³²Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen, Report and Recommendations to the Governments of Iceland and Norway, June 1981, 20 International Legal Materials 797(1981).



Map 17: Gulf of Maine case:

showing the construction of the second segment

Source: Cooper, John,

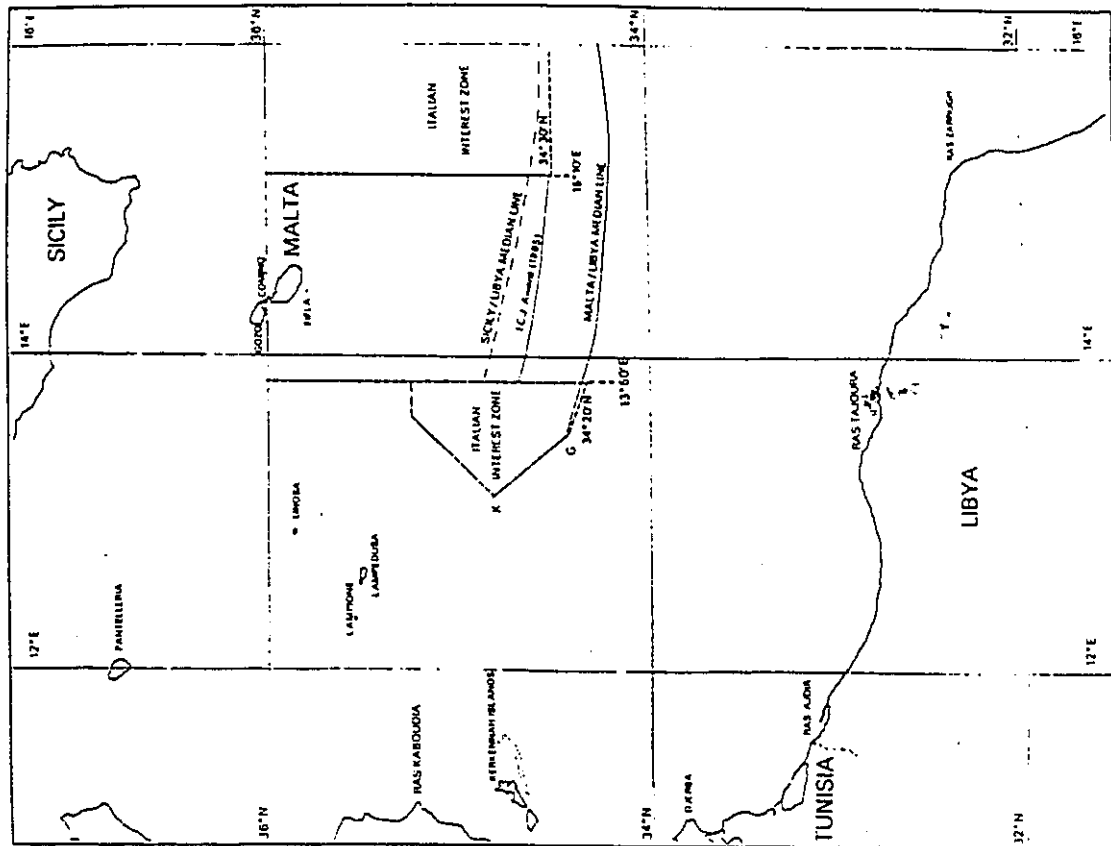
"Delimitation of the Maritime

Boundary in the Gulf of Maine

Area", 16 Ocean Development

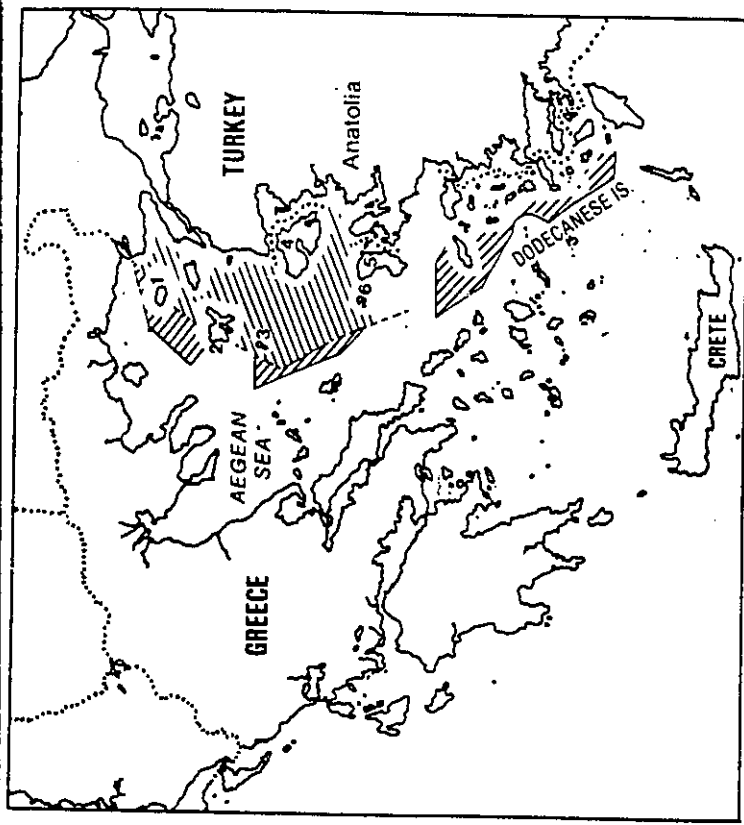
and International Law

59-90(1986), at 82.



Map 16: Libya-Malta case

Source: Willis, L.A., "From Precedent to Precedent: The Triumph of Pragmatis in the Law of Maritime Boundaries", 24 Canadian Yearbook of International Law 3-57(1986), at 19, 31.

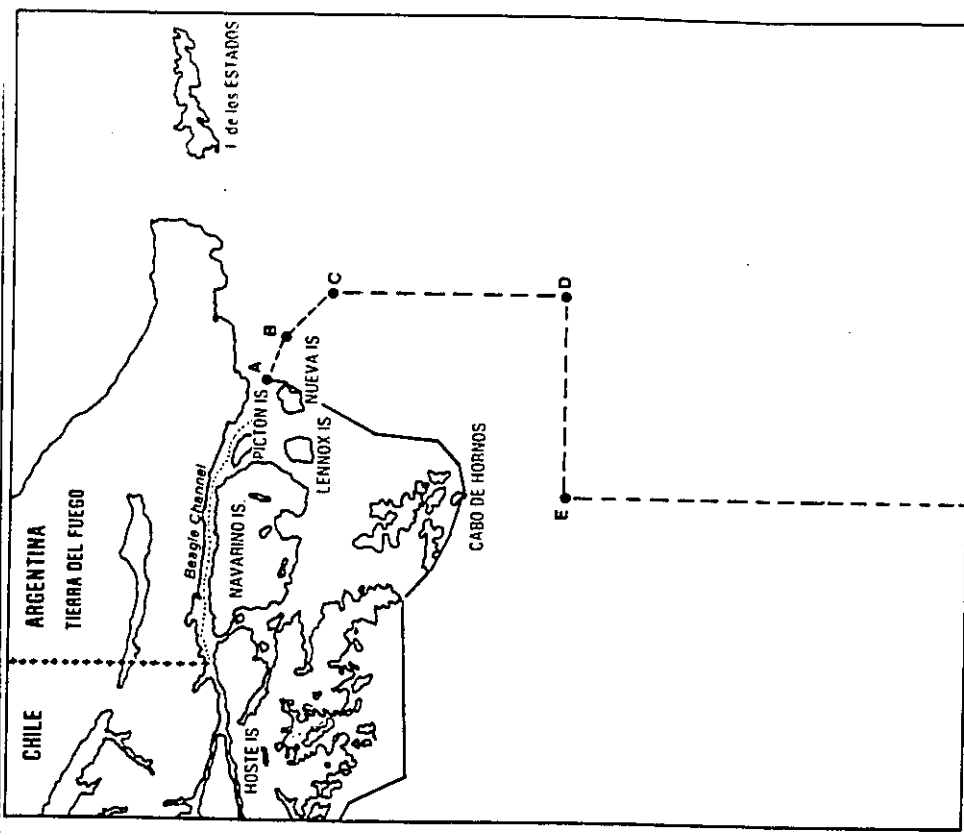


Area covered by Turkish exploratory permits, 1 November 1973

Area covered by Turkish exploratory permits, 18 July 1974

- 1 Samothráki
- 2 Límnos
- 3 Eustrátios
- 4 Lésvos
- 5 Khíos
- 6 Psará and Antipsará

Map 18: Aegean Sea case



..... International land boundary (1881 Treaty).

— Chilean straight baselines.

..... Beagle Channel boundary drawn by Court of Arbitration, 1977.

--- Maritime boundary (1984 Treaty).

Map 19: Beagle Channel case

Source: Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 155, 193.

Denmark brought a case against Norway in its dispute regarding maritime boundary between Greenland and Jan Mayen.³³ Most recently, France and Canada has agreed to submit their dispute to the International Court between Newfoundland and St. Pierre and Miquelon.³⁴ The disputes between El Salvador, Honduras, and Nicaragua in the Gulf of Fonseca also involved the effect of certain islands in the delimitation.³⁵

In conclusion, the above examined judicial and arbitral decisions, expressive and declaratory of customary international law in this field, all hold the view that the issue of islands is very pertinent to the delimitation of maritime boundaries. The principal points are that the weight an island or islands carry will depend on the particular case, primarily on the geographical circumstances. Solutions to problems created by the size and location of islands range from giving full, partial (often half) to no effect. The partial effect solution is expressed in the forms of half effect (bisector line), an enclave, or a certain percentage of the length of the coasts.

1(c) - Legal writings

Legal writings have confirmed the main propositions outlined above. In a lengthy article, Hodgson discussed various aspects of law of the sea in relation to islands, including the role of islands in the delimitation of continental shelf.³⁶ According to the effect attributed to them, Hodgson classified islands into three groups: full effect, no effect and partial effect on shelf boundaries. In his view islands larger than 1,000 square miles

³³12 Law of the Sea Bulletin, December 1988, at 76.

³⁴Canada-France Resolve to Arbitration on St. Pierre and Miquelon, 29 International Legal Materials 1-14(1990).

³⁵See Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to intervene, Order of 28 February 1990, ICJ Reports 1990, p.3; Composition of Chamber, Order of 13 December 1989, ICJ Reports 1989, p.162; Order of 13 December 1989, ICJ Reports 1989, p.129; Order of 29 May 1987, ICJ Reports 1987, p.176; Order of 27 May 1987, ICJ Reports 1987, p.15; Order of 8 May 1987 (Composition of Chamber), ICJ Reports 1987, p.10.

³⁶Hodgson, Robert D., "Islands: Normal and Special Circumstances", in Gamble, John King, Jr. and Pontecorvo, Giulio, eds., LAW OF THE SEA: The Emerging Regime of the Oceans, Proceedings, Law of the Sea Institute, Eighth Annual Conference, June 18-21, 1973, University of Rhode Island, Kingston, Rhode Island, Cambridge, Massachussets, Ballinger Publishing Company, 1973, at 137-199.

should be accorded to full weight.³⁷ Hainan Island has an area of more than 30,000 square kilometres and should be given full effect. Hodgson also proposed that an island sitting in the middle of restricted water bodies be given no effect.³⁸ He then enumerated islands with limited effect:

1. an island that is located far from the territorial seas, such as the Island Kharg;
2. islands near the median zone with a sizable population of indigenous peoples;
3. islands that are detached from the home State;
4. a small island that constitutes a significant segment of national territory;
5. islands by agreement.³⁹

These observations are still adequate for our purpose in the Gulf of Tonkin. Archipelago des Fai Tsi Long, Iles Kao Tao, Weizhou Dao and Xieyang Dao, and Dao Bach Long Vi all fall within the limited effect group. Their different treatments derive from their location, population, economic independence, size and relationship with the home State.

Symmons endorsed the idea of giving reduced or half weight to some islands due to location, size and other factors.⁴⁰ The renowned publicist, Professor O'Connell summarized the applicable rules on islands in the following words:

The practice of giving islands only partial effect is mostly confined to cases where islands are inconveniently located near the median line which could be drawn supposing that they were altogether ignored.⁴¹

He identified three solutions to this kind of problem. One is to give half effect to the island, the other is to draw a territorial sea enclave, and finally there are cases where all islands on each side were ignored.⁴² The Canadian jurist, Johnston concluded that more judicial discretion is exercised with regard to the choice of methods for weighing islands by giving them no effect ("except for

³⁷ *Ibid*, at 182-187.

³⁸ *Ibid*, at 187-189.

³⁹ *Ibid*, at 189-193.

⁴⁰ Symmons, Clive Ralph, THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW, The Hague, Martinus Nijhoff Publishers, 1979, at 189-204.

⁴¹ O'Connell, D. P., THE INTERNATIONAL LAW OF THE SEA, Vol. II, Oxford, Clarendon Press, 1984, at 720.

⁴² O'Connell, D. P., THE INTERNATIONAL LAW OF THE SEA, Vol. II, Oxford, Clarendon Press, 1984, at 720.

an appropriate territorial sea enclave, if it satisfies the legal criteria for such treatment"), partial (half) effect, or full effect.⁴³ These views are reflected in later works on the question of islands.

In his treatise on islands, Dr. Jayewardene would give no effect to islands in the following situations: (i) offlying islands, (ii) islands in the median zone, (iii) reciprocal islands, (iv) detached islands, (v) disputed islands, and (vi) *ad hoc* settlement.⁴⁴ He also endorsed the technique in the Malaysia-Indonesia maritime boundary agreement by giving partial effect to the Indonesian Natuna Islands.⁴⁵

In his comprehensive study on relevant circumstances, Evans proposed the following factors in assessment of the effect of islands:

1. position will determine the choice or the application of a method;
2. size will be evaluated in relation to other features or the delimitation area;
3. economic factors generally are not given much weight;
4. presence of a sizable population is a useful indicator;
5. political considerations can be taken into account.⁴⁶

Population, economic factors, and political considerations are not able to negative the conclusion drawn upon position and size. They can only support the result.⁴⁷ These factors are generally accepted by the courts when deciding question of islands. But it is doubtful whether the law has reached the said degree of precision with respect to each factor.

Against these general trends, Professor Weil thought that the theoretical distinction between general configuration and special

⁴³Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 283-284, 404, note 13.

⁴⁴Jayewardene, Hiran W., THE REGIME OF ISLANDS IN INTERNATIONAL LAW, Dordrecht, Martinus Nijhoff Publishers, 1990, at 354-356.

⁴⁵Jayewardene, Hiran W., THE REGIME OF ISLANDS IN INTERNATIONAL LAW, Dordrecht, Martinus Nijhoff Publishers, 1990, at 358. The actual effects attributed to the Natuna Islands ranges range from 56% to 86%.

⁴⁶Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, London, Clarendon Press, 1989, at 143-145.

⁴⁷Evans, Malcolm D., RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, London, Clarendon Press, 1989, at 145.

feature in relation to islands had caused confusion.⁴⁹ He criticized that the unusualness of geographical feature and the differences in treatment based on distortion effect were concepts that lacked objectivity.⁴⁹ Weil's criticism culminated when he said:

Nature and geography are neither equitable nor inequitable, neither normal or abnormal. There are no major or minor features, general or special configurations, usual or unusual situations, significant or insignificant features. There are no geographical aberrations any more than there is geographical normality.⁵⁰

However, he admitted that the case-law had established the distinction and could not be reversed.

Other commentators basically follow the same lines of reasoning in the treatment of island in delimitation between neighbouring States.⁵¹

In summary, international law has established that islands generally constitute a relevant circumstance to be taken into account in maritime boundary settlement. Three ways have been invented to counter the difficulties resultant from islands. First, there are abundant cases where islands have been granted full effect facing open seas and islands forming the significant part of the country. Secondly, it is more frequent that islands have been taken into account partially on various considerations, which may be cited as: islands close to the median line from the general direction of the coast, islands on the wrong side of the median line, and islands by agreement. Thirdly, sometimes, by reasons of negligible significance of size, population and location, islands may be assigned no role in delimiting maritime boundaries. Partial-effect solution often takes three forms; namely, an enclave, half-effect, and a certain percentage of coastal length, although other forms are not excluded.

⁴⁹Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflection, Cambridge, Grotius Publications Limited, 1989, at 233-234.

⁴⁹Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflection, Cambridge, Grotius Publications Limited, 1989, at 234.

⁵⁰Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflection, Cambridge, Grotius Publications Limited, 1989, at 234.

⁵¹For example see Bowett, D.W., THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW, Dobbs Ferry, Oceana Publications, 1979, at 231-240; and Briscoe, J., "The Use of Islands in International Maritime Boundary Delimitation", in Dallmeyer, D.G. and DeVorse, L. Jr., eds., RIGHTS TO OCEANIC RESOURCES -- Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989, 115-146.

2 - Techniques to Achieve a Partial-Effect Solution

The first question with respect to an island in a delimitation is whether or not the island should be given effect. The second question is how much effect would be equitable. The third question is by what technique a desirable partial effect can be achieved. More often than not, islands will be given limited effect. The selection of techniques to effect the most desirable and equitable solution of limited effect will be crucial. Several techniques have emerged from State practice, judicial decisions, and academic discussions. They are half-effect realized by the use of a number of geometric lines, limited percentage of the length of coastlines measured by its general direction, and enclave.

2(a) - Half-effect

This technique was first used in the delimitation between Iran and Saudi Arabia in 1968 concerning the Iranian island Kharg.⁵² Kharg was located about 17 miles from the Iranian coast and was of measurable size and had its own inhabitants.⁵³ The application of the technique requires a three-step procedure. First, a line is drawn by according full effect to the insular feature. Secondly, another line is marked by ignoring completely the feature. Thirdly, a half-effect is achieved by dividing equally the space between the two previous lines.⁵⁴

The technique has found its application in the arbitral proceedings in the Anglo-French case when the British Scilly isles were given half effect because of its distance from the British mainland was 31 miles while the French Ushant was only 14 miles from the French coast.⁵⁵ In the Libya-Tunisia case, half-effect with respect to the Kerkennah Islands of Tunisia resulted from the use of a straight line bisecting the angles formed by the two lines:

⁵²Beazley, P.B., "Half-Effect Applied to Equidistance Lines", 1 International Hydrographical Review LVI (January 1979), 153-160.

⁵³Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 75-76. Also see Amin, S.H., "Law of the Continental Shelf Delimitation: the Gulf example", 27 Netherlands International Law Review 335-346(1980), at 340-342.

⁵⁴Kapoor, D.C. and Kerr, A.J., A GUIDE TO MARITIME BOUNDARY DELIMITATION, Toronto, Carswell, 1986, at 83.

⁵⁵Arbitral Award, 1977, para. 235, at 118.

one gave full effect to Kerkennah, and the other ignored it.⁵⁶ When considering the effect of Seal Island of Canada in the Gulf of Maine case, the Chamber employed this technique again by half the distance between Seal and the coast of Nova Scotia so as to move the median line 3.84 nautical miles closer to Canadian side by a transverse displacement rather than an angular displacement.⁵⁷

The techniques to cause a half-effect solution have considerable flexibility after the survey of its application. The only requirement is that it achieves an equitable result by reflecting the equitable criteria and by taking into account the relevant circumstances.

2(b) - A limited percentage of coastal length

One of the innovative features of the Guinea--Guinea-Bissau case is its treatment of the Bijagos Archipelago off Guinea-Bissau coast. A tangent line drawn between Unhocomo and Orango was taken to add 25.6 nautical miles long to the total length of Guinea-Bissau coast. The Tribunal then considered that this represented a 20% coefficient of its own coast and thus did not disturb the equitable result.⁵⁸ The length is not calculated by their total perimeters. These islands were considered as an element of the total coastal length by the tangent line linking the peripheral islands (in this case, Unhocomo and Orango).

The two groups of islands (coastal islands and Bijagos Archipelago) which were qualified for this coefficient were described in the following terms. The coastal islands, separated only by narrow sea channels, formed an integral part of the continent. The Bijagos Islands, the nearest of which is only 2 miles from the continent and the furthest 37 miles, were linked by a distance no more than 5 miles from each other. If the 12-mile territorial seas applied, they would be within each other's territorial waters and thus intricately connected with the continent.⁵⁹

It is not known whether this technique has ever been used elsewhere. However, what matters most is its merits as a practical technique to attribute a limited weight to islands under

⁵⁶ ICJ Rep. 1982, para. 128-129, at 88-89.

⁵⁷ ICJ Rep. 1984, para. 222, at 336-337. For a detailed description of the angular and transverse displacement techniques, see Jayewardene, Hiran W., THE REGIME OF ISLANDS IN INTERNATIONAL LAW, Dordrecht, Martinus Nijhoff Publishers, 1990, at 356-358.

⁵⁸ Arbitral Award, 1985, para. 97, at 292-293.

⁵⁹ Arbitral Award, 1985, para. 95, at 291-292.

appropriate circumstances. These circumstances include, on the one hand, the close proximity between the coastal islands and the continent in question so as to be able to characterize the relationship as an integral one. Indeed these coastal islands were inseparable from the continent. On the other hand, for non-coastal islands, such as the Bijagos Archipelago, the inter-coverage of territorial seas each other will qualify them to be treated as an element of the coastal length. If the coastal relationship is adjacency, especially when the coastline on each side of the land boundary terminus forms a straight coastline by its general direction, or the land boundary terminus is the point at which the coastline changes its direction, the application of this technique seems more appropriate.

2(c) - Enclave, semienclave, and partial enclave

The technique has found its application in a number of delimitation agreements between States.⁶⁰ For example, the Australian islands located closer to the coast of Papua New Guinea were enclaved.⁶¹ The 15 Australian islands on the "wrong side" of the median line were given 3-mile territorial seas. Separate boundaries were established for fishery and seabed. All these enclaved islands were located on the fishery zone of Australia but on the seabed zone of Papua New Guinea.⁶²

In the well-documented Italy-Tunisia agreement, the Italian islands close to the median line, Partelleria, Lampedusa and Linosa were allowed 12-mile territorial seas plus 1-mile continental shelf. The island Lampione received only 12-mile territorial seas vis-a-vis Tunisia.⁶³ The 12-plus-1 solution was termed as "partial enclave". And the necessity to accord a territorial seas to islands

⁶⁰Jayewardene, Hiran W., THE REGIME OF ISLANDS IN INTERNATIONAL LAW, Dordrecht, Martinus Nijhoff Publishers, 1990, at 358. He made an important study on the techniques of enclave and semi-enclave.

⁶¹Treaty concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters, Dec. 18, 1978, (entered into force Feb. 22, 1985), 18 International Legal Materials 291(1979).

⁶²Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 90-92; Burmester, H., "The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement", 76 American Journal of International Law 321-349(1982).

⁶³Limits in the Seas, No. 89 (1980).

was emphasized.⁶⁴ This application of the technique resulted in several bulges in the median boundary line. This was referred to as *semienclave*.⁶⁵ Other examples in State practice include maritime boundaries between Italy and Yugoslavia (1968),⁶⁶ between Qatar and the United Arab Emirates (1969),⁶⁷ between Iran and Saudi Arabia (1968),⁶⁸ and between Dubai and Sharjah.⁶⁹

The technique of enclave was extensively discussed and then applied to the Channel Islands in the Anglo-French case. The main consideration influencing the Court's decision was the location of the Channel Islands on the wrong side of the median line between the mainland coasts of Britain and France which is opposite and comparable,⁷⁰ and the completely detached nature of the Channel Islands from the U.K.⁷¹ Consequently, a 12-mile zone was drawn along the north and west of the Channel Islands. South and east of the Channel Islands opposite to the French coast would be subject to negotiations between France and Britain.⁷²

In the recent submission to arbitration concerning St. Pierre and Miquelon, Canada maintains the position that these islands ought to be enclaved.⁷³ Considerations in support of the Canadian position were said to include the proportionality of coastline lengths and political and economic factors peculiar to the

⁶⁴Evans, Malcolm, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION, Oxford, Clarendon Press, 1989, at 149.

⁶⁵McDorman, Ted L., "The Canada-France Maritime Boundary Case: Drawing a Line Around St. Pierre and Miquelon", 84 American Journal of International Law 157-189(1990), at 177.

⁶⁶Limits in the Seas, No.9 (1970).

⁶⁷Limits in the Seas, No. 18 (1970).

⁶⁸Limits in the Seas, No. 24 (1970).

⁶⁹Weil, Prosper, THE LAW OF MARITIME DELIMITATION -- Reflections, trans. from French (*Perspectives du Droit de la Delimitation Maritime*), Cambridge, Grotius Publications Limited, 1989, at 273.

⁷⁰Arbitral Award, 1977, para. 196, at 100-101.

⁷¹Arbitral Award, 1977, para. 199.

⁷²Arbitral Award, 1977, para. 199-202, at 101-103.

⁷³Siddon, T. Minister of Fisheries and Oceans, Remarks, *1987§ 3 Canadian Parliamentary Debates, House of Commons, 33d Parl., 2d Sess. 2808-2809.

relationship between Canada and the French islands.⁷⁴

In conclusion, important points of the technique of enclave, semi-enclave, or partial enclave can be summarized as follows. The application of enclave is exclusively confined to islands in an opposite situation sitting either on the wrong side of the median line, or closer to the median line than to the mainland coast of the State. Enclave solution, or for more clarity, complete enclave, is more appropriate where the islands in question are located on the wrong side of the median line and are very close to the coast of the State to which the islands do not belong. Partial enclave, as it is called, can be more useful where the distance allows the additional band of continental shelf or EEZ to be appertaining to the islands. It underlines the idea that the basic maritime jurisdiction, namely territorial seas, will be granted whenever possible. Indeed, the Arbitration Court in the Anglo-French case stressed the point that the enclave lines "must not be so drawn as to allow the continental shelf of the French Republic to encroach upon the established 12-mile fishery zone of the Channel Islands".⁷⁵ Semi-enclave, which refers to the situation of a bulge on the median line, is applicable to those islands that sit closer to the median line than to the coast of State to which they belong. The best example is the agreement between Italy and Yugoslavia. State practice has shown that the bulge line would allow a 12-mile territorial seas and a token belt of continental shelf or EEZ.

3 - Question of Islands in the Gulf of Tonkin

Before we proceed to examine the other relevant islands, we must elucidate the status and weight of Hainan Island in the delimitation. Hainan Island is a very large island with an area of 33,556 square kilometers. A vibrant economy has existed there for thousands of years. More than six million people are now inhabiting the island. Administratively, Hainan became the 31st province in China in 1987. For all intent and purpose, it is beyond doubt that Hainan Island assumes the status of continental mainland and should be given full consideration.⁷⁶

There are five island or groups of islands that cause problems

⁷⁴McDorman, Ted L., "The Canada-France Maritime Boundary Case: Drawing a Line Around St. Pierre and Miquelon", 84 American Journal of International Law 157-189(1990), at 180-188.

⁷⁵Arbitral Award, 1977, para. 202, at 102-103.

⁷⁶Sun, Xiangpin, WOGUO DE HAIYANG (Seas of Our Country), Commercial Press, Beijing, 1985, at, 39, in Chinese; Hsieh, Chiaomin and Zhong, Gong-fu, "Hainan -- the Island of South China Sea, A New Province in China", 20 Geo Journal 385-391.

in setting up the boundary in the Gulf. They are Archipelago des Fai Tsi Long, Iles Kao Tao, Dao Bach Long Vi, Weizhou Dao and Xieyang Dao, and several isolated coastal islands.⁷⁷

3(a) - Archipelago des Fai Tsi Long

Like the Bijagos Archipelago of Guinea-Bissau, Archipelago des Fai Tsi Long is separated from the mainland coast by very narrow sea lanes from 0.5 to 17.3 miles and no distance between any two islands in the Archipelago exceeds 5.6 miles must be considered as an "integral part of the continent". In a sense, they are inseparable from the mainland. The territorial seas generated by these islands overlap with each other. Finally, it should be always borne in mind that the Archipelago sits very close to the land boundary terminus Tra Co.

The solution to effect an equitable delimitation is the one adopted in the Guinea--Guinea-Bissau case, namely, taking the Archipelago as an element in the coastline length.⁷⁸ Because only at Ile aux Sangliers the outline of the Archipelago starts to deviate at a bearing of 40° towards south southwest and reach its peak at Nui Thuong Mai, Dao Lai Tao, and the two islands in Xuy Nong Chao. The tangent line linking these four most outlying islands is 24.6 miles. This represents 5.6% of the entire length of Vietnamese coast from Tra-co to Mui Da Nang (437 miles). The total length after addition of this coefficient is 461.6 miles. It is contrary to the equitable criterion of land's domination over sea⁷⁹ and the idea that an island should be given limited weight⁸⁰ if the 24.6 miles of tangent lines are to be given more than this percentage. There is no indication that such a choice would be contrary to equity.

3.(b) - Iles Kao Tao

As described in Chapter II, this group of islands is separated from Archipelago des Fai Tsi Long by a sea passage of 6.2-6.7 mile wide. The nearest of islands in Iles Kao Tao is 9.5 miles from the

⁷⁷The calculations and measurements in the text below are made by the author on the basis of the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

⁷⁸Arbitral Award, 1985, para. 95, at 291.

⁷⁹Gulf of Maine case, ICJ Rep. 1984, para. 157, at 312-313.

⁸⁰Gulf of Maine case, ICJ Rep. 1984, para. 196, at 327-328.

mainland coast and the furthest 19.6 miles. The maximum distance between any of two islands in the group is 6.7 miles. There is a cohesion within the islands interconnected by the overlapping territorial seas of each individual island.

The most equitable solution appears to be to give a limited effect in the drawing of the boundary line from Tra-co to the midpoint between Tra-co and Pingma Chiao. The effect suggested here is to give a quarter effect to the group of islands so that the baseline for the purpose of delimitation can be decided by dividing the angle formed by the straight line linking Tra-co with Hon Dau (Line C) and by the straight line linking Tra-co with Tai Shan Tao (Line D) into four equal sectors. The angle formed by the above lines is 50° . One-quarter of the angle is $12^{\circ}5'$ (Line E) (see Map 20).

Several considerations tend to support this approach. First of all, the size of Iles Kao Tao are not so negligible and its location is not so far from the mainland coast that a limited effect must be given. Secondly, unlike the Archipelago des Fai Tsi Long which is integrally linked with the mainland coast, Iles Kao Tao is separated from the mainland coast by 9.5 miles at least. They are also apart from Archipelago des Fai Tsi long by a 6.2-6.7 mile wide sea lane. Although the territorial seas of the islands merge each other, one of the most outlying island, Tai Shan Tao is only 11.2 miles from the bisector line constructed from the mainland coasts. This calls for a more limited effect to these islands. Thirdly, the Chinese coast from Tra-co to Kuantou Chiao runs an east-west direction. If half effect were given to Iles Kao Tao by bisecting the angle formed by the lines between Tra-co and Tai Shan Tao and between Tra-co and Hon Dau, there would be a danger that the eventual boundary line based on this bisector line would result in a cut-off effect to the Chinese coast from Tra-co to Kuantou Chiao, from Kuantou Chiao to Yinglo Chiang, and from Yinglo Chiang to Chiaowei Chiao. Such cut-off effect, whenever possible, should be avoided. Finally, one must not overlook the location and size of the Chinese islands Weizhou Dao and Xieyang Dao which will counterweigh the extension of Iles Kao Tao.

3(c) - Dao Bach Long Vi

Dao Bach Long Vi is entitled to some maritime jurisdictions. Because of the closeness of the island to the median line (15.1 miles if taking the Archipelago des Fai Tsi Long as basepoints, and 5.5 miles if using the Vietnamese mainland coasts as basepoints), if it is given full effect, substantial inequity would ensue by adding 1700 square nautical miles to Vietnam.

The solution is to be found in the semienclave with a bulge in the boundary line and the partial enclave to allow a token belt of continental shelf or EEZ. Factors favouring this solution include the closeness of the island from the median line, the

**Map 20 : Effects of Islands
In the Gulf of Tonkin**

**Source: LIMITS IN THE SEAS,
No. 99, Straight Baselines:
Vietnam, 1983.**

Source: LIMITS IN THE SEAS,
No. 99, Straight Baselines:
Vietnam, 1983.

detachment of the island from the mainland or the archipelagic coasts, and the small size of the island. The solution would be semi-enclave and partial enclave with a bulge on the median line with a 12-mile territorial seas plus one mile continental shelf and EEZ. Hence the bulge would have a radius of 13 miles (see Map 20).

Indeed, most of the commentators on this question agree that Dao Bach Long Vi should be given either no effect at all or a limited effect by enclave.⁸¹

3(d) - Weizhou Dao and Xieyang Dao

These two Chinese islands lie on the northeastern corner of the Gulf opposite on three sides to mainland coast of China: coast of Leizhou Peninsula, and coast of Hainan Island. The shortest distance between Weizhou and Chinese coast is 19.6 miles (northward). Similarly, 8.4 miles from Weizhou is Xieyang Dao with a distance of 24.6 miles from the nearest Chinese mainland coast.

Though some distance apart from the mainland coasts, these two islands are sitting in an area in which three sides of the waters are surrounded by Chinese coasts. Also of some importance is their distance from the nearest Vietnamese coast, Tra-co (64.3 miles). The equitable criterion of no refashioning of nature is calling for the treatment of these two islands in such a way as to enable them to extend maritime jurisdiction to their half permissible extent under international law. Such an extension would also prevent any encroachment caused by Archipelago des Fai Tsi Long or Iles Kao Tao on the extension of Chinese coasts. What this means is that these two islands will cause the boundary line to shift 13° toward the Vietnamese side by giving these islands half effect (Lines A and B) to draw one sideline of the angle (Line E) (see Map 20).

3(e) - Individual coastal islands

Southward from Hon Dau, there are a few Vietnamese coastal islands, such as Hon Me, Hon Matt, Hon Gio, Hon Co, and Cu Lao Cham. On the Chinese side, there is Hsiku Tao. These islands are fairly close to the mainland coasts, ranging from 2.8 to 13.4 miles. None of the islands deviate significantly from the general direction of the coasts to which they belong. In view of the large drama of the Gulf which has twice the length of coasts than that

⁸¹Prescott, J.R.V., MARITIME JURISDICTION IN SOUTHEAST ASIA: A Commentary and Map, Honolulu, East-West Environmental and Policy Institute, 1981, at 12-13; Kittichaisaree, Kriangsak, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA, Singapore, Oxford University Press, 1987, at 89; Morgan, Joseph R. and Valencia, Mark J., eds., ATLAS FOR MARINE POLICY IN SOUTHEAST ASIAN SEAS, Berkeley, United States, University of California Press, 1983, at 48.

in the Gulf of Maine, they should be ignored on both sides.

4 - Summary

Effects given to islands in maritime delimitation can be classified into three categories: full effect, no effect and limited effect. The most difficult question to decide is how to attribute a limited effect to islands under specific circumstances. Islands close to the median line in an opposite situation, islands on the wrong side of the median line, and islands that may cause a substantial swing of the bisector line in an adjacent situation, will be accorded limited effect.

The techniques to carry out the limited effect are half-effect technique, limited percentage of coastal length, and enclave. The half-effect technique includes angular displacement and transverse displacement.

The limited percentage of coastal length has been used in the Guinea--Guinea-Bissau case by drawing a tangent line around the outmost islands and then taking the length of this line as a coefficient of the entire coastal length. It is appropriate where the islands are inseparable from the mainland as an integral part of the latter, and the territorial seas generated by each island in the group are inter-covered.

Enclave solutions are subdivided into complete enclave, semienclave, and partial enclave. Complete enclave refers to situation where the islands in question are surrounded completely by only a territorial sea belt. Partial enclave refers to a 12-plus-1 solution. The islands in question are enclosed by a 12-mile territorial seas and 1 mile continental shelf and EEZ. Of course, the width of continental shelf and EEZ can be more than 1 mile. Semienclave is the situation where the islands are enclave on one or more side but not complete enclave. As a result, there will be bulges on the delimitation lines where the islands have been granted semienclave. Semienclave and partial enclave are not mutually exclusive.

There are six types of islands in the Gulf of Tonkin. Each calls for different solution. Because of its immense size, population, economic activities, and political considerations, Hainan Island should be taken into account fully in the delimitation.

Archipelago des Fai Tsi Long is analogous to the Bijago Archipelago of Guinea in terms of its location and relationship with the mainland coast. It constitutes an integral part of the Vietnamese mainland and the territorial seas of each island are merged. A tangent line is drawn around the most outlying islands to calculate the length of the islands so as to give them a certain

percentage in the entire length of the Vietnamese coast. The tangent line measures 24.6 miles which represents a 5.6% of the entire length of Vietnamese coast.

The Iles Kao Tao have been given a limited effect due to their location, size and relationship with the mainland. The solution is to give a 1/4 effect to the islands by dividing the angle formed by the general direction line of the coast, and the line connecting Tra Co and the most outlying island in the group. To avoid the cut-off effect on the Chinese coast, this solution is justifiable.

Dao Bach Long Vi is too close to the median line to be given full effect. A partial and semi-enclave solution seems most suitable. The radius of the bulge line is 13 miles.

Facing Chinese coasts on three sides and having a distance to the Vietnamese coast of 3 times farther than that to the Chinese coasts, Weizhou Dao and Xieyang Dao are accorded half effect (13°).

Because of the immense size of the Gulf of Tonkin, and the complete parallel oppositeness between Chinese and Vietnamese coasts, the individual coastal islands on both sides are ignored.

CHAPTER XII

APPLICATION OF PRACTICAL METHODS IN THE GULF OF TONKIN

From the inception, the methods with which the delimitation of maritime boundary is actually effected, have been playing a very important role. They can be used directly to draw the boundary line. They may also have the function to correct the inequity created by nature or by another method. Most of them are geometric in nature. In order to carry a satisfactory operation of the task of this dissertation, it is imperative to find out what parameters international law has prescribed in their selection and use.

1 - Evolution of rules on Practical Methods

1(a) - Pre-1950s

There is an interesting phenomenon that the search for methods suitable for delimiting maritime spaces frequently intermingled with that for legal guiding principles for delimitation.

The great jurist Samuel Pufendorf (1632-1694) proposed that "If several people live upon a strait or bay, their several dominions are understood to extend straight out from their territories to its centre, unless ... by convention they decide to exercise that dominion as a unity against foreigners but to use those waters promiscuously among themselves."¹ In the search for the principle of proportionality, various methods were employed to achieve this effect. Lake Geneva was delimited by application of the principle of proportionality in the Treaty of Lausanne of October 30, 1564.² This was explained 300 years later by Vittorio

¹Pufendorf, S., DE JURE NATURAE ET POLITICARUM, BK. IV, chapter V, 8 (Carnegie Endowment ed. of 1688, 1937), in Rhee, Sang-Myon, "See Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 556.

²Adami, V., I CONFINI DI STATO NELLA LEGISLAZIONE INTERNAZIONALE (1919), translated as NATIONAL FRONTIERS IN RELATIONS TO INTERNATIONAL LAW (translator, T.T. Behrens, 1927), at 40. In Rhee, Sang-Myon, "See Boundary Delimitation between States before World War II", 76 American Journal of International

Adami in the following terms:

In the case where portions of both banks belong to the same State, if the boundary marks on the two opposite banks are placed vis a vis the lake boundary line is the line joining the two boundary marks; if, on the contrary, the two marks are not opposite one another, the boundary line starting from one of the marks, crosses the surface of the water in a direction perpendicular to the coast, till it joins the median line of the lake, then following this line, it continues till it meets the other perpendicular starting from the opposite shore.³

The predominant concern is to effect an equal and equitable delimitation through the application of methods.

For opposite situation, the main channel (or thalweg) principle and the median line principle emerged in the 19th century. State practice was extensively analyzed by Professor Rhee.⁴ For instance, the Peace Treaty of September 17, 1809, established the maritime frontier between Finland and Sweden, traversing the middle of the Gulf of Bothnia.⁵ The Treaty of Nanking of 1842 was assumed to draw the boundary in the middle between Hong Kong Island and mainland China.⁶ The middle line was also the boundary separating the United States and the United

Law 555-588(1982), at 556.

³Adami, V., I CONFINI DI STATO NELLA LEGISLAZIONE INTERNAZIONALE (1919), translated as NATIONAL FRONTIERS IN RELATIONS TO INTERNATIONAL LAW (translator, T.T. Behrens, 1927), at 38. In Rhee, Sang-Myon, "See Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 556.

⁴Rhee, Sang-Myon, "See Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982).

⁵See Addendum 1, UN Doc. A/CN.4/71/Add.1, at 2, to the Information and Observations Submitted by Governments Regarding the Question of the Delimitation of the Territorial Sea of Two Adjacent States, UN Doc. A/CN.4/71(1953); New Jersey and New York divided Raritan Bay by the use of the median line, see Rhee, Sang-Myon, "See Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 560.

⁶Gidel, 3G, LE DROIT INTERNATIONAL PUBLIC DE LA MER, 738(1934).

Kingdom in the Strait of Juan de Fuca in 1846.⁷ These early efforts led to the entrenchment of median line principles and the thalweg principle where it was easy to identify the relationship between the coasts and where the preservation of equal access became paramount.

For adjacent situation, a perpendicular line to the coast by its general direction, median line, as well as latitude and longitude line were applied.⁸

There were continuous attempts to codify and systemize the rules on delimitation of water bodies, straits, bays, lakes, territorial seas prior to the 1930 Hague Codification Conference. They include the analysis by Finnish scholar Bjorksten in 1925,⁹ the draft presented by International Law Association of Japan in 1926,¹⁰ the Memorandum prepared by the Subcommittee on Territorial Waters of the Committee of Experts for the Progressive Codification of International Law in 1927,¹¹ and the study by Harvard Law School in 1929.¹² Though they all made valuable contribution to the evolution of customary rules on delimitation, these efforts failed to achieve the goal of codification at the 1930 Hague Codification Conference.

A particular contribution in this regard was made by the French jurist Lapradelle. He suggested two methods for water

⁷Rhee, Sang-Myon, "See Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 560.

⁸Rhee, Sang-Myon, "Sea Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 564-565.

⁹Bjorksten, S.R., . Das WASSERGEBIET FINNLANDS IN VOLKERRECHTLICHER HINSICHT, 93-98 (1925).

¹⁰25 Kokusaiho Gaiko Zasshi (Journal of International Law and Diplomacy) 599, 608-609, 635-636(1926).

¹¹Memorandum by Mr. Schucking, in Report to the Council of the League of Nations on the Questions which appear ripe for International Regulation by the Committee of Experts for the Progressive Codification of International Law, League of Nations Doc. C.194.M.70. 1927, Vol.1, at 7.

¹²Draft Convention on Territorial Waters, Text and Comment, 23 American Journal of International Law, Spec. Supp. 281 (1929).

boundary delimitation: extension of land boundary (last straight line section of the land boundary) and the perpendicular line to the coast.¹³

After 1930 Hague Conference, Firtz Munch and S. W. Boggs did excellent research on the subject. It was Boggs who first accurately defined the median line as "the line every point of which is equidistant from the nearest point or points on opposite shores".¹⁴ Before World War II, the median line was generally considered to meet the principle of sovereign equality though insular formations or other unusual coastal circumstances may distort its effect. When the preservation of equal access and navigational consideration took the priority, the thalweg was adopted in the opposite situation. For the adjacent situation, the delimitation often took the latitude, the longitude, azimuth, and perpendicular lines.¹⁵ The median line principles were further refined in another article by Boggs.¹⁶

1(b) - Discussions in the ILC and the Geneva Conventions

The International Law Commission (ILC) was seized of the question of delimitation of territorial sea and continental shelf from 1951 to 1956 in preparation for the draft conventions of the First United Nations Conference on the Law of the Sea. As a result of the discussion, median line was suggested for opposite situation, and four other methods were recommended for adjacent situation. They were the continuation of land frontier, a perpendicular line on the coast at the intersection of the land frontier and the coastline, a vertical line on the general direction of the coast, and a median line. Although median line for the opposite situation and equidistance line for the adjacent situation were adopted finally, the phrase "special circumstances" was added to allow exceptions based on geographical irregularities,

¹³Lapradelle, Paul de, LA FRONTIERE, Paris, Les Editions Internationales, 1928, 368p, at 215-216.

¹⁴Boggs, Wittemore S., "Problems of Water-Boundary Definition: Median Line and International Boundaries Through Territorial Waters", 27 Geographical Rev. 445, at 448(1937).

¹⁵Rhee, Sang-Myon, "Sea Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 588.

¹⁶Boggs, Whittemore S., "Delimitation of Seaward Areas under National Jurisdiction", 45 American Journal of International Law 240-266(1951).

islands, navigable channels and historic title.¹⁷ The draft articles were subsequently adopted by the 1958 Geneva Conference and embodied in the Convention on Continental Shelf and Convention on Territorial Seas.

This was the first time that the method used to effect delimitation of sea areas was written into multilateral conventions. Because of the wording in Article 6 of the Continental Shelf Convention, it was believed that the equidistance method was not only a convenient and practical tool for maritime delimitation, but also a legal principle governing the delimitation itself. The blurring of legal principles on the one hand and the useful methods on the other was not resolved until the North Sea cases.¹⁸

1(c) - North Sea cases and its aftermath

The controversy in these two cases was about the use of equidistance lines in establishing boundaries of continental shelf between Denmark, West Germany and the Netherlands. Noting the widening tendency of equidistance on the projecting coasts, the International Court of Justice relegated the equidistance principle to the status of a merely useful method, which did not enjoy a *priori* status over any other method.¹⁹ Admitting the advantages of the equidistance method, the Court declared that they "do not suffice of themselves to convert what is a method into a rule of law".²⁰

That the Court placed emphasis on the proposition to seek not "one method of delimitation, but one goal" was significant.²¹ Because the function of practical methods was thus made unequivocally clear: to serve for the goal of attaining equity, equidistance method and all other methods were further held not obligatory in every circumstance.²² Although other international judicial decisions have pronounced on the subject, it was in the

¹⁷ILC Rep., 3rd sess. Yearbook of ILC, 1951, Vol.II. Yearbook of ILC, 1952, Vol.II. Yearbook of ILC, 1953, Vol.II. Yearbook of ILC, 1953, Vol.II. Yearbook of ILC, 1956, Vol.II. Annex to A/CN.4/61/Add.1, Yearbook of ILC, 1954, Vol.II.

¹⁸Johnston, Douglas M., THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING, Kingston, McGill-Queen's University Press, 1988, at 210.

¹⁹ICJ Rep. 1969, para. 8, 21-59.

²⁰ICJ Rep. 1969, para. 23.

²¹ICJ Rep. 1969, para. 92.

²²ICJ Rep. 1969, para. 101 (A) (B).

Gulf of Maine case that the function and status of practical methods were effectively clarified. According to the Special Chamber of the Court, the distinction was important "between principles and rules of international law enunciated in the convention and criteria and methods for whose application it might provide in particular circumstances".²³

It may be possible to draw a list of practical methods envisaged or used, but such attempt should not be directed to seek general rules governing their usage in a particular application, rather it might be appropriate to extract some guidance as to their nature and use.²⁴ Practical methods that are suitable for short distance delimitation, such as that of territorial sea, may not be suitable for long distance delimitation, such as that of continental shelf and EEZ.²⁵ On the question of practical methods, the Chamber concluded:

Here again the essential consideration is that none of the potential methods has intrinsic merits which would make it preferable to another in the abstract. The most that can be said is that certain methods are easier to apply and that, because of their almost mechanical operation, they are less likely to entail doubts and arouse controversy. That explains to a certain extent why they have been taken into consideration in preference to others. At any rate there is no single method which intrinsically brings greater justice or is of greater practical usefulness.²⁶

The point that the appropriateness or inappropriateness of a particular method can only be evaluated in light of the specific circumstance in each case is made clear. A suitable method may be adopted at the beginning of a particular delimitation, but may very well be abandoned or replaced by other methods at the later stage of the delimitation. The combined use of various methods has become accepted and for different segments of the entire boundary line, the method can be different to suit the particular geographical and other circumstances.²⁷ Since the boundary line is to separate both continental shelf and EEZ, the Chamber ruled that only geometrical methods will be good for this purpose.²⁸ The question whether non-geometrical methods may be employed if the boundary in

²³ ICJ Rep. 1984, para 82, at 290.

²⁴ Gulf of Maine case, ICJ Rep. 1984, para. 159, at 313-314.

²⁵ Gulf of Maine case, ICJ Rep. 1984, para. 160, at 314.

²⁶ Gulf of Maine case, ICJ Rep. 1984, para. 162, at 315.

²⁷ Gulf of Maine case, ICJ Rep. 1984, para. 163, at 315.

²⁸ Gulf of Maine case, ICJ Rep. 1984, para. 199, at 329.

question appertains to merely one of them remained unanswered.

All the methods used in maritime delimitation fall into three categories: geometrical, non-geometrical and techniques. Of geometrical methods, there are equidistance line, perpendicular to the coast or its general direction, azimuth line, longitude line, latitude line, bisector line, equiratio method and continuation of land frontier. Of non-geometrical methods, there are thalweg, main channel, geomorphological consideration, and ecological consideration. In the category of techniques, there are half-effect, enclaves, and limited percentage of the coastline.

1(d) - Assessment

In summary, what international law requires about practical methods in maritime delimitation can be succinctly stated as follows.

1. There is no single method the use of which is commanded by law in all circumstances. There is not even "*priori* or preference of any method in the abstract". The appropriateness of a particular method can only be assessed in the context of coastal geographical and other circumstances in a concrete situation.
2. In comparison with other methods, equidistance legally has no privileged status, not even as a starting point. Courts have repeatedly deemphasized this particular method against the background of the 1958 Geneva Continental Shelf Convention.
3. Combined use of various methods in a particular delimitation is acceptable. At different stage of the delimitation operation and on the different segments of the delimitation line, different methods can be selected to meet the changed circumstances.
4. The methods themselves are not legal rules but simply practical methods capable of ensuring an equitable solution in light of all the relevant circumstances.
5. Geometrical methods are the more preferred group over non-geometric ones due to their precision, simplicity, and convenience.
6. There is no exhaustive list of practical methods. It is quite plausible that newly-invented methods may be adopted for maritime boundary delimitation.

2 - Description of Various Methods

2(a) - Equidistance

This method was developed by the American geographer S. W. Boggs and was incorporated into Article 6 of the Continental Shelf Convention and Article 12 of the Territorial Sea Convention. A

great many bilateral agreements have also employed this method.²⁹ The original author of the equidistance line, Boggs, explained the operation of the method in this way:

The median line, being equally distant from opposite shores, follows a straight line that is equally distant from two projecting points on the two shores until a third point that is equally distant is reached, then it usually proceeds in relation to one of the first two points and the new point. Each such straight line lies on the perpendicular that bisects the line connecting the two nearest points on opposite shores; in fact, the median line consists of a series of such straight lines, each of which is extended until it intersects the next.³⁰

Each turning point is defined by indicating the three points from which it is equidistant. Such point can be accurately described by reference to longitude and latitude. Finally, the line thus drawn can be further defined by directions and distances from the initial point at which land boundary terminus intersects with the coastlines of the two States.³¹ Professor Charney pointed out that the application of equidistance method was appropriate in two situations: when the areas are close to coasts of States and when an opposite situation exists.³²

The advantage of this method consists in its simplicity, convenience, certainty and precision. But this is largely true with all geometrical methods. From the practice of States as evidenced from the bilateral agreements, the method is probably the most frequently adopted among all other methods. However, the application of equidistance method in marked concave or convex coasts and presence of islands has caused considerable dissatisfaction and concern. In adjacent situation, it often causes inequitable results arising from small sinuosities and irregularities of the coasts. In opposite situation, the median line can best be effected and executed by the equidistance method

²⁹Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 121.

³⁰Boggs, S. W., "Problems of Water-Boundary Definition: Median Line and International Boundaries Through Territorial Waters", 27 Geographical Rev. 445(1937), at 449.

³¹Boggs, S.W., INTERNATIONAL BOUNDARIES -- A Study of Boundary Functions and Problems, Ams Press Inc., New York, 1966, 272p, at 192.

³²Charney, Jonathan I., "The Delimitation of Ocean Boundaries", in Dallmeyer, D.G. and DeVorse, L. Jr., eds., RIGHTS TO OCEANIC RESOURCES, Dordrecht, Martinus Nijhoff Publishers, 1989, 25-49, at 35.

provided that irregular coastal or insular formations will be properly treated by supplementary methods.

2(b) - Perpendicular line

This is the method used in the Grisbadarna Case³³ between Norway and Sweden in 1909. The Arbitration Tribunal drew a median line in the inner area and a perpendicular line in the outer area together with the adjustment in light of the historical claim and circumstances of facts. The prerequisite for its application is the identification and establishment of the general direction of the coasts against which the perpendicular line is drawn. Difficulty has arisen also because there is no generally accepted formula to determine the general direction of the coast.³⁴ In a recent study on the question of straight baselines by the U.S. Office of the Geographer, the concept of general direction of the coasts was defined this way:

1. The line should approximately parallel the direction of the relevant coastline;
2. The line should not exceed 60 nautical miles in length, unless it does not deviate anywhere in its length more than 20 degree from the direction of the relevant coastline; and
3. Each endpoint of a general direction line should be on mainland.³⁵

Though this formula is devised for the purpose of drawing straight baselines, it may nonetheless bear some relevance to the general direction in the context of delimitation. It may be that the requirements to outline the general direction of the coastline for baselines are more stringent than those for delimitation.

Another form of the perpendicular line is not with reference to the general direction but to the coastline itself directly, provided always that the relevant coastline stretches fairly straight without apparent protrusion or recession or other irregularities.

³³4 American Journal of International Law 226(1910); Scott, James Brown, ed., THE HAGUE COURT REPORTS, 121-140.

³⁴Professor Rhee had this comment: "In theory, the line perpendicular to the general direction of the coast looks simple and convenient, but in practice it is extremely difficult to determine the general direction." in Rhee, Sang-Myon, "Sea Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 570.

³⁵Bernhardt, Smith and Greiveldinger, "Developing Standard Guidelines for Evaluating straight Baselines", Limits in the Seas, No. 106, 1987, at 30-32.

Examples of the use of perpendicular line can be found in maritime boundary between Columbia and Panama in the Pacific Ocean (perpendicular line to the general direction of the coastline),³⁶ in territorial sea boundary between Soviet Union and Poland in the Baltic Sea (perpendicular line to the general direction of the coastline),³⁷ in maritime boundaries between Uruguay and her two neighbours, Brazil and Argentina (perpendicular line to the coastline),³⁸ and in continental shelf agreement between Sharjah and Ummal Qaiwan in 1964.³⁹

Professor Rhee observed that the perpendicular line was the outgrowth of the method by latitude and longitude.⁴⁰ Perhaps it is more accurate to regard the perpendicular line as the special case of the bisector method geometrically. The method reflects the fundamental conviction of equal division of the area in dispute. The perpendicular line was used in Tunisia-Libya Case⁴¹ and for the third segment in the Gulf of Maine Case.⁴² Its application must be made in adjacent situation.

2(c) - Bisector method

This method has its application frequently in order to create half effect in certain geographical circumstances. For example, it was used in the Iran/Saudi Arabia delimitation in the Persian Gulf by giving half-effect to the Iranian island Kharg.⁴³ This half-effect technique has since won judicial recognition and has been employed in a number of cases. Distinctions must be made, however, as to the two different usages of this method. The first relates to the treatment of an island with a view to attributing half

³⁶Limits in the Seas, No. 79, 1978.

³⁷Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 119.

³⁸Limits in the Seas, No. 64 (1975), and No. 73 (1976).

³⁹Gulf of Maine Case, Canadian Reply Annexes, Vol. I, pp. 23 and 27.

⁴⁰Rhee, Sang-Myon, "See Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 577.

⁴¹ICJ Rep. 1982, para. para. 119, at 84.

⁴²ICJ Rep. 1984, paras. 224-226, at 337-338.

⁴³Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 76-77.

effect thereto, such as the treatment of Kerkennah Islands in Tunisia-Libya Case⁴⁴ and the treatment of Scilly Isles in the Anglo-French case⁴⁵. The second use is found in delimiting the boundary line in an actual or constructive adjacent situation by bisecting the angle formed by the two lines representing the general directions of the respective coasts or the actual coastlines. This is the way the Special Chamber dealt with the first segment of the delimitation line in the Gulf of Maine Case.⁴⁶

Geometrically, a distinction must be made between angular bisector and parallel bisector. The latter has found its application in the treatment of Seal Island in the Gulf of Maine Case.⁴⁷ Bisector method is related to the equidistance method in its micro-application. As pointed out by Cooper, "a true equidistance line is, in effect, a series of segments of perpendicular bisector lines joining the nearest points on the coasts of both parties."⁴⁸

2(d) - Latitude line, longitude line, or azimuth line

At the end of 15th century, when the marine expansion of Spain and Portugal was in its full swing, following the great discovery by Christopher Columbus, the Pope in Rome issued a Bull dividing the Spanish and Portuguese sea domain along a meridian of longitude and was incorporated into the Treaty of Tordesillas of 1494.⁴⁹ After reviewing several agreements on the use of latitude or longitude lines, Professor Rhee regarded such usage as capable of arriving at equitable result.⁵⁰

Examples of the use of longitude line, latitude line or azimuth lines can be found in State practice. In 1960, a maritime boundary following 240° azimuth from the intersection of the land boundary and the low-water mark was made between Senegal and

⁴⁴ICJ Rep. 1982, paras. 127-129, at 88-89.

⁴⁵Arbitral Award, 1977, paras. 249-251, at 123-124.

⁴⁶ICJ Rep. 1984, para. 213, at 333.

⁴⁷ICJ Rep. 1984, para. 222, at 336-337.

⁴⁸Cooper, John, "Delimitation of the Maritime Boundary in the Gulf of Maine Area", 16 Ocean Development and International Law 59-90(1986), at 80.

⁴⁹O'Connell, D.P., THE INTERNATIONAL LAW OF THE SEA, Oxford, Clarendon Press, Vol. I, at 2.

⁵⁰Rhee, Sang-Myon, "See Boundary Delimitation between States before World War II", 76 American Journal of International Law 555-588(1982), at 577.

Guinea-Bissau.⁵¹ Gambia runs like a strip along the two banks of Gambia River on the west African coast. Her maritime frontage measures approximately 32 miles. The agreement between Senegal and Gambia gave a strip of maritime area to Gambia by specifying two latitude lines on the north and on the south.⁵² Mauritania and Morocco signed an agreement on delimitation of continental shelf in 1976 with the boundary line running along 24th parallel north from the terminus of the land frontiers on the coast.⁵³ In Latin America, following the Santiago Declaration of 1962, a number of maritime boundaries between adjacent States have been drawn along the parallels of the latitude. These agreements are between Chile and Peru (1954), Peru and Ecuador (1954), Columbia and Ecuador (1975).⁵⁴ In the agreements between Columbia and Panama (1976), and between Columbia and Costa Rica (1977), both meridians and parallels were used.⁵⁵ The maritime boundaries between Uruguay and her two neighbours, Brazil and Argentina also follow the parallels of the latitude.⁵⁶ In 1976, Spain and Portugal settled their maritime boundaries by following latitude 41°50'57" N and longitude 7°23'48" W.⁵⁷ In 1988, the United Kingdom reached an agreement with Ireland to divide the continental shelf. There is an innovative use of the parallels and meridians by drawing "lines consisting of parallels of latitude and meridians of longitude joining" in sequence. The lines are akin to stair steps.⁵⁸

Because of their convenience, precision and simplicity, longitude lines, latitude lines and azimuth lines are often selected to determine the boundaries in the sea. However, such selection is still predicated upon the equitable results and marked

⁵¹Limits in the Seas, No. 68, 1976.

⁵²Limits in the Seas, No. 85, 1979.

⁵³Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 97-98.

⁵⁴Limits in the Seas, No. 86, 1979; Limits in the Seas, No. 88, 1979; Limits in the Seas, No. 69, 1976.

⁵⁵Limits in the Seas, No. 79, 1978; Limits in the Seas, No. 84, 1979.

⁵⁶Limits in the Seas, No. 64, 1975; Limits in the Seas, No. 73, 1976.

⁵⁷Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 115.

⁵⁸Simmonds, K. ed., NEW DIRECTIONS IN THE LAW OF THE SEA, New Series, Looseleaf, Oceana Publications Inc., London, 1989, Binder I, G6.

deviation could result in its abuse.

2(e) - Continuation of land boundary

The method of extension of land boundary (last segment of straight line of the land boundary) was also among the candidates for sea boundary delimitation.⁵⁹ The International Law Commission identified the extension of land boundary as one of the four methods for delimitation of continental shelf.⁶⁰

The International Court of Justice used it in part to justify a *de facto* line in the Tunisia-Libya Case.⁶¹ Difference as to which direction of the prolongation of the general direction of the land boundary should take would be discounted in light of the more close-to-shore nature of the initial sector of the delimitation line.⁶² In Guinea--Guinea-Bissau Case, the Arbitral Tribunal accepted the "southern limit" as the initial boundary close to the coast because it coincided with (i) a short segment of the land boundary (boundary between islands); (ii) the geographical prolongation of the land boundary; and (iii) the perpendicular line to the coast. Moreover, the "southern limit" in the treaty was put forward by one of the original parties to the treaty, namely France.⁶³

However, the application of this method must be qualified by its near-coast nature so as to contain its deviative direction and inequitable effect. Its application to distant offshore delimitation after the initial stage must be approached with caution. For a short distance boundary like the territorial sea, such a method may be properly used.

2(f) - Equiratio method

The Dutch Hydrographer Wijnand Langeraar designed this new method for maritime boundary delimitation based on equidistance

⁵⁹Lapradelle, Paul de, LA FRONTIERE, Paris, Les Editions Internationales, 1928, 368p., at 215-216.

⁶⁰UN Doc. Annex to A/CN.4/61/Add.1(18 May 1953), Yearbook of the International Law Commission, 1953, Vol. II, at 19.

⁶¹ICJ Rep. 1982, para. 120, at 85.

⁶²ICJ Rep. 1982, para. 120, at 85.

⁶³Arbitral Award, 1985, 25 International Legal Materials 252-309(1986), para. 106, at 295-296; 89 Revue General de Droit International Publique 484-537(1985), para. 106, at 526-527.

method.⁶⁴ In his description, the method is like this:

A boundary line between the offshore areas under the jurisdiction of two coastal States, either adjacent or opposite, will be called an equiratio line when every point of it will be defined by a constant ratio of its distances from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.⁶⁵

He further explained that the lines would be finite stretches of lines or curves which would be either arcs of circles or parts of ellipses, parabolas, or hyperbolas. After satisfactory testing against the decided cases by ICJ, the author concluded that equiratio was capable of satisfying every nuance of equity.⁶⁶

There has been no opportunity to apply this method in reality. The reluctance on the part of disputing States to agree on the drawing of baselines, either normal or straight, may weaken the credibility of this new approach.

2(g) - Area-weighted equidistance method

The essential idea of this method rests on the comparison of the area of sea and the area of the adjacent land of the coastal States. In view of the evolution of customary rules on maritime delimitation, it is inconceivable to use such a method which does not derive its entitlement from the coast.⁶⁷

2(h) - Geomorphological method

Rooted in the formation of seabed morphology, this method can be classified either as a circumstance or a method based on geomorphological consideration. It was used in the Indonesia-

⁶⁴Langeraar, Wijnand, SURVEYING AND CHARTING OF THE SEAS, Elsevier Oceanography Series, No. 37, 1984. Langeraar, Wijnand, "Equitable Apportionment of Maritime Areas through the Equiratio Method", 36 Hydrographical Review 19-28 (1985). Langeraar, W., "Maritime Delimitation, the equiratio method -- a new approach", 10 Marine Policy 3-18(1986).

⁶⁵Langeraar, W., "Maritime Delimitation, the equiratio method - a new approach", 10 Marine Policy 3-18(1986), at 7.

⁶⁶Langeraar, W., "Maritime Delimitation, the equiratio method - a new approach", 10 Marine Policy 3-18(1986), at 7-8.

⁶⁷Kapoor, D.C. and Kerr, Adam J., A GUIDE TO MARITIME BOUNDARY DELIMITATION, Toronto, Carswell, 1986, at 85.

Australia delimitation in the Timor Trough⁶⁸ and the Indonesia-Thailand agreement in the Gulf of Thailand.⁶⁹ The United States also invoked this concept in the Gulf of Maine Case.⁷⁰ The usefulness of this method becomes doubtful in light of the growing trend towards a single maritime boundary for both continental shelf and EEZ. It also lacks the neutral character that geometric methods have.

2(i) - Ecological method

This method was advocated by the United States in the Gulf of Maine Case on the ground that there was a certain ecological pattern and ecosystem which should be respected by the delimitation lines. But the Chamber did not accept it.⁷¹ Like the geomorphological method, the significance of this method is diminished when a single boundary line is constructed and a geometric method with neutral character is called for. Besides, as pointed out by Weil, maritime boundary delimitation is a judicial-political operation.⁷² Natural boundary can be adopted only when accepted by States.

3 - Choice of Practical Methods in the Gulf of Tonkin

The selection of practical methods to effect the delimitation lines in the Gulf of Tonkin will be based on equitable criteria applicable and relevant circumstances identified. In different sectors of the delimitation area, the choice of methods will be different because different considerations come into play.

3(a) - Bisector line at Tra Co

The relevance of Tra Co lies in that it is not only the land boundary terminus but also a point where the general direction of coast changes. The basic equitable criterion is the equal division of the overlap of maritime projection of the respective coasts. Bearing in mind also that the coastal lengths of the two countries in the Gulf achieve an approximate equality, the only way to separate the area equitably is through the use of bisector line.

⁶⁸Jagota, S.P., MARITIME BOUNDARY, Dordrecht: Martinus Nijhoff Publishers, 1985, at 89, 123.

⁶⁹Jagota, S.P., MARITIME BOUNDARY, Dordrecht, Martinus Nijhoff Publishers, 1985, at 83, 123.

⁷⁰United States Memorial, para. 315.

⁷¹ICJ Rep. 1984, para. 166-168, at 316-317.

⁷²Weil, Prosper, THE LAW OF MARITIME DELIMITATION, Cambridge, Grotius Publications Limited, 1989, at 21-45.

The two straight lines from Tra Co to Hon Dau and from Tra Co to Kuantou Chiao form an angle of 140° . To divide it by half, one will get a bisector line.

As has been said in Chapter X, within the hypothetical line drawn from Pingma Chiao to Tra-co, the waters inside the line are enclosed on three sides by Chinese coasts with Weizhou Dao and Xieyang Dao at the centre. The bisector line must try to avoid swinging inside the line so as to cause cut-off or encroachment effect. The Iles Kao Tao and Weizhou Dao and Xieyang Dao must also be taken into consideration. As elaborated in Chapter XI, the effects given to Iles Kao Tao is $1/4$, $12^{\circ}5'$, and to Xieyang Dao and Weizhou Dao $1/2$, 13° .

The commencing point of this bisector line is Tra-co. Its direction is defined by the adjusted lines at bearings of 20° and 164° of parallel. Where will it terminate? Keeping in mind that the relationship of coasts changes from adjacency at Tra Co to oppositeness some point where the coast of Vietnam is opposite to that of China. The point is on the line linking the midpoints of the lines between Tra-co and Pingma Chiao and between Cam Pha Port and Tachiao Tou. The distance between Tra-co and Pingma Chiao is 118.5 miles and between Cam Pha Port and Tachiao Tou is 122.9 miles. The midpoints are 59.25 miles ($108^{\circ}1'51''E$, $20^{\circ}11'45''N$) and 61.45 miles ($108^{\circ}39'40''E$, $20^{\circ}42'51''N$). The coordinates of the terminating point of the first sector line is $108^{\circ}16'32''E$, $20^{\circ}24'01''N$ (hereinafter designated as point A). The angle bisected is 117° . The bisector line so obtained has a bearing of 78.5° of parallel of latitude.⁷³

3(b) - Median line from point A to the closing line

The coasts of Vietnam and China are roughly in a parallel oppositeness throughout the Gulf from point A downward. As discussed above, unless there are some overriding circumstances which will warrant deviation from it, the median line will be applicable to effect an equal division of overlap of maritime projection from the respective coasts of Vietnam and China. The median line can be drawn with a simplified equidistance line. The basepoints selected to draw the median line are based on the general direction of the coasts. The following points are used on Vietnamese coasts: Cam Pha Port, Hon Dau, Cap Chao, Mui Ga, Mui Ron, Mui Ong, Cap Lay and Mui Da Nang; on Chinese coast: Tachiao Tou, Yingge Tsu, and Chinmu Chiao. The line thus constructed

⁷³These figures are obtained by the author on the basis of the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

connects the following points (see Map 21):⁷⁴

1. Point A (108°16'32" E, 20°24'1" N);
2. Point B (108°1'31" E, 20°11'48" N);
3. Point C (107°41'25" E, 19°55'50" N);
4. Point D (107°16'18" E, 19°25'45" N);
5. Point E (107°14'40" E, 19°14'29" N);
6. Point F (107°26'13" E, 18°55'58" N);
7. Point G (107°29'40" E, 18°36'35" N);
8. Point H (107°38'5" E, 18°4'19" N);
9. Point I (108°19'58" E, 17°19'42" N);
10. Point J (108°42'12" E, 17°16'1" N);
11. Point K (108°55'2" E, 17°9'22" N).

3(c) - Semienclave and partial enclave line of Dao Bach Long Vi

As examined in Chapter X, the Vietnamese island Dao Bach Long Vi which is only 7.3 nautical miles from the median line will result in inequity if given full effect. The solution is to give a limited effect by using the technique of semienclave and partial enclave. Thus a 13-mile radius with the island as the centre will produce a bulge line joining on two points with the median line between B, C, and D. These are Point L (107°53'50" E, 20°8'7" N) and Point M (107°41'16" E, 19°55'14" N). This semienclave and partial enclave will give Dao Bach Long Vi a 12-mile territorial seas and 1-mile continental shelf and EEZ.

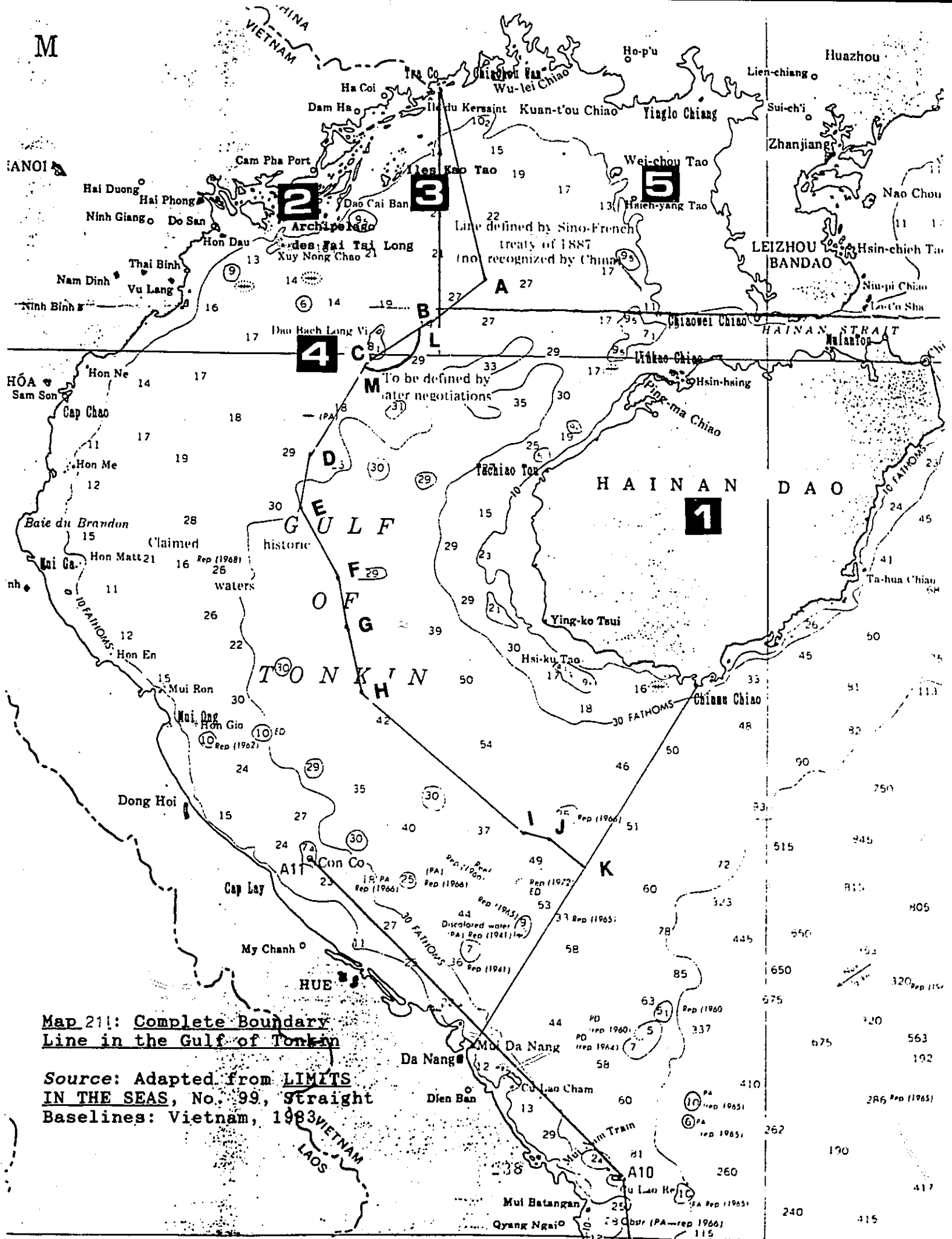
4 - Complete Boundary Line

The final line will consist of the straight lines (between Points L and M is an arc line) linking the following points (see Map 21):⁷⁵

1. Tra Co (108°3'13" E, 21°30'2" N);
2. Point A (108°16'32" E, 20°24'1" N);
3. Point B (108°1'31" E, 20°11'48" N);
4. Point L (107°53'50" E, 20°8'7" N);
5. Point M (107°41'16" E, 19°55'14" N);

⁷⁴These points are determined by the author on the basis of the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.

⁷⁵These points are determined by the author on the basis of the map entitled Asia, South China Sea, MUI DA NANG TO SHENQUAN GANG: Including Hainan Dao (Hai-Nan Tao) and Paracel Islands, published and prepared by the United States Defense Mapping Agency Hydrographic/Topographic Center, Washington, D.C., 8th Edition, Sept. 7, 1985, scale 1:1,035,000.



6. Point D (107°16'18" E, 19°25'45" N);
7. Point E (107°14'40" E, 19°14'29" N);
8. Point F (107°26'13" E, 18°55'58" N);
9. Point G (107°29'40" E, 18°36'35" N);
10. Point H (107°38'5" E, 18°4'19" N);
11. Point I (108°19'58" E, 17°19'42" N);
12. Point J (108°42'12" E, 17°16'1" N);
13. Point K (108°55'02" E, 17°9'22" N).

5 - Summary

International law has not obliged coastal States to use any single method as *a priori*. A circumstance-oriented approach is adopted instead. Different methods can be employed to meet the requirements of equity. A method for the provisional line may very well be different from the method for the final line. So may a method for one sector be different from the method for another sector. Practical methods play the role of serving the requirements of equitable criteria and relevant circumstances. Increasingly, geometrical methods become the preferred group to non-geometric ones due to their precision, simplicity, and convenience.

Frequently used methods in State practice and judicial decisions include the equidistance method, the perpendicularity method, the bisector method, and the latitude, longitude and azimuth method. In adjacent situation, an initial line can be drawn with the bisector method (perpendicular line is a special case of the bisector line). In opposite situation, a median line can be properly effected by the equidistance method.

In the Gulf of Tonkin, the first segment of the delimitation line from Tra Co to the midpoint where the coasts of Vietnam and China become completely opposite, will be delimited by a bisector line. By taking into consideration of the Iles Kao Tao and Weizhou Dao and Xieyang Dao, the bisector line is adjusted accordingly.

Once the coastal relationship becomes complete opposite, the appropriate method to effect an equal division of the overlap of coastal projections of Vietnam and China is a simplified equidistance method to draw a median line. This median line will go as far as the closing line of the Gulf between Mui Da Nang and Chinmu Chiao.

CHAPTER XIII

TEST OF PROPORTIONALITY

The exercise of delimiting maritime boundaries cannot be complete without conducting the proportionality test. The idea of dividing sea areas proportionate to the respective coastlines of the States in question was developed quite early. But the modern conception of the proportionality test in maritime boundary delimitation is of recent origin from the evolution of customary international law especially through the judicial or arbitral decisions of international tribunals.

1 - Basic Rules

1(a) - Early ideas

Samuel Pufendorf was the first jurist to expound on proportionality in sea boundary division. He suggested that for the division of a strait or bay, "the sovereignty of each shall extend into the middle in proportion to the breadth of its land".¹ This conception of proportionality served as a basic principle governing the delimitation. The modern conception of proportionality was pursued in the context of two complementary processes: the delimitation and the post-delimitation check.

1(b) - Proportionality as a relevant factor

The North Sea cases articulated the element of proportionality for the first time. Essentially, the Court proposed that proportionality functioned as a relevant factor in drawing the line. Proportionality was perceived between the extent of continental shelf and the length of the coasts measured by their general directions in order to eliminate or minimize the distorting effect produced by concave or convex coasts or by irregular coastal formations.²

¹Rhee, Sang-Myon, "Sea Boundary Delimitation Between States Before World War II", 76 American Journal of International Law 555-588(1982), at 556-557.

²ICJ Rep. 1969, para 98.

The Anglo-French case provided detailed exposition on the use of proportionality as a criterion to evaluate a particular geographical feature in the context of the specific method utilized. The Court stated:

The factor of proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the North Sea Continental Shelf cases. But it may also appear, and more usually does as a factor for determining the reasonable or unreasonable -- the equitable or inequitable effects of particular geographical features or configurations upon the course of an equidistance-line boundary.³

The Court concluded that proportionality was to be used as "a criterion or factor relevant in evaluating the equities of certain geographical situations, not as general principle providing an independent rights to areas of continental shelf".⁴ In other words, proportionality was not comparable with other relevant circumstances in entitling the coastal States to continental shelf. Rather, it was a corrective device in evaluating any inequitable result created by the unusual geographical feature. Therefore, the Channel Islands were considered to cause inequity if the median line had been permitted to run between the archipelago and the French coast due to their proximity to the French coast.⁵ Similarly, the British Scilly Isles were given half-effect because of their distorting effect on the course of boundary in the Atlantic region.⁶

In the Tunisia-Libya Case, the Tunisian Kerkennah Islands were attributed half-effect, but insufficient reason was given.⁷ Half-effect was also accorded to Seal Island of Canada in the Gulf of Maine Case.⁸ In the Libya-Malta Case, the significant disparity between the lengths of the respective coasts was taken into account under the criterion of proportionality as a relevant circumstance.⁹

Proportionality, as a relevant circumstance, functions as an aspect of equity against disproportionately distorting effect created by particular geographical features, whether it is island

³Arbitral Award, 1977, para. 100, at 67.

⁴Arbitral Award, 1977, para. 101, at 68.

⁵Arbitral Award, 1977, para. 196, at 101.

⁶Arbitral Award, 1977, paras. 248-250, at 123-124.

⁷ICJ Rep., 1982, paras. 128-129, at 88-89.

⁸ICJ Rep., 1984, para. 222, at 336-337.

⁹ICJ Rep., 1985, paras. 66-68, at 48-50.

or lengths of coasts. Proportionality as a relevant circumstance should, therefore, be distinguished from proportionality as a post-line-drawing test to determine the equitableness of the lines thus drawn.

1(c) - Proportionality test

Based on the proposition of the North Sea cases, the Court put the proportionality test into operation in the Tunisia-Libya Case. The only absolute requirement of the test was that comparison must be made between likes.¹⁰ The test proceeded through the following steps. First, the Court was not deterred from taking into consideration the internal waters within the baselines for the purpose of calculation.¹¹ Next, an appropriate area was enclosed with lines for comparison and calculation. Lastly, three aspects were selected for comparison and calculation: the lengths of coasts measured from the low-water mark by discounting small inlets, creeks and lagoons; the coastal front represented by straight lines indicative of the general directions of the coasts; and the seabed areas below low-water mark. The ratios in the Tunisia/Libya Case stood respectively as 31:69, 34:66, and 40:60.¹²

In the Gulf of Maine Case, the test was deemed unnecessary within the closing line of the Gulf because "it is precisely those parameters which served the Chamber as a guide in determining the parts of the line which are to take effect in this portion of the delimitation area".¹³ It was obvious that the primary interest of the parties was focused on the Georges Bank. When assessing the equitable character of the lines drawn, human and economic geography may be a factor.¹⁴ However, only "catastrophic repercussions" caused to the "livelihood and economic well-being of the population of the countries concerned" can bring this factor into operation.¹⁵

The Arbitral Tribunal in Guinea/Guinea-Bissau Case rejected the argument of proportionality with respect to landmass, and concluded that by taking into account the Bijago Islands, the two States were deemed to have the same length of coasts and hence

¹⁰ICJ Rep. 1982, paras. 103-104, 130, at 76, 91.

¹¹ICJ Rep. 1982, para. 103-104, at 76.

¹²ICJ Rep. 1982, paras. 103-104, at 91.

¹³ICJ Rep. 1984, para. 231, at 340.

¹⁴ICJ Rep. 1984, para. 232, at 340.

¹⁵ICJ Rep. 1984, para. 237, at 342.

"neither of the two parties can claim any additional advantage".¹⁶ When Libya advocated the significant disproportionate lengths of the coasts between herself and Malta in the Libya/Malta Case, the Court did not endorse it as a proportionality question and offered the following warning:

to use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each party, is to go far beyond the use of proportionality as a test of equity, and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration: for it would be at once the principle of entitlement to continental shelf rights and also the method of putting that principle into operation.¹⁷

The difficulty of undertaking the proportionality test in that case lay in the fact that the claims of Italy, the prospective delimitations, and the problem in identifying precisely the relevant coasts or areas made inappropriate and impractical the form of proportionality test used in the Tunisia/Libya Case.¹⁸ The calculation of the ratio of coastal lengths became redundant because the ratio had already been used in determining the lines. According to the Court, the areas appertaining to each party after the delimitation satisfied the requirement of proportionality test.¹⁹

The proportionality test can be best used in a clearly definable delimitation area, such as in the Gulf of Maine or Gulf of Tonkin.²⁰ Professor Jaenicke considered that the test can be applied with respect to the proportionality calculation between the lengths of the coasts and the maritime area to be attributed to these coasts as both a confirmation of the equitableness of the

¹⁶Arbitral Award, 1985, para. 118-120, at 300-301.

¹⁷ICJ Rep. 1985, para. 58, at 45.

¹⁸ICJ Rep. 1985, para. 74, at 53.

¹⁹ICJ Rep. 1985, para. 75, at 55.

²⁰Charney, Johnathan I., "The Delimitation of Ocean Boundaries", in Dallmeyer, D.G. and DeVorse, L. Jr., eds., RIGHTS TO OCEANIC RESOURCES -- Deciding and Drawing Maritime Boundaries, Dordrecht, Martinus Nijhoff Publishers, 1989, 25-49, at 38.

delimitation and a correction if the test is not satisfied.²¹

2 - Application of Proportionality Test in the Gulf of Tonkin

The delimitation area in the Gulf of Tonkin will be enclosed by the two closing lines on the east end of the Qongzhou Strait and the Grand Entrance. Proportionality, as a factor, has been taken into account in drawing the median line in the form of comparison of coastal lengths. The coastal length represented by the general directions of the coasts of the two countries have achieved an approximate equality (Vietnam: 461.6 miles, China: 464.5 miles). The ratio is 1:1.006.

The two States have a broad equality of coasts and coastal frontage (measured by general direction). It becomes superficial to proceed to examine the areas appertaining to each State as an element of the proportionality test. There is no reason to suggest that this is imperative. The boundary line will be most unlikely to have a "catastrophic" consequences on the local communities. So the test of proportionality is satisfied.

3 - Summary

To summarize, several points need stressing. First, the proportionality test does not require a uniformity of ways to carry it out. Proportionality test can take a form most appropriate in a particular circumstance. There are a few forms of the test known through judicial decisions, such as the ratio of coastal lengths, the ratio of coastal frontages, the ratio of areas appertaining to each other party after delimitation lines have been drawn, and the consequence of delimitation lines on the livelihood and economic well-being of the community. Secondly, the test does not abide by an arithmetic calculation and an approximate legal equality is sufficient for the purpose of fulfilling the requirements of equity. Thirdly, a distinction must be made between proportionality as a relevant factor in performing the function of equity in laying down the lines on the one hand, and proportionality as a test in evaluating the equitableness of the lines thus drawn. Therefore, if the comparison of coastal lengths has been taken into consideration in the process of determining the delimitation lines, it may be omitted at the stage of the proportionality test.

Because there is an approximate equality between the respective coasts of Vietnam and China, which factor has already

²¹Jaenicke, G. "The Role of Proportionality in the Delimitation of Maritime Zones", in Bos, Adriaan and Sibblesz, Hugo, eds., REALISM IN LAW-MAKING -- Essays on International Law in Honour of Willem Riphagen, Dordrecht, Martinus Nijhoff Publishers, 1986, 51-69, at 69.

been reflected in the drawing of a bisector line for the first segment and a median line for the second segment, the test of proportionality has been satisfied.

CONCLUSION

The task of drawing a delimitation line has been fulfilled. The following will serve as a concise statement of the principal conclusions reached in the thesis.

- The questions that the dissertation has tried to answer are:
- (1) Did the 1887 Sino-French Convention establish the maritime boundary between Vietnam and China in the Gulf of Tonkin?
 - (2) What rules and principles of international law are applicable to the delimitation of the territorial seas, exclusive economic zone and continental shelf in the Gulf of Tonkin between Vietnam and China?
 - (3) What is the single maritime boundary appertaining respectively to Vietnam and China in the Gulf of Tonkin between the eastern point of Tra Co and the closing line of the Gulf?

Question 1

The 1887 Sino-French Convention did not establish a maritime boundary as such between Vietnam and China in the Gulf of Tonkin. A pre-existing treaty can establish maritime boundary by either express acceptance by the State parties or recognition by the State parties as satisfying equitable requirements. Vietnam has failed to show either of these necessary conditions.

In accordance with the rules on treaty interpretation, it has been found that the 1887 Sino-French Convention was not intended to establish a maritime boundary in the Gulf of Tonkin. The Parties to the Convention has not accepted expressly it as having the effect of dividing the marine areas in the Gulf. The Convention line fails to reflect equity as understood in maritime delimitation. The examination of four key terms used in the 1887 Convention has revealed the object and purpose of the Convention as well as the intention of the Parties to the Convention. *Iles* was not assigned a special meaning so as to include the surrounding waters. Even if it was given a special meaning, the only possible maritime zone was a three-mile territorial sea. *Paris meridian 105°43'E* has neither a starting nor terminating point. Furthermore, ambiguity arises from three different versions of translation of its seconds. The *line passing through the eastern point of Tra-co* was not intended as establishing a maritime boundary in the Gulf of Tonkin. Nor has it been accepted as such by the Parties. *Frontière* was not used to mean maritime boundary in the Convention. The complete absence of terms such as, "sea", "territorial sea", "waters", and "maritime", indicates that the object and purpose of the Convention is the delimitation and demarcation of land

boundary, not sea boundary.

In support of its argument on 1887 Convention, Vietnam invoked the concept of historic waters. Vietnam's claim, however, has failed on the following grounds: too brief period; no effective exercise of authority; China's objection; other countries' protests; and the practical problem of dividing the historic waters in the Gulf.

Vietnam has also relied on the doctrine of State conduct to bolster its case. If State conduct has shown a consistent respect for a *de facto* or *modus vivendi* line for a reasonable period of time, State conduct can be taken into account in the delimitation. If any detrimental effect happens to the other Party as a result of reliance on the said conduct, a claim of estoppel can arise. State conduct can also evince acceptance of a particular set of equitable criteria, relevant circumstances, and practical methods. Fishing activities and offshore oil concessions can hardly have any material influence on the delimitation line. The conduct of China and Vietnam has not shown any respect for the Paris meridian of 105°43'E in their practice relating to the territorial seas, marine fisheries, and offshore petroleum development. Nor have China and Vietnam accepted any set of equitable criteria, relevant circumstances, and practical methods for the division of ocean space in the Gulf of Tonkin.

Question 2

Overview

There are two types of maritime boundary: single line or separate line. A growing trend is to use a single line to separate both EEZ and continental shelf. This is partly because of the identical rules on entitlement for both EEZ and continental shelf within 200 miles as embodied in the 1982 Law of the Sea Convention. A single line will divide both continental shelf and EEZ, as well as territorial sea in the Gulf of Tonkin.

The multiplicity of the sources of applicable law (conventions, treaties, judicial decisions, and legal writing) has caused confusion. The mainstream is the six major cases which entail most of the rules on delimitation. Scholarly writings plays an important role in the law-making process. More than 100 maritime boundaries have been settled through bilateral agreements. There are still over 400 potential maritime boundaries to be drawn.

The rules on delimitation include: legal principles, equitable criteria, relevant circumstances, and practical methods. Each plays its respective role in the hierarchical framework of rules.

Drawing of a provisional line based on equal division of

coastal projection constitutes the first step in the delimitation process. A subsequent correction can be carried out to take into account the relevant circumstances. An equidistance line can be used to effect the provisional line in opposite situation. A perpendicular or bisector line will be more appropriate in adjacent situation.

The principle of delimitation by agreement contains three elements: invalidity of unilateral delimitation, genuine effort to arrive at agreement, and third-party dispute settlement procedure.

Relevant Circumstances

Any generalization of the relevant circumstances is risky because there are many gaps and ambiguities in the law. Some circumstances will be always relevant, such as the factors derived from coastal geography. Others may play a subordinate role, for instance, security, historic title, and navigation. Still others, e.g. landmass or sovereign equality, have been thrown out completely. Geographical circumstances relating to the coast have acquired a preeminent status vis-a-vis other non-geographical ones.

The distance criterion has been recognized as a relevant in opposite situation. But its relationship with adjacency is still obscure. The location of land boundary terminus and perpendicularity to coasts can be relevant in deciding the perpendicular line or bisector line in adjacent situation. General geographical context can play a supportive role. However, its exact application needs further clarification. Geomorphology and geology does not have any material relevance as far as delimitation within 200 miles is concerned. Ecology is rejected because of its exclusive association with the water column in a single line delimitation, and because of its dubious natural stability and identifiability. Natural resources can be taken into account if the Parties agree. Navigation has a better application in near-shore areas. The same is true with the circumstance of Security. The effect of a third State's claim or interest still causes controversy. Establishment and delimitation of any other maritime zone may arise fairly often due to the variety of marine zones to be delimited. Pure economic interests (e.g. developing nation status, economic dependency or poverty) are extrinsic to maritime delimitation. However, if the boundary line will likely have a catastrophic consequences on the economic well-being of the coastal community concerned, economic factors can be used to correct the inequity.

Equity and equitable criteria

All rules, criteria, circumstances and methods revolve around equity as the central controlling device. Though full of ambiguity, arrival at an equitable solution is the minimum requirement in any maritime delimitation. Negatively, equity is distinct from *ex aequo*

et bono, applying abstract justice, equality, distributive justice or refashioning nature. Positively, equity is expressed through the well-known equitable criteria: land dominates the sea, equal division of overlap, non-encroachment, cut-off effect, and respect for all relevant circumstances, etc. However, it is still uncertain whether there is any material difference between equitable criteria and relevant circumstances.

Question 3

Closing line

The questions of relevant coasts and the delimitation area become the question of determining the closing lines in the Gulf of Tonkin. The considerations to determine the closing lines for the purpose of delimitation include the location of the natural entrance points, the difference of choice of equitable criteria, relevant circumstances, and practical methods in delimiting the boundary between the inner zone and the outer zone, the coverage of all delimitation boundaries and relevant coasts, and the position of the Parties.

The line connecting Mui Da Nang and Chinmu Chiao satisfies better than any other closing line the requirements as a closing line in the Gulf of Tonkin. The closing line in the Qongzhou Strait's west end is decided as the line between Niupi Chiao and Mulan Tou for the purpose of calculation of the length of coasts. The closing in the Qongzhou Strait's east end is decided as the line between Chiaowei Chiao and Linkao Chiao for the purpose of determination of the geometric shape of the delimitation area.

Coastal relationship

The dominance by one situation over another is to be avoided to ensure the equitableness of the delimitation. There are four situations in the Gulf of Tonkin. The coasts from Tra Co to Kuantou Chiao has a complete adjacency with the Vietnamese coast from Tra Co to Hon Dau. This adjacent relationship gives way to partial adjacency from Kuantou Chiao to Yinglo Chiang. From Yinglo Chiang to Chiaowei Chiao, the coasts become partial opposite. Finally, from Linkao Chiao to the closing line of the Gulf, a complete oppositeness exists. One predominant feature is the parallel relationship between coasts of China and Vietnam with complete oppositeness for the greater part of the Gulf.

Coastal geographical features

The three principal elements of the coasts are concavity, convexity and irregularity; length of coasts; and general direction of coasts. Equidistance line will be more likely to produce an inequitable result in an adjacent situation. Chinchou Wan is

qualified as a relevant concavity to justify the drawing of a straight line across its mouth to measure the general direction of the coasts.

Because the coastal lengths of China and Vietnam in the Gulf of Tonkin achieve an approximate equality, bisector line is adopted from Tra Co to the middle point and then a median line from this point to the closing line of the Gulf. The concavity of Chinchou Wan is justified for drawing a straight baseline on the basis of State practice and Article 10 of the Law of the Sea Convention. The changes of general directions at Tra Co, Yinglo Chiang, Chiaowei Chiao and Linkao Chiao are relevant circumstances in the Gulf of Tonkin delimitation.

Effects of islands

Islands can be given full, limited or no effect in maritime delimitation. Islands close to the median line in an opposite situation, on the wrong side of the median line, and close to the bisector line in an adjacent situation, will be accorded limited effect. The techniques to carry out the limited effect are half-effect (angular displacement and transverse displacement), limited percentage of coastal length, and enclave (complete enclave, partial enclave and semi-enclave).

Six types of islands in the Gulf of Tonkin call for different treatment each. Because of its immense size, population, economic activities, and political considerations, Hainan Island is given full effect. Archipelago des Fai Tsi Long constitutes an integral part of the Vietnamese mainland and the territorial seas of each island are merged. A tangent line is drawn around the most outlying islands to calculate the length of the islands so as to give them a certain percentage in the entire length of the Vietnamese coast. The tangent line measures 24.6 miles which represents 5.6% of the entire length of Vietnamese coast. Iles Kao Tao is given 1/4 effect due to its location, size and relationship with the mainland. This is done by an angular displacement so as to avoid the cut-off effect on the Chinese coast. A partial and semi-enclave solution (13-mile radius of a bulge line) seems most suitable for Dao Bach Long Vi because of its closeness to the median line. Surrounded on three sides by Chinese coasts and with a distance to Vietnamese coast of 3 times that to Chinese coasts, Weizhou Dao and Xieyang Dao are accorded half effect (13%). The immense size of the Gulf of Tonkin and the complete parallel oppositeness between Chinese and Vietnamese coasts for the most part, the individual coastal islands on both sides are not given any weight.

Practical methods and their application in the Gulf of Tonkin

No single method is mandatory for coastal States to use. Different methods can be employed in different segment of the delimitation line and at different stage of the delimitation

process. Geometrical methods are increasingly adopted due to their precision, simplicity, convenience and neutrality. The principal methods used are equidistance method, perpendicularity method, bisector method and latitude, longitude and azimuth method. To effect an equal division of the coastal projection of each State, a bisector method is more appropriate in adjacent situation and a median line in opposite situation.

In the Gulf of Tonkin, a bisector line is drawn from Tra Co to the midpoint where the coasts of Vietnam and China become complete opposite. A median line is drawn by a simplified equidistance line to effect an equal division in the part with opposite situation until the line reaches the closing line of the Gulf between Mui Da Nang and Chinmu Chiao.

Proportionality test

Proportionality test can take several forms, such as the ratio of coastal lengths, the ratio of coastal frontages, the ratio of areas appertaining to each other party after delimitation lines have been drawn, and the consequence of delimitation lines on the livelihood and economic well-being of the community. An approximate legal equality will suffice to satisfy the requirements of equity. It is essential to distinguish between proportionality as a relevant factor in establishing the lines and proportionality in evaluating the equitableness of the lines thus drawn. Therefore, if the comparison of coastal lengths has been taken into consideration in determining the delimitation lines, it may not be necessary to use it again in the proportionality test.

The approximate equality between the respective coast of Vietnam and China make it unnecessary to undertake another proportionality test since the lengths of coasts have already been reflected in drawing the bisector line and the median line in the Gulf of Tonkin.

APPENDICES

It would not be necessary to produce this rather lengthy appendices if the Gulf of Tonkin dispute were well-documented and if there were any previous comprehensive legal study on the subject. These appendices are essential documents to understand the background and the main arguments presented in the thesis. Appendix I includes three documents on Chinese and Vietnamese national legislation on maritime zones and delimitation. Appendix II reproduces the 1887 Sino-French Boundary Convention which forms one of Vietnam's main claims. Appendix III lists the important documents about the positions of the Parties and the origin of the disputes. Appendix IV contains documents on the responses of some critical third States in the Gulf of Tonkin disputes.

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Appendix I

National Legislations and Straight Baselines of Vietnam and China

1. Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, and the Continental Shelf of Vietnam -- May 12, 1977. Source: Smith, Robert W. EXCLUSIVE ECONOMIC ZONE CLAIMS -- An Analysis and Primary Documents, Dordrecht, Martinus Nijhoff Publishers, 1986, at 481.
2. Declaration du Gouvernement de la Republique Socialiste du Viet Nam Concernant la Ligne de Base de la Mer Territoriale du Viet Nam -- 12 novembre 1982. Source: UN Doc. A/37/697.
3. Declaration on China's Territorial Sea -- September 4, 1958. Source: Peking Review, September 9, 1958.

STATEMENT ON THE TERRITORIAL SEA,
THE CONTIGUOUS ZONE, THE EXCLUSIVE ECONOMIC ZONE,
AND THE CONTINENTAL SHELF OF VIETNAM¹

The statement which is dated May 12, 1977, and has been approved by the Standing Committee of the SRV National Assembly, reads in full as follows:

The Government of the Socialist Republic of Vietnam,

After approval by the Standing Committee of the National Assembly of the Socialist Republic of Vietnam,

Declares that it has defined the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of the Socialist Republic of Vietnam as follows:

1. The territorial sea of the Socialist Republic of Vietnam has a breadth of 12 nautical miles measured from a baseline which links the furthest seaward points of the coast and the outermost points of Vietnamese offshore islands, and which is the low-water line along the coast.

The waters on the landward side of the baseline constitute internal waters of the Socialist Republic of Vietnam.

The Socialist Republic of Vietnam exercises full and complete sovereignty over its territorial sea as well as the superjacent air space and the bed and subsoil of the territorial sea.

2. The contiguous zone of the Socialist Republic of Vietnam is a 12-nautical-mile maritime zone adjacent to and beyond the Vietnamese territorial sea, with which it forms a zone of 24 nautical miles from the baseline used to measure the breadth of the territorial sea.

1. Foreign Broadcast Information Service (FBIS), Daily Report: Asia & Pacific, May 24, 1977.

The Government of the Socialist Republic of Vietnam exercises the necessary control in its contiguous zone in order to see to its security and custom and fiscal interests and to ensure respect for its sanitary, emigration and immigration regulations within the Vietnamese territory or territorial sea.

3. The exclusive economic zone of the Socialist Republic of Vietnam is adjacent to the Vietnamese territorial sea and forms with it a 200-nautical-mile zone from the baseline used to measure the breadth of Vietnam's territorial sea.

The Socialist Republic of Vietnam has sovereign rights for the purpose of exploring, exploiting, conserving and managing all natural resources, whether living or non-living, of the waters, the bed and subsoil of the exclusive economic zone of Vietnam; it has exclusive rights and jurisdiction with regard to the establishment and use of installations and structures, artificial islands; exclusive jurisdiction with regard to other activities for the economic exploration and exploitation of the exclusive economic zone; exclusive jurisdiction with regard to scientific research in the exclusive economic zone of Vietnam; the Socialist Republic of Vietnam has jurisdiction with regard to the preservation of the marine environment, and activities for pollution control and abatement in the exclusive economic zone of Vietnam.

4. The continental shelf of the Socialist Republic of Vietnam comprises the seabed and subsoil of the submarine areas that extend beyond the Vietnamese territorial sea throughout the natural prolongation of the Vietnamese land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline used to measure the breadth of the Vietnamese territorial sea where the outer edge of the continental margin does not extend up to that distance.

The Socialist Republic of Vietnam exercises sovereign rights over the Vietnamese continental shelf in the exploration, exploitation, preservation and management of all natural resources consisting of mineral and other non-living resources, together with living organisms belonging to sedentary species thereon.

5. The islands and archipelagos, forming an integral part of the Vietnamese territory and beyond the Vietnamese territorial sea mentioned in Paragraph 1, have their own territorial seas, contiguous zones, exclusive economic zones and continental shelves, determined in accordance with the provisions of Paragraphs 1, 2, 3 and 4 of this statement.

6. Proceeding from the principles of this statement, specific questions relating to the territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf of the Socialist Republic of Vietnam will be dealt with in detail in further regulations, in accordance with the principle of defending the sovereignty and interests of the Socialist Republic of Vietnam, and in keeping with international law and practices.

7. The Government of the Socialist Republic of Vietnam will settle with the countries concerned, through negotiations on the basis of mutual respect for independence and sovereignty, in accordance with international law and practices, the matters relating to the maritime zones and the continental shelf of each country.

DECLARATION DU GOUVERNEMENT DE LA REPUBLIQUE SOCIALISTE DU VIET NAM
CONCERNANT LA LIGNE DE BASE DE LA MER TERRITORIALE DU VIET NAM

En application des dispositions du paragraphe 1 de la Déclaration concernant la mer territoriale, la zone contiguë, la zone économique exclusive et le plateau continental publiée par le Gouvernement de la République socialiste du Viet Nam le 12 mai 1977, après avoir été approuvée par le Comité permanent de l'Assemblée nationale de la République socialiste du Viet Nam,

Le Gouvernement de la République socialiste du Viet Nam fait la déclaration suivante concernant la ligne de base à partir de laquelle la largeur de la mer territoriale du Viet Nam est mesurée :

1. La ligne de base à partir de laquelle la mer territoriale du territoire continental du Viet Nam est mesurée est constituée par une série de lignes droites reliant les points dont les coordonnées sont indiquées dans l'annexe ci-jointe.

2. La ligne de base de la mer territoriale du Viet Nam, qui commence au point 0 (le point de rencontre des deux lignes de base servant, respectivement, à mesurer la largeur de la mer territoriale de la République socialiste du Viet Nam et de la mer territoriale de la République populaire du Kampuchea, qui est situé en mer sur la ligne reliant l'archipel de Tho Chu et l'île de Poulo Wai) et qui se termine à l'île de Con Co, sera tracée d'après les coordonnées indiquées dans l'annexe ci-jointe sur les cartes à l'échelle de 1:100 000 publiées par la Marine populaire vietnamienne avant 1979.

3. Le golfe de Bac Bo (golfe du Tonkin) est le golfe situé entre la République socialiste du Viet Nam et la République populaire de Chine; la frontière maritime dans le golfe entre le Viet Nam et la Chine est tracée conformément à la convention de délimitation des frontières du 26 juin 1887 signée par la France et la dynastie Qing de l'Empire de Chine.

La partie du golfe qui appartient au Viet Nam constitue les eaux historiques et est soumise au régime juridique des eaux intérieures de la République socialiste du Viet Nam.

La ligne de base entre l'île de Con Co et l'entrée du golfe sera définie après le règlement du problème relatif à la ligne de fermeture du golfe.

4. La ligne de base servant à mesurer la largeur de la mer territoriale des archipels de Hoang Sa et de Truong Sa sera définie dans un prochain instrument conformément au paragraphe 5 de la Déclaration du Gouvernement de la République socialiste du Viet Nam en date du 12 mai 1977.

5. La partie de la mer qui se trouve entre la ligne de base et la côte ou les îles du Viet Nam constitue les eaux intérieures de la République socialiste du Viet Nam.

6. Le Gouvernement de la République socialiste du Viet Nam considère que tous les différends avec les autres pays intéressés concernant diverses zones marines et le plateau continental seront réglés au moyen de négociations fondées sur le respect mutuel de l'indépendance et de la souveraineté nationales de chaque pays, conformément au droit international et à la pratique internationale.

Hanoi, le 12 novembre 1982.

COORDONNEES DES POINTS SERVANT A ETABLIR LA LIGNE DE BASE DROITE A
PARTIR DE LAQUELLE LA LARGEUR DE LA MER TERRITORIALE DU VIET NAM
EST MESUREE

(Annexe jointe à la Déclaration du Gouvernement de la République
socialiste du Viet Nam en date du 12 novembre 1982)

POINTS	DESCRIPTION GEOGRAPHIQUE	LATITUDE (N)	LONGITUDE (E)
0	Sur la ligne de démarcation sud-ouest entre les eaux historiques de la République socialiste du Viet Nam et celles de la République populaire du Kampuchea		
A1	Sur l'île de Nhan, dans l'archipel de Tho Chu (province de Kien Giang)	09° 15'0	103° 27'0
A2	Sur l'île de Da Le, qui est située au sud-est de Hon Khoai (province de Minh Hai)	08° 22'8	104° 52'4
A3	Sur l'îlot de Tai Lon, dans les îles de Con Dao (secteur administratif de Con Dao-Vung Tau)	08° 37'8	106° 37'5
A4	Sur l'îlot de Bong Lang, dans les îles de Con Dao	08° 38'9	106° 40'3
A5	Sur l'îlot de Bay Canh, dans les îles de Con Dao	08° 39'7	106° 42'1
A6	Sur l'îlot de Hon Hai (groupe de Phu Qui) (province de Thuan Hai)	09° 58'0	109° 05'0
A7	Sur l'îlot de Hon Doi (province de Thuan Hai)	12° 39'0	109° 28'0
A8	Au cap Dai Lanh (province de Phu Khanh)	12° 53'8	109° 27'2
A9	Sur l'îlot de Ong Can (province de Phu Khanh)	13° 54'0	109° 21'0
A10	Sur l'île de Ly Son (province de Nghia Binh)	15° 23'1	109° 09'0
A11	Sur l'île de Con Co (province de Binh Tri Thien)	17° 10'0	107° 20'6

The Government of the People's Republic of China (PRC) on September 4, 1958, publicly claimed a 12-nautical-mile territorial sea to be measured from straight baselines. The Peking Review text of September 9, 1958, states:

Declaration on China's Territorial Sea

The Government of the People's Republic of China on September 4 issued the following declaration on China's territorial sea:

The Government of the People's Republic of China declares:

1) The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.

2) China's territorial sea along the mainland and its coastal islands takes as its baseline the line composed of the straight lines connecting base-points on the mainland coast and on the outermost of the coastal islands; the water area extending twelve nautical miles outward from this baseline is China's territorial sea. The water areas inside the baseline, including Pohai Bay and the Chiungchow Straits, are Chinese inland waters. The islands inside the baseline, including Tungyin Island, Kaoteng Island, the Matsu Islands, the Paichuan Islands, Wuchiu Island, the Greater and Lesser Quemoy Islands, Tatan Island, Erhtan Island and Tungting Island, are islands of the Chinese inland waters.

3) No foreign vessels for military use and no foreign aircraft may enter China's territorial sea and the air space above it without the permission of the Government of the People's Republic of China.

While navigating Chinese territorial sea, every foreign vessel must observe the relevant laws and regulations laid down by the Government of the People's Republic of China.

4) The principles provided in paragraphs 2) and 3) likewise apply to Taiwan and its surrounding islands, the Penghu Islands, the Tungsha Islands, the Hsisha Islands, the Chungsha Islands, the Nansha Islands, and all other islands belonging to China.

The Taiwan and Penghu areas are still occupied by the United States by armed force. This is an unlawful encroachment on the territorial integrity and sovereignty of the People's Republic of China. Taiwan, Penghu and such other areas are yet to be recovered, and the Government of the People's Republic of China has the right to recover these areas by all suitable means at a suitable time. This is China's internal affair, in which no foreign interference is tolerated.

Appendix II

Convention Relative a la Delimitation de la
Frontiere Entre la Chine et le Tonkin
Signee a Pekin le 26 juin 1887

Convention Relative a la Delimitation de la Frontiere entre la Chine et le Tonkin, signee a Pekin le 26 juin 1887. Source: China Maritime Customs, TREATIES, CONVENTIONS, ETC., BETWEEN CHINA AND FOREIGN STATES, Vol. 1, 2nd Edition, Shanghai, Inspectorate General of Customs, 1917, at 933-936.

CONVENTION RELATIVE À LA DÉLIMITATION DE LA FRONTIÈRE
ENTRE LA CHINE ET LE TONKIN, SIGNÉE À PÉKIN LE
26 JUIN 1887.

Les commissaires nommés par le Président de la République française et par S.M. l'Empereur de Chine, en exécution de l'article 3 du traité du 9 juin 1885, pour reconnaître la frontière entre la Chine et le Tonkin, ayant terminé leurs travaux :

M. ERNEST CONSTANS, député, ancien ministre de l'intérieur et des cultes, commissaire du gouvernement, envoyé extraordinaire de la République française, d'une part ;

Et S.A. le Prince K'ING, Prince du second rang, président du Tsong-li Yamen, assisté de

S. Exc. SOURN YU OUEH, membre du Tsong-li Yamen, premier vice-président du ministère des travaux publics, d'autre part :

Agissant au nom de leurs gouvernements respectifs :

Ont décidé de consigner dans le présent acte les dispositions suivantes destinées à régler définitivement la délimitation de ladite frontière : —

1. Les procès-verbaux et les cartes y annexées qui ont été dressés et signés par les commissaires français et chinois sont et demeurent approuvés.

續議界務專條

按照光緒十一年四月二十七日由

大清國

大皇帝及

大法民主國

大總理墾天德各派官員親赴中國與北圻交界處所會同勘定

界限業經兩國大臣親自履勘竣事現經

大清國

大皇帝特派總理各國事務衙門多羅慶郡王

大法民主國

大總理墾天德特派全權大臣下議院國會議員曾任吏部尚書恭

將該處界務會商定議永遠遵守所有商定辦法開列如左

一將兩國勘

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相校閱各

無異議

一其間有兩國勘界大臣意見不合之處及光緒十一年四月二十七日和約第三款末節所載改正之處照以下所開三條辦理

一廣東界務現經兩國勘界大臣勘定邊界之外芒街以東及東北一帶所有商論未定之處均歸中國特轄至於海中各島照兩國勘界大臣所畫紅線向南接畫此線正過茶古社東邊山頭即以該線為界

萬注在芒街以南竹山西南

該線以東海中各島歸中國該線以西海中九頭山

越名及各小島歸越南若有中國人民

犯法逃往九頭等山按照光緒十二年三月二十二日和約第十七款由法國地方官訪查嚴拿交出

一滇越邊界第二段從小賭咒河南岸狗頭寨照圖上甲字起由狗頭寨自西直抵東計五十餘里北邊聚義社即聚義社聚美社姜肥社即義肥社歸中國南邊有朋社歸越南至圖上乙字處從乙字至丙字亦由西抵東中越邊界路經二河其二河並歸一河人大賭咒河又名黑河從丙字往東南約十五里至丁字以北之南丹地方全歸中國從丁字往東北至猛峒下村即圖上戊字處按圖上所畫從丁字至戊字界線其南

2° Les points sur lesquels l'accord n'avait pu se faire entre les deux commissions, et les rectifications visées par le deuxième paragraphe de l'article 2 du traité du 9 juin 1885 sont réglés ainsi qu'il suit :

Au Kouang tong, il est entendu que les points contestés qui sont situés à l'est et au nord-est de Moukai, au delà de la frontière telle qu'elle a été fixée par la commission de délimitation, sont attribués à la Chine. Les îles qui sont à l'est du méridien de Paris 105° 13 de longitude est, c'est-à-dire de la ligne nord-sud passant par la pointe orientale de l'île de Tch'a Kou ou Quan chau (Tra co) et formant la frontière sont également attribuées à la Chine. Les îles Go-cho et les autres îles qui sont à l'ouest de ce méridien appartiennent à l'Annam.

Les Chinois coupables ou inculpés de crimes ou délits, qui chercheraient un refuge dans ces îles, seront, conformément aux stipulations de l'article 17 du traité du 25 avril 1886, recherchés, arrêtés et extradés par les autorités françaises.

Sur la frontière du Yun nan, il est entendu que la ligne de démarcation suivra le tracé suivant :

De Keou-tou tchai (Cao-dan trai) sur la rive gauche du Siao-tou tchou-ho (Tien-do chu-lu), point M de la carte de la 2^e section, elle se dirige pendant 50 li (20 kilomètres) directement de l'ouest vers l'est en laissant à la Chine les endroits de Tani kiang-cho ou Tani-y-cho (Tu-nghia-xa), Tani mei-cho (Tu-mi-xa), Kiang sei-cho ou Y-foi-cho (Nghia-fi-xa), qui sont au nord de cette ligne, et à l'Annam, celui de Yeou-p'ong-cho (Hu-bang xa) qui en est au sud, jusqu'aux points marqués P et Q sur la carte annexée où elle coupe les deux branches du second affluent de droite du Hei ho (Hac-ha) ou Tou-tchou ho (Do chu-hai). À partir du point Q, elle s'infléchit vers le sud-est d'environ 15 li (6 kilomètres) jusqu'au point R, laissant à la Chine le territoire de Nan-tan (Nan-don) au nord de ce point R; puis à partir de ce dit point, remonte vers le nord-est jusqu'au point S en suivant la direction tracée sur la carte par la ligne R-S, le cours du Nan-teng-ho (Nam-dang-ha) et les territoires de Man-mai (Man-mi), de Meng-tong chan-ta'oun (Muong-dong-truong thon), de Meng-tong chan (Muong-dong an), de Mang-toung tchoung-ta'oun (Muong-dong-truong thon), et de Mang-toung chia-ta'oun (Muong-dong ha thon) restant à l'Annam.

À partir du point S (Meng-toung-chia-t'oum ou Muong-dong-ha-thon), le milieu du Tsing-chouei-ho (Than-thuy ha) indique jusqu'à son confluent, en T, avec la rivière Claire, la frontière adoptée.

Du point T, son tracé est marqué par le milieu de la rivière Claire jusqu'au point X, à hauteur de Tchouan-teou (Thuyen-dan).

Du point X, elle remonte vers le nord jusqu'au point Y, en passant par Pai-che-yai (Bach thach gai) et Lao-ai-k'an (Lao-hai-kan), la moitié de chacun de ces deux endroits appartenant à la Chine et à l'Annam; ce qui est à l'est appartient à l'Annam, ce qui est à l'ouest à la Chine.

À partir du point Y, elle longe, dans la direction du nord, la rive droite du petit affluent de gauche de la rivière Claire qui le reçoit entre Pien-pao-kia (Bien-hao-kha) et Pei-pao (Bac-hao) et gagne ensuite Kao-ma-pai (Cao-ma-bach), point Z, où elle se raccorde avec le tracé de la troisième section.

À partir de Long-po-tchai (cinquième section), la frontière commune du Yun-nan et de l'Annam remonte le cours du Long-po-ho jusqu'à son confluent avec le Tsing-chouei-ho, marqué A sur la carte; du point A, elle suit la direction générale du nord-est au sud-ouest jusqu'au point indiqué B sur la carte, endroit où le Sai-kiang-ho reçoit le Mien-chouei-quan; dans ce parcours, la frontière laisse à la Chine le cours du Tsing-chouei-ho.

Du point B, la frontière a la direction est-ouest jusqu'au point C où elle rencontre le Teng-tiao-tchiang au-dessous de Ta-chou-tchiao. Ce qui est au sud de cette ligne appartient à l'Annam, ce qui est au nord à la Chine.

Du point C, elle redescend vers le sud en suivant le milieu de la rivière Teng-tiao-tchiang jusqu'à son confluent, au point D, avec le Tsin-tse-ho.

Elle suit ensuite le Tsin-tse-ho pendant environ 30 li et continue dans la direction est-ouest jusqu'au point E où elle rencontre le petit ruisseau qui se jette dans la rivière Noire (Hei-tsiang ou Hac-giang) à l'est du lao de Meng-pang. Le milieu de ce ruisseau sert de frontière du point E au point F.

À partir du point F, le milieu de la rivière Noire sert de frontière à l'ouest.

之南盤河漫美猛峒上村猛峒山猛峒中村猛峒下村全歸越南其北全歸中國從猛峒下村戊字起經清水河入大河之處即圖上己字以河中為界從己字至庚字以大河中為界河西之船頭歸中國河東之偏馬寨歸越南從庚字往北至辛字經老隘坎至白石崖
 以西歸中國由辛字往北順偏保卡北保中而入大河之小河東岸直往北至高馬白即圖上壬字即接第三段勘界大臣所審定之處
 一 越邊界第五段自龍膊寨雲南越南邊界經龍膊河到清水河入龍膊河之處為止此處圖上甲字由此界自東北往西南至綿水灣入寨江河之處為止即圖上乙字按現審界則清水河綿水灣河歸中國自乙字由東直抵西遇藤條江在大樹脚以南為止此段界線以南歸越南以北歸中國圖上丙字自丙字處起到金子河入藤條江之處為止以河中為界圖上丁字從丁字起經金子河計程三十餘里又由東至西抵圖上戊字處此界遇在猛蚌渡以東入黑江之小河圖上己字從戊字至己字以河中為界從己字往西以

黑江之河中爲界照兩國勘界大臣畫定界圖
並照以上所畫界線由

大清國地方官及

大法民主國欽派駐越大臣邊派官員前往會同

辦理安設界牌事宜

現畫定界圖二分每分三張乃兩國

欽差大臣帶押用印者圖上新界以紅線爲界雲南
界圖並註有法國阿等字中國甲等字以便易
於識認

光緒十三年五月初六日
西曆一千八百八十七年六月二十六日

Les autorités locales chinoises et les agents désignés par le résident général de la République française en Annam et au Tonkin seront chargés de procéder à l'albornement, conformément aux cartes dressées et signées par la commission de délimitation et au tracé ci-dessus.

Au présent acte sont annexes trois cartes en deux exemplaires, signées et scellées par les deux parties. Sur ces cartes, la nouvelle frontière est tracée par un trait rouge et indiquée sur les cartes du Yun-nan par les lettres de l'alphabet français et les caractères cycliques chinois.

Fait à Pékin, en double expédition, le 26 juin 1887.

(Signature et cachet du plénipotentiaire chinois.)

Signé: CONSTANS

(Cachet de la légation de France à Pékin.)

ART. 2.—Le ministre des affaires étrangères est chargé de l'exécution du présent décret.

Fait à Rambouillet, le 19 octobre 1886.

FÉLIX FAURE.

Par le Président de la République :

Le ministre des affaires étrangères.

G. HANOATAUX.

Appendix III

Positions of Vietnam and China

1. Memorandum dated 15 March 1979 of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam concerning the Chinese authorities' provocations and territorial encroachments in the border regions of Viet Nam. Source: "Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General", UN Doc. S/13234, 12 April 1979.
2. Proposal put forward by the delegation of the Government of the Socialist Republic of Viet Nam in the first session of the negotiations between the Vietnamese delegation and the Chinese delegation on 18 April 1979 at Hanoi. Source: "Letter dated 18 April 1979 from the representative of Viet Nam to the Secretary-General", UN Doc. S/13257, 18 April 1979.
3. Statement by the Viet Nam News Agency protesting against the signing of contracts between the Chinese authorities and foreign oil companies. Source: "Letter dated 29 September 1982 from the representative of Viet Nam to the Secretary-General", UN Doc. S/15441, 1 October 1982.
4. Statement by the Viet Nam News Agency. Source: "Letter dated 16 February 1983 from the representative of Viet Nam to the Secretary-General", UN Doc. S/15612, 18 February 1983.
5. Statement dated 21 January 1986 issued by the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam regarding the 22 November 1985 statement of Thailand concerning the historic waters and the baselines of Viet Nam. Source: UN Doc. A/41/99.
6. Proposal of principles for handling Sino-Vietnamese relations put forward by the delegation of the Chinese Government at the second session of the Sino-Vietnamese negotiations on 26 April 1979. Source: "Letter dated 26 April 1979 from the representative of China to the Secretary-General", UN Doc. S/13278, 27 April 1979.

7. Speech made by Han Nianlong, head of the Chinese Government delegation and Vice-Minister for Foreign Affairs, at the fourth plenary meeting of the Sino-Vietnamese negotiations on 12 May 1979. Source: "Letter dated 14 May 1979 from the representative of China to the Secretary-General", UN Doc. S/13318, 14 May 1979.
8. Statement dated 28 November 1982 by the spokesman of the Ministry of Foreign Affairs of the People's Republic of China. Source: UN Doc. A/37/682.
9. Statement by New China News Agency (Xinhua). Source: UN Doc. A/38/97, 18 February 1983.

DOCUMENT S/13234*

Letter dated 9 April 1979 from the representative of Viet Nam to the Secretary-General

[Original: English]
[12 April 1979]

I have the honour to transmit herewith the text of the memorandum of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam dated 15 March 1979 concerning the Chinese authorities' provocations and territorial encroachments in the border region of

Viet Nam and request that this letter and its enclosure be circulated as an official document of the General Assembly and of the Security Council.

(Signed) HA VAN LAU
Permanent Representative of Viet Nam
to the United Nations

* Circulated under the double symbol A/34/170-S/13234.

ANNEX

Memorandum dated 15 March 1979 of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam concerning the Chinese authorities' provocations and territorial encroachments in the border region of Viet Nam

I. ESTABLISHMENT OF THE HISTORICAL BORDER BETWEEN VIET NAM AND CHINA AND THE 1957-1958 BORDER AGREEMENT BETWEEN THE TWO COUNTRIES

1. Viet Nam and China are two neighbouring countries having common borders both on land and sea (Bac Bo Gulf). These borders have been established through a long historical process. Before it was placed under French colonial rule, Viet Nam had been an independent and sovereign country having clearly drawn and stable borders with China.

Nearly 100 years ago, the French Government and the Chinese Ch'ing dynasty signed the 1887^a and 1895^b Conventions to solve the frontier question between Viet Nam and China, officially recognizing, in the main, the existing border.

The delimitation of the borderline was carried out jointly by the two parties, section by section, from January 1886 to March 1887; on 26 June 1887, the two aforesaid Governments signed a border-delineating convention at Peking.^a Article 1 of that convention delimited the portion of border between Viet Nam and the Chinese provinces of Kwang Tung, Kwang Si and part of Yunnan. Article 2 of the convention delimited the borderline in the Bac Bo Gulf and the portion of border between Viet Nam and the remaining part of Yunnan up to the Da river. Then, the French Government and the Ch'ing dynasty signed at Peking the 20 June 1895 convention^b to complement the 1887 convention, and to give further clarifications on the portion of border between Viet Nam and the Chinese province of Yunnan.

The planting of border-stones was carried out from early 1890 to June 1897. A system of over 310 border-stones concretized the borderline on the terrain. Generally speaking, these border-stones still exist now.

As a matter of fact, since the signing of the conventions, successive administrations on both sides have been exercising their sovereignty on the land and in the Bac Bo Gulf areas delimited by this border. But reactionary régimes in China prior to 1949 had seized more than 60 places in Vietnamese territory.

Thus, the whole borderline between Viet Nam and China on land and in the Bac Bo Gulf has been clearly delineated by the conventions signed in 1887 and 1895 between the French Government and the Ch'ing dynasty, and officially marked out (on land). This is a complete borderline both on land and in the Bac Bo Gulf, having a historical basis in the age-old political life of the two nations, a solid international legal value, and all practical elements for recognition on the terrain.

Through their exchanges of documents, the Vietnamese and the Chinese Governments have on many occasions confirmed this historical borderline.

However, it is noteworthy that the negotiation and signing of the border-delineating Convention was carried out concurrently with the negotiation and signing of the trade Convention between France and the Ch'ing dynasty. The latter strove to link the two questions to bring pressure to bear on France. In the course of the negotiations, in order to achieve an early expansion of trade with China, the establishment of French consulates on Chinese territory, and a prompt fulfilment of pacification programmes in Viet Nam, France cut off and gave to the Ch'ing dynasty Bac Luan Cape, the Giang Binh area, Bat Trang-Kien Duyen Canton, Deo Luong Canton, Tu Long Canton and a number of other places, to the detriment of the Vietnamese people.

2. Nevertheless, in November 1957, the Central Committee of the Viet Nam Workers' Party (the Communist Party of Viet Nam today) proposed to the Chinese side that the two sides

^a Convention entre la France et la Chine relative à la délimitation de la frontière entre la Chine et le Tonkin [*British and Foreign State Papers*, 1892-1893, vol. LXXXV (London, Her Majesty's Stationery Office, 1899), p. 748].

^b Convention entre la France et la Chine, complémentaire de la Convention de délimitation de la frontière entre le Tonkin et la Chine du 26 juin 1887 [*ibid.*, 1894-1895, vol. LXXXVII (London, Her Majesty's Stationery Office, 1900), p. 523].

maintain the *status quo* on the borderline left by history; the national border question, in view of its importance, should be settled in accordance with the existing or reaffirmed legal principles, and decisions should be made by the two Governments; all eventual border or territorial disputes should be settled through negotiations. That is a correct, reasonable and sensible policy, in keeping with historical reality and international law. In April 1958, the Central Committee of the Communist Party of China answered that it agreed to the Vietnamese proposal.

The aforesaid agreement between the two parties has a great significance in principle and in practice not only for the settlement of border and territorial differences but also for the building of a borderline of lasting friendship between the two countries. This is the sincere thinking and real desire of the party, Government and people of Viet Nam. That is why the Vietnamese side has always strictly honoured the agreement between the Central Committees of the two parties.

The Chinese attitude is, however, just the reverse. The Chinese side has violated this agreement more and more seriously and failed to respect the principle of maintaining the *status quo* on the borderline left by history. It has encroached since 1949 on Vietnamese territory in 90 other places along the whole borderline between Viet Nam and China.

II. CHINESE ENCROACHMENTS ON VIETNAMESE TERRITORY SINCE 1954

In the past quarter of a century, the Chinese authorities have carried out encroachments on one area after another of Vietnamese territory, from smaller to larger ones, from militarily important to economically important ones. They have resorted to every trick, including odious ones that had not been used even by China's previous reactionary régimes. Hereunder are a number of main tricks:

From encroachment for cultivation and settlement purposes to land-grabbing

Turning to account the special feature that in many places the two countries have contiguous mountains and are watered by the same rivers, and that the inhabitants on the two sides of the borderline are linked by bonds of parenthood and nationality, the Chinese side sent Chinese to cultivate lands in Vietnamese territory and settled them on the spot and, finally, the Chinese authorities arrogantly considered those areas as belonging to Chinese territory.

The Trinh Tuong area in Quang Ninh Province constitutes a typical example of this type of encroachment. That area has been clearly determined by documents, maps and border-stones to belong to Vietnamese territory: the historical borderline which passes here through a range of high mountains clearly indicates that Trinh Tuong village and the surrounding area belong to Vietnamese territory. In practice, for generation after generation, the Trinh Tuong inhabitants and the Chinese who came and practised cultivation in Trinh Tuong paid taxes to the Vietnamese authorities. But since 1956, the Chinese side has tried to extend control over the Chinese who had been earning their living in Trinh Tuong by supplying them with ration cards to purchase sugar, cloth and other commodities, and enlisting them into Tung San Commune, Tung Hsing District, Chwang Autonomous Zone, Kwangsi Province. Thus the Chinese authorities overtly shifted a Vietnamese territory 6 kilometres in length and 1.3 kilometres in width into the collective ownership of a Chinese commune and turned it into a Chinese territory. Then they drove away the Vietnamese inhabitants who for many generations had been earning their living in Trinh Tuong, set up telephone lines, arrogated to themselves the right to patrol the area, and unilaterally shifted the borderline to Vietnamese Khau Thuc Hill. Subsequently, they indulged in beating and kidnapping members of Viet Nam's armed security forces patrolling the historical borderline and destroyed crops of the local population. Trinh Tuong is not an isolated case. Over 40 other places have been encroached upon by the Chinese side with similar tricks, for instance, Thanh Loa village in the Cao Loc District (border-stones Nos. 25, 26 and 27) in Lang Son Province; Kham Khau (border-stones Nos. 17 and 19) in Cao Bang Province; Ta Lung, Lan Phu Phin, Minh Tan (border-stone No. 14) in Ha Tuyen Province; Nam Chay village (border-stones Nos. 2 and 3) in Hoang Lien Son

Province; and an area of over 300 hectares, over 4 kilometres in length and over 1 kilometre in width.

It can be said that this is a silent type of land-grabbing.

Turning to account the construction of friendship projects to move the borderline deep into Vietnamese territory

In 1955, in the Friendship Gate area, when helping Viet Nam restore the railroad from the Viet Nam-China border to Yen Vien near Hanoi, the Chinese side, abusing Viet Nam's trust, laid the junction of the Viet Nam-China railway over 300 metres deep inside Vietnamese territory as compared with the historical borderline, and it came to consider this railway junction to be a point on the borderline between the two countries. On 31 December 1974, the Government of the Democratic Republic of Viet Nam proposed that the two Governments instruct the two railway services to readjust the railway junction in conformity with the historical borderline, but the Chinese side flatly refused by promising examination of this question when the whole border problem was discussed by the two sides. Up to now, it has still contended brazenly that this area with the 300 metres of railroad was Chinese territory, claiming that "there cannot be a railroad of one country on the territory of another".

Also in this area, the Chinese side wrecked border-stone No. 18 on the national highway, 100 metres away from the Nam Quan Gate in order to remove all traces of the historical borderline, and planted the zero-kilometre milestone over 100 metres inside Vietnamese territory, considering this a point on the national borderline between the two countries.

Thus the Chinese side has encroached on a whole area stretching from the railway to the highway in Bao Lam village, Van Lang District, Lang Son Province; it is 3.1 kilometres long and situated half a kilometre deep inside Vietnamese territory. In 1975, in the area of border-stone No. 23 (Bao Lam village), a similar attempt was made in the course of the joint laying of a pipeline across the border: the Vietnamese side proposed that the junction of the pipeline be located right on the borderline, which was rejected by the Chinese side: the project was therefore left unfinished.

In the construction of bridges across border watercourses the Chinese side drew up engineering projects so as to shift the borderline to China's advantage.

The Hoanh Mo ford in Quang Ninh Province was built in 1968 with Chinese aid. Over a long period after its completion the borderline along the medial line of the river was honoured by both sides: spare building material for repair work was stored on both sides in equal quantities as calculated on the basis of the borderline running along the medial line of the river. But as China with ulterior motives had built only one water culvert close to the Vietnamese bank, the current shifted its course totally towards the Vietnamese side; then the Chinese side moved the borderline on the ford further towards Vietnamese territory. This trick was also used with regard to the Po Hen ford (Quang Ninh), the Ai Canh Dam (Cao Bang) and the Ba Nam Cum Bridge (Lai Chau).

Unilateral construction of works at the border encroaching on Vietnamese territory

Both at portions of the border on continuous ground and at those running along watercourses, the Chinese side has undertaken, on its own, construction works with a view to gradually encroaching on Vietnamese territory.

In the vicinity of border-stone No. 53 (Dam Thuy village, Trung Khanh District, Cao Bang Province), the Ban Gioc Falls on the Quy Thuan river have long been Vietnamese, and the Peking authorities have also recognized this fact. On 29 February 1976, the Chinese side mobilized over 2,000 people, including members of the armed forces, to establish a dense defence ring round the whole area of the Ban Gioc Falls on Vietnamese territory, and sent Chinese workers there to hastily build a solid concrete dam across the border river: with this feat accomplished, it encroached on Vietnamese territory on the river and at Con Po Thong and then cynically claimed that this islet belonged to China.

The township of Ai Diem (opposite Chi Ma, Lang Son) and Binh Minh (opposite Soc Giang, Cao Bang) situated close to border-stones Nos. 43 and 114, has been expanded by the

Chinese side, encroaching on Vietnamese territory from tens to hundreds of metres with houses, schools and streets.

By establishing forest exploitation sites, afforestation work, and setting fire-belts, high-voltage electric lines and telephone lines encroaching on Vietnamese territory, China has turned many other Vietnamese territories into Chinese ones.

Borrowing Vietnamese territory and then turning it into Chinese

In a number of areas, complex topographical features cause difficulties to the Chinese population: at the request of the Chinese side, Viet Nam has lent China highways, water points, pasture-lands, firewood sites, graveyards.

However, abusing the goodwill of Viet Nam, the Chinese side has gradually come to regard these borrowed lands as Chinese. The Phia Un area (border-stones Nos. 94-95) in Tra Linh District, Cao Bang Province, is a typical example of this type of encroachment. At first the Chinese side borrowed a trail which was later expanded into a motor road leading to Chinese mines, electric lines were installed, the population grew and new villages were established. Basing itself on this fact, the Chinese side has come since 1956 to deny that the historical borderline runs over the top of the Phia Un mountain but instead claims that the borderline runs quite a distance south of the above-mentioned trail, over 500 metres inside Vietnamese territory. It argues that were it not Chinese territory, how could they have built a motor-road and established a telephone line and so on. The main reason for its encroachment lies in the existence of a manganese deposit in the Phia Un area.

Removal and legal distortion of national border-stones to change the borderline

In addition to the illegal occupation of Vietnamese territory under cover of the shifting at an earlier stage of border-stones, at variance with the principle of maintaining the *status quo* of the historical borderline, the Chinese side has also shifted, on its own, border-stones at various places: further, it has secretly destroyed or taken away those border-stones which are unfavourable to them, such as in Chi Ma (Lang Son) and at border-stone No. 136 in Cao Bang Province. In such cases, it has turned down all Vietnamese proposals for joint investigation and establishing records of the facts. Even in a number of places where the position of the border-stones corresponds to the historical borderline, it has sought to distort the facts; thus, it has refused to admit the borderline running between two border-stones in the area of Kim Ma-Kim Ngan-Mau Son (border-stones Nos. 41, 42 and 43) in Lang Son Province, a distance of over 9 kilometres with a width of 2.5 kilometres inside Vietnamese territory and an area of approximately 1,000 hectares; and in the area of Na Pang-Keo Trinh (border-stones Nos. 29, 30 and 31) in Cao Bang Province, 6.45 kilometres in length, 1.3 kilometres in width and about 200 hectares in area.

Building border roads to encroach on Vietnamese territory

To prepare for aggressive attacks against Viet Nam, the Chinese side has carried out for many years a big plan of building border roads, allegedly for the purposes of "mechanizing agriculture". Especially since 1974, it has undertaken massive projects of road building; in some places, 8,000 people were mobilized at a time for this job. While building these roads, they destroyed vestiges of the historical borderline, in many places, they have encroached upon Vietnamese territory; from October 1976 to 1977 alone, they encroached upon Vietnamese territory at dozens of points, some with an area of over 32 hectares, 1 kilometre deep inside Vietnamese territory. This was the case in the area between border-stones Nos. 63 and 65 in Tra Linh District, Cao Bang Province and in the area between border-stones Nos. 1 and 2 in Cao Ma Po, Ha Tuyen Province. There the encroachment was 4 kilometres long and 2 kilometres deep inside Vietnamese territory.

To draw wrong borderlines on maps printed for Viet Nam

In 1955-1956, Viet Nam requested China's aid for the re-printing of maps of Viet Nam at the 1:100,000 scale. Abusing Viet Nam's trust, the Chinese side drew some portions of the borderline further towards the Vietnamese side, thus turning Vietnamese territories into Chinese. For instance, it changed the

drawing in the area of the Ban Gioc Falls (border-stone No. 53) which it wanted to occupy in parts along with Con Po Thoon (Cao Bang Province).

Resorting to threats of armed forces and stationing troops to occupy land

In some important areas, the Chinese side has openly used armed forces for encroachment purposes. In Tra Man-Suoi Lung area (border-stones Nos. 136-137), Bao Lac district, Cao Bang Province, China in 1953 sent a number of Chinese families to settle on Vietnamese territory and stay there with Vietnamese people; later on, it continued sending out more people, thus establishing three hamlets (with 16 households and 100 persons) called Si Lung after the name of a nearby Chinese village. However, up to 1957, the Chinese side still recognized this area to be Vietnamese. From 1957 onwards it built schools, installed a loud-speaker network, exploited graphite, then brazenly hoisted flags as a sign of Chinese territorial sovereignty. In June 1976, Chinese armed forces were impudently sent in to suppress the struggle of the people and to obstruct Viet Nam's patrolling activities in the area, occupying a Vietnamese area of over 3.2 kilometres possessing a graphite deposit.

A similar situation occurred in the area between border-stones Nos. 2 and 3 in Nam Chay village, Muong Khuong District, Hoang Lien Son Province. In 1967-1968, a number of Meo families from Ma Kwan District, Yunnan Province (China) came to settle down there. The Vietnamese side requested the Chinese side to take these people back to China. Nevertheless the Chinese side turned a deaf ear, and further increased the number to 36 households comprising 152 persons; it levied taxes and supplied the people with ration cards for the purchase of cloth; this Meo hamlet was called Sin Sai Thang after the name of a Chinese village, 3 kilometres from the area, on the other side of the border. In spite of repeated protests from the Vietnamese side, the Chinese side failed to take these people home; instead, the Chinese armed forces were sent in early 1976 to occupy the area. The Chinese side has now established telephone lines, installed loud-speakers, built schools and set up production teams, regarding the area as a Chinese territory.

Occupying the Hoang Sa Islands (Paracels) of Viet Nam

The Hoang Sa Islands (Chinese name: Si Sha) are about 193 kilometres east of Da Nang. The Vietnamese side possesses documents clearly showing that both these islands and the Truong Sa Islands (Chinese name: Nam Sha) farther to the south are Vietnamese territory. The Vietnamese people have, for a long time now, discovered and exploited the Hoang Sa Islands, over which the Nguyen Dynasty officially exercised Vietnamese sovereignty. After establishing its protectorate over Viet Nam in the middle of the nineteenth century, France, in the name of Viet Nam, set up on the islands two administrative units and one weather station, which has supplied the World Meteorological Organization with data on a continuing basis over the past decades under the code name of Htang Sa (Spratley). Viet Nam has always exercised sovereignty over these islands. This is clear and undeniable.

However, after the withdrawal of the United States from Viet Nam under the provisions of the Paris Agreements of 27 January 1973 and at a moment when the Vietnamese people were stepping up their struggle for the liberation of South Viet Nam and the puppet régime in South Viet Nam was about to collapse, the Chinese authorities brazenly used armed force to occupy the Hoang Sa Islands.

The way in which they occupied the Hoang Sa Islands was the same as that used to encroach on the territory of neighbouring countries. This was an odious betrayal in view of their boasts. The following is a rough account of the event:

(a) On 26 December 1973, the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam informed the Government of the People's Republic of China of Viet Nam's intention to prospect for oil in the Bac Bo Gulf and proposed that negotiations be started in order to officially delimit the border between the two countries in the Bac Bo Gulf.

(b) On 11 January 1974, the spokesman of the Chinese Ministry of Foreign Affairs stated that the Si Sha (Hoang Sa) and Nam Sha Islands (Truong Sa) were Chinese territory and that China would not tolerate any encroachment on its sovereignty and territory.

(c) On 18 January 1974, an answer came from the Chinese Government, saying in substance that it agreed to the proposed negotiations regarding the Bac Bo Gulf, but did not agree to the involvement of any third country in the exploration and exploitation of the Gulf. In fact, it wanted to prevent Viet Nam from co-operating with Japan, France and Italy in the exploration and exploitation of the Vietnamese continental shelf in the Bac Bo Gulf.

(d) On 19 January 1974, mobilizing great naval and air forces, China attacked the Saigon administration's troops stationed on the Hoang Sa Islands. This aggressive military operation was dubbed "a counter-offensive in self-defence".

Prior to 1973, the Chinese side had indulged in encroachments and provocations in many places on the Viet Nam-China border. Since its occupation of the Hoang Sa Islands, border incidents and land encroachments provoked by the Chinese side against Viet Nam have been increasing in number: 1974—179 cases; 1975—294 cases; 1976—812 cases; 1977—873 cases; and 1978—2,175 cases.

III. THE TWO ROUNDS OF NEGOTIATIONS BETWEEN THE VIETNAMESE AND THE CHINESE GOVERNMENTS FOR THE SETTLEMENT OF THE BORDER QUESTIONS BETWEEN THE TWO COUNTRIES

In 1957-1958, the two parties agreed that, along with the maintenance of the *status quo* on the borderline left by history, talks at the provincial level would be held to settle specific questions relating to the people's life and the security and order of the border region of the two countries. Since that date there have been a great number of meetings between local authorities which resulted in the working out of certain regulations on the movement, trade, mutual visits, etc., between the population of the frontier provinces. However, the territorial question should be negotiated and settled by the two Governments.

That is why there were two rounds of negotiations at the vice-foreign-minister level in 1974 and in 1977-1978.

The first round of negotiations

With a view to furthering national construction, on 26 December 1973, the Vietnamese Government proposed to the Chinese Government that negotiations be held to officially delineate the borderline between Viet Nam and China in the Bac Bo Gulf.

On 18 January 1974, the Chinese Government agreed to negotiate, but insisted on prospection work not being carried out in the rectangular area formed by the 18th to 20th parallels and the 107th and 108th meridians, and on "no third country being allowed to explore the Bac Bo Gulf"; the purpose was to prevent Viet Nam from exploiting the resources of its continental shelf.

The negotiations started on 15 August 1974 at Peking.

The 1887 Convention between France and the Ch'ing dynasty, article 2, stipulates: the meridian 105° 43' east of the Paris Meridian (i.e., the meridian 108° 3'13" east of the Greenwich Meridian) is the borderline between the two countries in the Bac Bo Gulf. The Vietnamese side was prepared to hold discussions with the Chinese side in order to determine the mouth of the Bac Bo Gulf, and thence to determine officially the borderline in the Gulf.

The Chinese side categorically refused to accept article 2 of the 1887 Convention, and to consider the aforesaid meridian as constituting a borderline. They claimed that there had never been any borderline in the Bac Bo Gulf, and that the two countries had to discuss and delineate it. Although the Vietnamese side expressed their readiness to listen to the Chinese views, the Chinese spoke only in general terms, saying that if this meridian was to be adopted China's share would be "too small" while Viet Nam's would be "too large"; therefore, there must be a fair and reasonable division; but they did not put forward any concrete plans, and deliberately dragged the negotiations on.

By the end of November 1974, the talks had to be suspended.

The second round of negotiations

On 18 March 1975, the Chinese Government proposed to the Vietnamese Government that in 1975 negotiations be opened on the land border question between the two countries.

On 12 April 1975 the Vietnamese Government replied that it agreed in principle, but that, as in the immediate future it had

a lot of work to do in view of the developments in the liberation of South Viet-Nam, it proposed that the negotiations be postponed to an appropriate date. In the meantime, the Vietnamese side proposed that the two sides resume the talks between border provinces; however, these negotiations also failed to bring about any results; meanwhile, Chinese violations and provocations at the Viet Nam-China border kept increasing in number.

On 7 October 1977, the negotiations were started at Peking between representatives of the Vietnamese and Chinese Governments to solve the questions relating to the border on land and in the Bac Bo Gulf.

The Vietnamese side once more reaffirmed that both sides should strictly respect the 1887 and 1895 Conventions relating to the land and sea borders and that it was, therefore, necessary to discuss the whole border question. The Chinese side adamantly insisted on discussing only the question of the land border.

The negotiations were facing difficulties. With a view to bringing them forward, the Vietnamese side agreed to discuss first the land border question, then the question of the border in the Bac Bo Gulf. Nevertheless, the Chinese side refused the discussions. It insisted on the Vietnamese side giving up its view to the effect that there already existed a borderline in the Bac Bo Gulf. And only in that case, would it agree to discuss the land border question.

To seek a way out, the Vietnamese side again proposed that the two sides discuss at once the land border question: as for the differences over the Bac Bo Gulf, each side might maintain its respective views and the question could be discussed later.

On the basis of the proposals made by Viet Nam and China, the Vietnamese side put forth a draft agreement on the national land border between the two countries for joint discussions.

The full text of the draft agreement is as follows:

DRAFT AGREEMENT ON THE NATIONAL LAND BORDER BETWEEN THE SOCIALIST REPUBLIC OF VIET NAM AND THE PEOPLE'S REPUBLIC OF CHINA

The Government of the Socialist Republic of Viet Nam and the Government of the People's Republic of China,

Proceeding from the desire to unceasingly consolidate and strengthen the militant solidarity and the great traditional friendship on the basis of Marxism-Leninism and proletarian internationalism between the Socialist Republic of Viet Nam and the People's Republic of China, between the Vietnamese and the Chinese peoples,

With a view to building up a frontier of lasting friendship between Viet Nam and China, in conformity with the earnest aspirations and fundamental interests of the two peoples,

On the basis of respect for each other's independence, sovereignty and territorial integrity and complete equality and on the principle of respect for the borderline left by history,

Have agreed as follows:

Article 1

The High Contracting Parties officially recognize that the frontier between Viet Nam and China, as delimited and marked out under the documents on the frontier line signed by the Government of the French Republic and the Government of the Chinese Ch'ing dynasty, is the national frontier line between the Socialist Republic of Viet Nam and the People's Republic of China.

These documents on the frontier line include:

1. The Convention on the delimitation of the borderline between Tonkin and China signed on 26 June 1887 along with the *procès-verbaux* and delimitation maps enclosed.

2. The complementary Convention to the 26 June 1887 Convention on the delimitation of the borderline between Tonkin and China, signed on 20 June 1895 along with the *procès-verbaux* and delimitation maps enclosed.

3. The *procès-verbaux* and maps of the border-stones in implementation of the above Conventions, signed from 15 April 1890 to 13 June 1897, date of the completion of the marking out of the borderline between Tonkin (Viet Nam) and Yunnan Province (China).

In the following articles, the above documents on the borderline will be referred to as "the 1887 and 1895 Conventions".

Article 2

The High Contracting Parties undertake to respect the national borderline between the two countries referred to in article 1.

The areas administered by either Party beyond the border mentioned in article 1 must be returned to the other Party.

Article 3

The national borderline between the two countries referred to in article 1 is clear in general. In case, after repeated comparisons and studies in conformity with the provisions of the 1887 and 1895 Conventions, it cannot be ascertained to which Party a small number of places on the frontier line belong, the two Parties shall try, through on-the-spot inspections and friendly consultations, to reach a settlement on a fair and logical basis.

Article 4

Both with regard to the border portions running along watercourses and to the islands on the same and in case these border rivers shift course for natural causes, the two Parties shall strictly abide by the provisions of the 1887 and 1895 Conventions concerning the borderline along these watercourses.

No matter how the borderline along watercourses is delimited under the provisions of the 1887 and 1895 Conventions, the borderline on the bridges spanning these watercourses runs exactly along the medial line of the bridges.

Article 5

Within one year of approval by the two Governments of the decision of the Joint Commission referred to in article 7 below regarding each border portion, the population of the area returned by one Party to the other will go back and live in the country of which they hold the nationality.

In case anyone wants to remain, he must register with the local administration so as to become a citizen of the country to which the land is returned.

Article 6

Neither side shall allow its population to cross the border for farming and illegal occupations on the territory of the other side.

In the areas returned to each other, an end shall be put to farming activities across the border immediately after the decisions of the Joint Commission referred to in article 7 below on each section of the borderline are approved by the two Governments.

Those persons who have grown crops on the territory of the other side shall be allowed to come and care for them until the crops are gathered in, and must respect all laws and regulations of the country.

Article 7

After this agreement comes into force, the two sides will set up a joint Viet Nam-China border commission (the Joint Commission) comprising representatives of the two sides in equal numbers. The Joint Commission shall base itself on the provisions of this Agreement to perform the following duties:

1. To determine concretely on the ground the entire length of the national land border between the two countries under article 1 of this Agreement.

2. To solve on the ground the question of the border sections referred to in articles 2 and 3 of this Agreement. The decisions of the Joint Commission on each section of the borderline are subject to approval by the two Governments.

3. To solve questions related to one party's returning lands to the other.

4. To verify and locate the national border-stones under the 1887 and 1895 Conventions, to put in place the national border-stones which are not in the right positions under the above-mentioned Conventions and to plant complementary border-stones in the places the two sides deem necessary, to solve questions related to the maintenance of the national border-stones.

5. To draft protocols to delimit on the terrain the national land border between the two countries and to draw maps of this borderline with detailed mention of the location of the borderline and the border-stones.

The Joint Commission will begin operations right after its establishment and terminate its duties after the signing of the above-mentioned protocols.

Article 8

The protocol along with the enclosed map referred to in article 7, paragraph 5, will be signed by the two Governments and will be an integral part of this agreement.

Article 9

This Agreement shall be ratified and shall come into force on the date of exchange of the instruments of ratification.

After this Agreement comes into force and the protocol referred to in article 7, paragraph 5 is signed, all Conventions and documents relating to the land border between the two countries shall immediately lose effect.

DONE in on the day of the year in duplicate in the Vietnamese and Chinese languages, both texts being authentic.

For the Government
of the Socialist Republic
of Viet Nam:

For the Government
of the People's Republic
of China:

The Chinese side refused to consider the draft agreement. It put forward another proposal which was in fact an amended version of an old one. It was its design to maintain the present state of the borderline (not the *status quo* of the historical borderline) so as to keep the areas it had occupied by encroachment and to change many border portions to its advantage.

The negotiations dragged on for 10 months without any result. Even at a time when the Chinese side intensified its border provocations, created the Hoa problem, and cut its aid to Viet Nam, the Vietnamese side patiently pursued the talks. But finally, no result was achieved as events proved that the more the Vietnamese side showed goodwill, the more the Chinese side pushed forward its demand. It obdurately tried to carry out its designs of big-Power expansionism; as a result, it did not respond to any proposal of the Vietnamese side. The negotiations on the border question ended in failure; the responsibility for it rested entirely on the Chinese side.

IV. CHINESE PROVOCATIONS AND VIOLATIONS OF THE SOVEREIGNTY AND TERRITORY OF VIET NAM SINCE 1978

From early 1978 to 17 February 1979, date of the massive invasion of Viet Nam, the Peking authorities, on the one hand, deadlocked the negotiations on the border question and, on the other, openly pursued a hysterical anti-Viet Nam policy.

In the border region, the Peking authorities escalated the use of force, intensified provocations and encroachments on the border, sovereignty and territory of Viet Nam:

(a) From early 1978 to August 1978, the Peking authorities provoked, through enticement or constraint, an exodus of Hoa people who were leading a peaceful life in Viet Nam, mainly in border provinces, in an attempt to create political, social and economic disturbances in Viet Nam which had then to cope with the heavy aftermath of natural calamities without precedent in the past 100 years; at the same time, they prepared the formation of a number of agents required for future aggressive operations. With this perfidious scheme, they enticed about 170,000 Hoa people to go back to China. The most despicable trick was their sudden decision to close the borders while Hoa people were pouring into China in a steady flow. This was to serve as a pretext to instigate these people to oppose the Vietnamese authorities. That was the situation they brought about at the Bac Luan border bridge (Quang Ninh Province) and at the Friendship Gate (Lang Son Province): while large numbers of Hoa people were blocked, they sent out their agents along with hooligans to indulge in acts of violence and create disturbances, at the Bac Luan Bridge on 8 August and at the Friendship Gate on 25 August, killing two members of the Vietnamese security forces and wounding 25 others.

(b) The Peking authorities massed troops (infantry, armoured, air force and artillery) close to the border, built fortifications, arranged military positions on the heights all along the border, and evacuated Chinese civilians in the border region to the hinterland. At the same time, the huge propaganda machine of Peking slanderously accused Viet Nam of "violating Chinese territory", and Chinese Vice-Premier Deng Xiaoping, disregarding all the principles of the United Nations, uttered repeated threats about teaching Viet Nam "a lesson" and "punishing Viet Nam".

(c) The Chinese armed forces made repeated encroachments on Vietnamese territory, destroyed barbed wire fences, mine fields and other defensive works of the Vietnamese side.

(d) They intruded into Vietnamese territory and attacked guard posts of the Vietnamese militia and border-guards, opened sniper fire and kidnapped Vietnamese to China. Hereunder are some examples:

- (i) On 13 October 1978, the Chinese armed forces intruded deep into Vietnamese territory in Pha Long village, Muong Khuong District, Hoang Lien Son Province, ambushed a working group on duty, killed two border guards and abducted Nguyen Dinh Am to China;
- (ii) On 1 November, on Chong Mu Hill, Cao Bang Province, hundreds of Chinese troops, together with over 1,000 Chinese militiamen entered Vietnamese territory, opened fire and attacked a Vietnamese militia group doing their duty on Vietnamese soil;
- (iii) On 23 December, Chinese armed forces crossed the border and launched an attack on a Vietnamese militia group who were doing their duty on Vietnamese territory in the area of border-stone No. 2 (at Binh Nhi, Lang Son Province) and took four persons away to China.

Similar provocations on the whole borderline can be counted by the hundreds.

Since early 1979, the Chinese provocations have been carried out on an increasing scale and involving ever-increasing forces:

(a) Artillery based in China (heavy machine-guns, 82 mm mortars, 75 and 85 mm recoil-less guns) brazenly opened fire in the direction of Viet Nam, in waves or for many successive days. A civilian walking on the road, a village, a hamlet, a residential quarter of a town, a workyard, a forest exploitation site, a State farm—all are targets for shelling. Hereunder are some examples:

- (i) On 14 January, Chinese forces shelled Phai Lau hamlet, Binh Lieu District, Quang Ninh Province;
 - (ii) On the same day, they shelled the main streets of Lao Cai provincial capital in Hoang Lien Son Province during a rush hour;
 - (iii) On 2 February, they shelled the Phuc Hoa sugar refinery and Hung Long hamlet, Qui Thuan village, Quang Hoa District, Cao Bang Province;
 - (iv) From 10 January to 25 January, with different types of infantry weapons and 82 mm mortars, they fired at a Vietnamese border-post in Tra Linh, Cao Bang Province.
- (b) With big infantry forces and strong fire support, they attacked and encroached upon Vietnamese territory, for instance:
- (i) On 10 February, over a battalion of the Chinese regular army entered Viet Nam over a distance of 2 kilometres and occupied the militia posts in Thanh Loa village, Cao Loc District, Lang Son Province;
 - (ii) On 11 February, a company of the Chinese regular army occupied the Hang Na-Coc Pheo area, Can Yen village, Thong Nong District, Cao Bang Province;
 - (iii) On 15 February, a company of the Chinese regular army crossed the border to occupy Na Ke hamlet of Bao Lam village, Van Lang District, Lang Son Province.

All the brazen and increasingly serious acts of provocation, carried out by the Chinese side, especially since 1978, have no other purpose than to make frenzied preparations for a war of aggression against the Vietnamese people. This has been borne out by the facts.

At dawn, on 17 February 1979, the Peking authorities unleashed a war of aggression against Viet Nam involving 600,000 troops from 11 army corps and many independent divisions

(among them, a number of divisions specializing in mountain fighting and including people who had been helping Viet Nam to build roads in border areas, and Hoa people who had previously lived in Viet Nam), over 500 tanks and armoured cars, and over 700 planes of different types. On the very first day, about 20 Chinese infantry divisions simultaneously attacked six Vietnamese provinces bordering on China: Quang Ninh, Lang Son, Cao Bang, Ha Tuyen, Hoang Lien Son and Lai Chau.

Because of the defeats inflicted by strong ripostes from the Vietnamese people, strong condemnation by world public opinion and opposition from the Chinese people, the Peking authorities are withdrawing their troops to China.

Since the beginning of the aggression in Viet Nam, the Chinese aggressors have indulged in wanton shooting, arson, looting, rape, and pitiless massacres using extremely barbarous methods. They crushed the victims' skulls with rifle butts, bayoneted them, beheaded them, cut their bodies into pieces, threw grenades into shelters, rounded people up and opened fire on them. The victims were mostly old people, women and children. In Cao Lau, Van Lang (Lang Son), they tore to pieces the body of Vi Viet Luong, a pupil of the fourth form, woke up seven children who were sleeping, shot them dead, then cut their bodies to pieces, and threw them out into the yard. In Thanh Loa village (Lang Son), four Chinese soldiers dragged a school mistress of Tay nationality to a hill, raped her and shot her. In the brick and tile works of Quang Kim village, Bat Xat District (Hoang Lien Son) they killed all the male workers with their B40 guns, raped the women workers and abducted them to China.

What is more serious, at the Bat Xat market, they beheaded and disembowelled about 100 children and scattered their bodies.

In the process of their slow withdrawal, the Chinese aggressors have continued to commit numerous crimes against the Vietnamese people. They have shelled and blown up everything still left standing, thus completely destroying Lang Son, Cao Bang and Lao Cai townships. Moreover, they have laid mines everywhere and even poisoned water wells, killing or poisoning a number of civilians.

V. THE CORRECT WAY TO A SETTLEMENT OF THE FRONTIER QUESTIONS BETWEEN VIET NAM AND CHINA

The facts expounded above have clearly illustrated the following:

(a) A historical frontier has existed between Viet Nam and China for a long time. It was defined by the 1887 and 1895 Conventions and subsequently clearly marked out along the entire length of the 1,400 kilometres of land border:

(b) Over the past 21 years, the Chinese side, in violation of the agreement between the two countries on the maintenance of the *status quo* of the frontier, left by history, has committed thousands of encroachments on the border, sovereignty and territory of Viet Nam;

(c) The Chinese side has deliberately deadlocked the talks on the border problem between the two countries: it has been intensifying armed provocations against Viet Nam and, on 17 February 1979, it embarked on a massive invasion of Viet Nam.

In order to conceal the extent of the war, to mislead the peoples of China and the world, the Chinese rulers have uttered base lies to the effect that the Vietnamese side indulged in "provocation" and "aggression", thus compelling China to launch a "counter-offensive in self-defence". The same contention about "counter-offensive in self-defence" was made in 1962 during the aggression against India and in 1974 when the Vietnamese islands of Hoang Sa were occupied. When the Chinese rulers talk about a "counter-offensive in self-defence", they are acting like all aggressors.

The Peking rulers have even said that this is only "a limited war" waged by "border-guard forces". In fact, they are clearly waging a large-scale war of aggression aimed at annexing Viet Nam, a war involving, at the outset, the participation of dozens of regular divisions with a troop strength equalling that of the United States at the peak of the United States war of aggression in Viet Nam.

The peoples of the five continents, the Governments of many countries including Deng Xiaoping's friends in the West, have

all called this China's aggression against Viet Nam. The ordinary people in China have also begun to be aware of the adventure that the Chinese rulers are pushing their country into with incalculable consequences.

Why did the Chinese rulers embark on an aggression against Viet Nam although this laid bare their real nature of big-nation expansionism and their nature as aggressors?

The current war of aggression in Viet Nam has its origin in the Chinese rulers' policy of trying to weaken and subjugate Viet Nam, to make it dependent on China, and at the same time, to annex Lao and Kampuchea in order to turn the Indo-Chinese Peninsula into a spring-board for the implementation of their big-nation expansionism in South-East Asia. They have suffered repeated setbacks in using the Pol Pot-Ieng Sary clique for attacks against Viet Nam from the south-west, in indulging in armed provocations and increasing military pressure from the North, in using the Hoa people to cause trouble and violence from within, and in trying to stifle Viet Nam by causing other countries to cut their aid at a moment when Viet Nam was facing economic difficulties.

They have also closed the three Vietnamese consulates general at Kunming, Nanning and Kwangchow, cut off the international railway and terminated the agreement on exemption of visas for officials of the two countries with a view to covering up their preparations for military attacks against Viet Nam. Finally, the Chinese rulers have rashly embarked on a war of aggression against Viet Nam.

In attacking the six provinces on the northern border of Viet Nam, they have also attempted to change the borderline, that is to hold on tightly to the areas they have previously occupied by encroachment, and at the same time to occupy other positions. They themselves have brazenly made this clear when they said that the Chinese troops would withdraw to the other side of "the borderline recognized by China". According to first reports, they have moved border-stones Nos. 41 and 45 at Chi Ma (Lang Son) deep inside Vietnamese territory. Yet they have often declared "China does not want an inch of land from any country!"

The stand of the Government of the Socialist Republic of Viet Nam has been made clear in the note dated 2 March 1979 [S/13134] to the Chinese Ministry of Foreign Affairs: the Chinese rulers having provoked a war of aggression in Viet Nam must put a permanent end to their aggression; withdraw immediately, completely and unconditionally their troops to the other side of the borderline left by history, as agreed upon between the two sides, and strictly respect the independence, sovereignty and territorial integrity of Viet Nam.

On 6 March 1979, the Vietnamese side stated:

"If China really withdraws all its troops from Vietnamese territory as it has said it will, after the total withdrawal of the Chinese troops to the other side of the historical frontier which the two sides have agreed to respect, the Vietnamese side will be disposed to begin immediately with the Chinese side negotiations at the level of Deputy Minister for Foreign Affairs on the re-establishment of normal relations between the two countries. The place and date will be agreed upon between the two sides". [S/13144, annex.]

If the Chinese rulers pursue their policy of aggression against Viet Nam, the Vietnamese people and army, exercising their sacred right of self-defence, will resolutely fight against the aggressors to defend their motherland, and to preserve peace in South-East Asia and the world.

The Vietnamese people are determined to spare no effort to preserve the traditional friendship with the Chinese people.

The Government of the Socialist Republic of Viet Nam firmly demands that the Chinese rulers:

1. Put a permanent end to their aggression, withdraw immediately, completely, and unconditionally all their troops, stop all criminal acts against Viet Nam, strictly respect the independence, sovereignty and territorial integrity of Viet Nam, respect the borderline left by history as agreed upon between the two sides, immediately stop the shifting of border-stones and other acts aimed at changing this borderline.

2. Start, at an early date with the Vietnamese side, the negotiations mentioned in the note sent on 15 March 1979 by the Vietnamese Ministry of Foreign Affairs to the Chinese

Ministry of Foreign Affairs [S/13174], with a view to bringing about peace and stability in the border areas, and restoring normal relations between the two countries.

The Vietnamese Government and people are firmly confident that the fraternal socialist countries, the member countries of

the non-aligned movement, the national independent countries, the friendly countries, and peace-loving and justice-loving people in the world will strengthen their solidarity with and support for Viet Nam, in the interests of independence, peace and stability in South-East Asia and in the world.

DOCUMENT S/13257*

Letter dated 18 April 1979 from the representative of Viet Nam to the Secretary-General

[Original: English]
[18 April 1979]

I have the honour to transmit to you herewith, for information, the text of the proposal put forward by the Delegation of the Government of the Socialist Republic of Viet Nam in the first session of the negotiations between the Vietnamese delegation and the Chinese delegation on 18 April 1979 at Hanoi.

I request that the present letter and its enclosure be circulated as an official document of the General Assembly and of the Security Council.

(Signed) HA VAN LAU
Permanent Representative of Viet Nam
to the United Nations

ANNEX

Proposal put forward by the delegation of the Government of the Socialist Republic of Viet Nam in the first session of the negotiations between the Vietnamese delegation and the Chinese delegation on 18 April 1979 at Hanoi

MAIN PRINCIPLES AND CONTENTS OF A THREE-POINT SETTLEMENT OF THE PROBLEMS CONCERNING THE RELATIONS BETWEEN THE TWO COUNTRIES

1. Urgent measures to secure peace and stability in the border areas of the two countries and to ensure an early reunion of the people captured during the war with their families:

(a) To refrain from concentrating troops close to the borderline, to separate the armed forces of the two sides; the armed forces of all kinds of each side along the entire borderline to pull back into their territory to a distance of 3 to 5 kilometres from the line of actual control prior to 17 February 1979;

(b) To stop all acts of war provocation and all forms of hostile activities violating the sovereignty and territorial integrity of the other side and threatening its security;

* Circulated under the double symbol A/34/201-S/13257.

(c) The zone lying on either side of the line of actual control mentioned above and where the armed forces of the two sides will no longer be present shall become a demilitarized zone; the status of this demilitarized zone shall be agreed upon between the two sides;

(d) The two sides shall exchange at once lists of people captured by the two sides during the war so that they may be returned as soon as possible;

(e) To set up a joint commission of the two sides to supervise and control the implementation of the above-mentioned measures.

2. Restoration of the normal relations between the two countries on the basis of the principles of peaceful coexistence; respect for independence, sovereignty and territorial integrity; non-aggression, refraining from the use of force or the threat of use of force; non-interference in the internal affairs of the other side; settlement through negotiations of disputes and differences in the relations between the two sides; development of economic and cultural relations in a spirit of mutual respect and benefit.

On that basis, to restore railway, civil aviation, postal and other relations.

To resolve the question of the aftermath of the war.

3. Settlement of border and territorial problems between the two countries on the principle of respect for the *status quo* of the borderline left by history and delineated by the 1887^a and 1895^b Conventions signed by the French Government and the Ch'ing Dynasty, as agreed upon between the Vietnamese and the Chinese sides; respect for independence, sovereignty and territorial integrity.

^a Convention entre la France et la Chine relative à la délimitation de la frontière entre la Chine et le Tonkin [*British and Foreign State Papers*, 1892-1983, vol. LXXXV (London, Her Majesty's Stationery Office, 1899), p. 748].

^b Convention entre la France et la Chine, complémentaire de la convention de délimitation de la frontière entre le Tonkin et la Chine du 26 juin 1887 [*ibid.*, 1894-1895, vol. LXXXVII (London, Her Majesty's Stationery Office, 1900), p. 523].

DOCUMENT S/15441*

Letter dated 29 September 1982 from the representative of Viet Nam
to the Secretary-General

[Original: English]
[1 October 1982]

I have the honour to forward herewith the statement dated 25 September 1982 by the Viet Nam News Agency protesting against the signing of contracts between the Chinese authorities and foreign oil companies for the prospection and exploration of oil and gas in the eastern part of the Bac Bo (Tonkin) Gulf.

I should be grateful if this letter and its enclosure could be circulated as an official document of the General Assembly and of the Security Council.

(Signed) HOANG BICH SON
Permanent Representative
of the Socialist Republic of Viet Nam
to the United Nations

ANNEX

Statement by the Viet Nam News Agency protesting against the signing of contracts between the Chinese authorities and foreign oil companies

Hanoi, VNA, 25 September 1982.—According to foreign sources, the Chinese authorities have made contracts with foreign oil companies for the prospection and extraction of oil and gas in the eastern part of the Bac Bo (Tonkin) Gulf and will conduct geological surveys around the Vietnamese archipelagoes of Hoang Sa and Truong Sa.

The Viet Nam News Agency is authorized to declare the following: the Government of the Socialist Republic of Viet Nam, based on valid historical and legal grounds, has many times affirmed its sovereignty over Hoang Sa and Truong Sa and the entire territorial waters and continental shelf of Viet Nam.

Viet Nam will firmly defend its sacred sovereignty and will not tolerate any encroachment on the resources held in its territorial waters and continental shelf.

Those foreign companies prospecting for oil in Viet Nam's territorial waters and continental shelf without permission from the Vietnamese Government will have to bear full responsibility for all consequences arising from their illegal activities.

*Circulated under the double symbol A/37/507-S/15441.

DOCUMENT S/15612*

Letter dated 16 February 1983 from the representative of Viet Nam
to the Secretary-General

[Original: English]
[18 February 1983]

I have the honour to transmit herewith, for your information, the text of the statement dated 12 February 1983 by the Viet Nam News Agency concerning the violation of Viet Nam's territory by China.

I should be grateful if you would arrange to have this statement distributed as an official document of the General Assembly and of the Security Council.

(Signed) HOANG BICH SON
Permanent Representative of the
Socialist Republic of Viet Nam
to the United Nations

ANNEX

Statement by the Viet Nam News Agency

According to foreign sources, the Chinese side has allowed United States oil and gas companies to explore and extract oil and gas in the territorial waters of Oanh Ca in the Bac Bo (Tonkin) gulf.

Concerning this fact, the Viet Nam News Agency is authorized to declare the following.

So far, the Government of the Socialist Republic of Viet Nam, basing itself on firm historical and legal data, has many times affirmed its sovereignty over Viet Nam's territorial waters and continental shelf as well as over all the natural sources in those areas.

The above-mentioned action of the Chinese side is a violation of Vietnamese sovereignty.

The foreign companies that conduct the exploration and extraction of oil and gas in violation of Vietnamese sovereignty must bear all the consequences arising from their wrong actions.

*Circulated under the double symbol A/38/94-S/15612.

Statement dated 21 January 1986 issued by the Ministry of Foreign
Affairs of the Socialist Republic of Viet Nam regarding the
22 November 1985 statement of Thailand concerning the historic
waters and the baselines of Viet Nam

With regard to the position of the Government of Thailand as mentioned in the 22 November 1985 statement by the Ministry of Foreign Affairs of Thailand, the Government of the Socialist Republic of Viet Nam wishes to reaffirm the following:

1. The 12 November 1982 statement on the baselines to measure the breadth of the territorial sea of Viet Nam and the 5 June 1984 statement on the airspace of Viet Nam issued by the Government of the Socialist Republic of Viet Nam are based on the sovereignty and other legitimate interests of Viet Nam, in conformity with international law and practice.

2. The position of the Government of Thailand as expressed in the 22 November 1985 statement of the Ministry of Foreign Affairs of Thailand is utterly unjustified and, therefore, has no legal value. Viet Nam reaffirms its determination to defend, in accordance with international law, its sovereignty and interests vis-à-vis its maritime zones and airspace as mentioned in the aforesaid legal documents.

DOCUMENT S/13278*

Letter dated 26 April 1979 from the representative of China to the Secretary-General

[Original: Chinese/English]
[27 April 1979]

I have the honour to transmit to you herewith the text of the proposal of principles for handling Sino-Vietnamese relations put forward by the Chinese Government delegation at the second session of the Sino-Vietnamese negotiations on 26 April 1979. I request that this proposal be circulated as an official document of the General Assembly and of the Security Council.

(Signed) LAI Ya-li
Acting Permanent Representative of the
People's Republic of China
to the United Nations

* Circulated under the double symbol A/34/213-S/13278.

ANNEX

Proposal of principles for handling Sino-Vietnamese relations put forward by the delegation of the Chinese Government at the second session of the Sino-Vietnamese negotiations on 26 April 1979

1. The two sides shall restore friendly and good-neighbourly relations between China and Viet Nam on the basis of the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful co-existence. They shall seek a reasonable solution of the disputes and issues in the relations between the two countries through peaceful negotiations.

2. Neither side should seek hegemony in Indo-China, South-East Asia or any other part of the world, and each is opposed

to efforts by any other country or group of countries to establish such hegemony. Neither side shall station troops in other countries and those already stationed abroad must be withdrawn to their own country. Neither side shall join any military blocs directed against the other, provide military bases to other countries or use the territory and bases of other countries to threaten, subvert or commit armed aggression against the other side or against any other countries.

3. The two sides shall respect the Sino-Vietnamese boundary line as delimited in the Sino-French boundary accords,* which shall serve as the basis for a negotiated settlement of their boundary and territorial disputes. Pending a settlement of the boundary question, each side shall strictly maintain the *status quo* of the boundary at the time when the Central Committees of the Chinese and Vietnamese parties exchanged letters in 1957-1958 and will not attempt to alter unilaterally and forcibly the actual extent of its jurisdiction along the border in any form or on any pretext.

4. Each side shall respect the other side's sovereignty over its 12 nautical-mile territorial sea, and the two sides shall demarcate their respective economic zones and continental shelves in

* Convention entre la France et la Chine relative à la délimitation de la frontière entre la Chine et le Tonkin [*British and Foreign State Papers*, 1892-1893, vol. LXXXV (London, Her Majesty's Stationery Office, 1899), p. 748] and Convention entre la France et la Chine, complémentaire de la Convention de délimitation de la frontière entre le Tonkin et la Chine du 26 juin 1887 [*ibid.*, 1894-1895, vol. LXXXVII (London, Her Majesty's Stationery Office, 1900), p. 523].

the Beibu Gulf and other sea areas in a fair and reasonable way, in accordance with the relevant principles of the present-day international law of sea.)

5. The Xisha and Nansha Islands have always been an inalienable part of Chinese territory. The Vietnamese side shall revert to its previous position of recognizing this fact and respect China's sovereignty over these two island groups and withdraw all its military personnel from those islands in the Nansha group which it has occupied.)

6. Nationals of one country residing in the other country shall respect the laws of that country and the ways and customs of the local people and shall endeavour to contribute to the economic and cultural development of that country. The Government of the country of residence shall guarantee their proper rights and interests in regard to residence, travel, making a living and employment and safeguard their personal safety and lawfully acquired properties in that country. Each side shall treat all the nationals of the other side residing in its country in a friendly manner and must not persecute or illegally expel them.

7. In response to the legitimate wish for repatriation on the part of the Vietnamese citizens forcibly driven by the Vietnamese authorities into Chinese territory, the Vietnamese Government should receive them back into the country and resettle them in a proper manner as soon as possible. The Chinese Government is ready to facilitate their early return in every way.

8. The restoration of railway traffic, trade, civil aviation, postal and telecommunication services and other bilateral ties shall be dealt with by the departments concerned of the two countries through consultations.

Letter dated 14 May 1979 from the representative of China to the Secretary-General

[Original: Chinese/English]
[14 May 1979]

I have the honour to transmit to you herewith the text of a speech made by Han Nianlong, head of the Chinese Government delegation and Vice Minister for Foreign Affairs, at the fourth plenary meeting of the Sino-Vietnamese negotiations on 12 May 1979. I request that this speech be circulated as an official document of the General Assembly and of the Security Council.

(Signed) LAI Ya-li
Acting Permanent Representative
of the People's Republic of China
to the United Nations

ANNEX

Speech made by Han Nianlong, head of the Chinese Government delegation and Vice-Minister for Foreign Affairs, at the fourth plenary meeting of the Sino-Vietnamese negotiations on 12 May 1979

Your Excellency Phan Hien, head of the Government delegation of the Socialist Republic of Viet Nam, colleagues on the Vietnamese Government delegation,

I find it most regrettable that in his speech at the third plenary meeting [S/13302, annex], Mr. Phan Hien, head of the Vietnamese Government delegation, once again made slanderous charges, and even in abusive language, against the Chinese Government and leadership.

The Vietnamese side also vilified and distorted the eight-point proposal put forward by the Chinese Government delegation [S/13278, annex], asserting that this proposal was a means to implement a "big-nation expansionist and hegemonistic policy towards Viet Nam" and contained "extremely unreasonable and arrogant demands". The Vietnamese side, confounding right and wrong, alleged that China's proposals for solving the boundary question and dividing the sea area in the Beibu Gulf (Gulf of Tonkin in international usage) contravened the Sino-French boundary accords and that the Xisha and Nansha Island groups were Vietnamese territory. But who has practised expansionism and provoked boundary and territorial disputes between China and Viet Nam? Who has violated the Sino-French boundary accords and the principles affirmed in the letters exchanged between the Central Committees of the two Parties? Who has created numerous border incidents and even provoked armed conflicts? We already made a preliminary exposition on these questions in the last two meetings. But in view of the fact that the Vietnamese side is still bent on distorting the facts to confuse public opinion, we deem it necessary to elaborate further on these points.

1. How did the boundary and territorial disputes between China and Viet Nam arise?

* Circulated under the double symbol A/34/235-S/13318.

The boundary between China and Viet Nam is a determined boundary, delimited by the accords signed between the Chinese Government of the Qing Dynasty and the French Government in 1887 and 1895 and jointly surveyed and indicated on the ground by boundary markers. After the founding of the People's Republic of China and the Democratic Republic of Viet Nam, the Sino-Vietnamese boundary line being clearly defined on the whole, there were no boundary disputes between the two sides. Only on a few sectors were there some differences of view left over from history waiting to be settled by the two sides.

The Government of the People's Republic of China has always taken the position that boundary questions left over from history should be settled in a fair and reasonable manner through friendly consultations in a spirit of mutual understanding and mutual accommodation, and that, pending a negotiated settlement, the *status quo* on the border should be maintained and conflicts avoided. Acting on these principles, the Chinese Government worked out negotiated settlements of its boundary questions and signed new boundary treaties with its neighbours — Burma, Nepal, Pakistan, Afghanistan and the People's Republic of Mongolia.

Regarding the Sino-Vietnamese boundary question, the Central Committees of the Chinese and Vietnamese Parties exchanged letters in 1957-1958, in which the two sides agreed that the boundary line delimited by the Sino-French boundary accords should be respected, that the *status quo* of the border should be strictly maintained pending a negotiated settlement of the boundary question by the two Governments, and that the local authorities were not empowered to settle any questions of territorial ownership. Acting in line with the principles affirmed in the letters exchanged between the two parties, the local authorities of the two countries in the border areas managed to deal satisfactorily with all kinds of issues that arose along the border. So the Sino-Vietnamese boundary was for many years a peaceful and friendly boundary.

(In the two decades and more prior to 1974, the Chinese and Vietnamese sides respected each other's territorial sea and sovereignty in the Beibu Gulf area. There was a relationship of friendly co-operation on such matters as shipping, fishery, scientific research and resistance to imperialist aggression, and no disputes occurred.)

(The Xisha and Nansha Islands have been Chinese territory since ancient times, and this fact was solemnly acknowledged and honoured in the many notes, statements and other official documents of the Democratic Republic of Viet Nam in its newspapers, periodicals, textbooks and official maps, and in the pronouncements of its leaders. On 15 June 1956, when referring to the question of sovereignty over the Xisha and Nansha Islands, a Vietnamese Vice-Minister for Foreign Affairs stated to the Chinese side that "judging from history, these islands belong to China". On 4 September 1958, in a statement on its territorial sea, the Chinese Government declared that this definition of China's territorial sea, including... the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands".

On 14 September 1958, Vietnamese Prime Minister Pham Van Dong stated in a note to Premier Zhou Enlai that "the

Government of the Democratic Republic of Viet Nam recognizes and agrees to the statement on defining China's territorial sea made by the Government of the People's Republic of China on 4 September 1958. The Government of the Democratic Republic of Viet Nam respects this decision." In a statement on 9 May 1965, the Vietnamese Government reiterated its consistent stand of clearly recognizing the Xisha Islands as belonging to China when it expressed condemnation of the fact that "United States President Lyndon Johnson designated the whole of Viet Nam and the adjacent waters which extend roughly 100 miles from the coast of Viet Nam and part of the territorial waters of the People's Republic of China in its Xisha Islands as a 'combat zone' of the United States armed forces". All these are indisputable facts which no one can deny.

After 1974, however, the Vietnamese authorities made an about turn in their position. Relying on their sharply increased military strength accumulated during the years of war and with the backing of Soviet social imperialism, they went in for regional hegemonism in a big way and adopted a policy of aggression and expansion. They constantly created incidents and disputes along the border, nibbled at and encroached upon Chinese territory, and used the boundary question to whip up nationalistic anti-China sentiment. Moreover, the Vietnamese authorities sought expansion on the sea and wanted to "occupy the greater part of the sea area in the Beibu Gulf. Brazenly going back on their own word, they laid territorial claims to China's Xisha and Nansha Islands and even sent forces to occupy some of China's Nansha Islands.

That was how boundary and territorial disputes arose between the two countries.

It is common knowledge that Viet Nam has three neighbours. Not only China but its two other neighbours suffer, and even more so, from its aggression and expansion. Viet Nam and Laos concluded a boundary agreement in 1977, which made a new demarcation of the Vietnamese-Lao boundary. There is no need to remind you of the tricks you have played and the amount of Laotian territory you have annexed. The Lao people keep an account in their minds, too. You occupied Kampuchea's coastal islands, provoked conflicts along the Kampuchean-Vietnamese border, and then carried out a massive invasion of Kampuchea. Recently, you sent reinforcements and wantonly conducted military operations to put out the flames of the Democratic Kampuchean people's armed resistance. You have brought disaster to the Kampuchean people.

Facts show clearly that it is the policy of regional hegemonism and of seeking territorial expansion pursued by the Vietnamese authorities with Soviet backing that has given rise to boundary and territorial disputes between Viet Nam, on the one hand, and China, Kampuchea and Laos, on the other. It is, moreover, a source of turbulence and unrest in Indo-China and South-East Asia and constitutes a grave threat to peace in Asia and the rest of the world.

2. Who has departed from the principles affirmed in the letters exchanged between the Chinese and Vietnamese parties?

In November 1956, representatives of China's Guangdong and Guangxi Provinces met representatives of Viet Nam's Hai Ninh, Lang Son and Cao Bang Provinces to discuss questions relating to border management. Their discussions touched on issues relating to the boundary. The two sides agreed to refer these to their respective central authorities for resolution. In November 1957, the secretariat of the Central Committee of the Viet Nam Workers' Party proposed, in a letter to the secretariat of the Central Committee of the Chinese Communist Party, that "the national border question, in view of its importance, must be settled in accordance with the existing legal principles or with new ones defined by the two Governments. Local authorities and organizations are strictly forbidden to enter into negotiations on setting up new boundary markers or on ceding territory to each other." In April 1958, the Central Committee of the Chinese Communist Party expressed its agreement to this view in a letter of reply. This meant that both sides would respect the boundary line delimited by the Sino-French boundary accords, that they would strictly maintain the *status quo* of the boundary pending a negotiated settlement of the boundary question by the two Governments, and that the local authorities were not empowered to settle questions pertaining to territorial ownership. These letters exchanged between the Chinese and Viet-

namese parties constitute the common basis for dealing with boundary issues prior to a negotiated settlement of the boundary question. The Chinese Government has faithfully adhered to the principles affirmed in the letters exchanged between the two Parties and has respected the boundary line delimited in the Sino-French boundary accords. In the few sectors where there were issues left over from history, the Chinese Government has strictly kept to the jurisdiction along the border prevailing at the time of the exchange of letters, that is to say, in the early days following the liberation of China. We made no attempt to change the state of jurisdiction even in those areas which clearly belonged to China, according to the provisions of the Sino-French boundary accords, but which had been under Vietnamese jurisdiction for many years. In so doing, we proceeded entirely in the spirit of the agreement between the two Parties, namely, to maintain peace and tranquillity along the border. This does not mean that during future boundary negotiations ownership over such disputed areas will be decided in accordance with the line of actual jurisdiction. The Chinese side holds that if it is ascertained in future negotiations that certain areas under the jurisdiction of one side are situated beyond the boundary line delimited in the Sino-French boundary accords, these should, in principle, be returned to the other side unconditionally. The Vietnamese side is well aware of the above Chinese position, for it was stated explicitly on many occasions in our official documents and in the statements of Chinese leaders.

After 1974, in order to nibble off Chinese territory, the Vietnamese authorities, while expressing willingness to respect the letters exchanged between the two Parties, vigorously denied the principle of maintaining the *status quo* on the border affirmed by that exchange of letters and tried to negate the boundary line delimited by the Sino-French boundary accords. For that purpose, they produced specious arguments, now claiming that "a historical frontier has existed between Viet Nam and China for a long time", then that "the two sides have agreed to respect the historical boundary line", and calling for "maintaining the *status quo* on the border line left by history" or "restoring the *status quo ante* of the historical line", and so on and so forth. When you speak now of this line and then of that, what you are really after is to supplant the boundary delimited in the Sino-French accords by your unilateral "historical border line". Your intention was best expressed by one of your senior officials who said that "there were boundary conventions in the French period. But those conventions are out-dated and too elaborate and cannot be used as the basis for demarcating the boundary line".

In recent years, under the pretext of "restoring the *status quo ante* of the historical boundary line", you have created numerous incidents on the Sino-Vietnamese border in a systematic, planned and purposeful way constantly to nibble off and occupy Chinese territory. You made Vietnamese border inhabitants come over to reclaim land, build roads and plant trees on Chinese territory; you sent over armed personnel to patrol, set up posts, build fortifications, lay mines, put up barriers on Chinese territory or even intrude into Chinese villages to take census and issue coupons in an attempt to change the state of jurisdiction. In many areas, Vietnamese military and political personnel, under various pretexts, claimed a boundary line at will, destroyed the original boundary markers there and surreptitiously set up new ones, thus making territorial claims on the Chinese side. In the face of increasing Vietnamese intrusions and provocations, the Chinese side, setting store by the friendship between the Chinese and Vietnamese peoples and their over-all interests, always exercised restraint and forbearance. We repeatedly proposed prompt boundary negotiations between the two sides. In the meantime we enjoined our border troops and inhabitants to keep strictly within the border, use reason and persuasion with the intruding and provoking Vietnamese personnel instead of returning blow for blow and curse for curse and absolutely not to open fire and resort to force. Our people did not return fire even when armed Vietnamese personnel opened fire and caused casualties on our side. But the Vietnamese side regarded China's restraint and forbearance as a sign of weakness and intensified its armed provocations on the border. Especially after August 1978, when you suspended the boundary negotiations between the two countries, you immediately went all out to strengthen your anti-China military dispositions in the border areas and incessantly opened fire with guns and artillery, creating incidents

of bloodshed resulting in 300 casualties among our military and civilian personnel in a period of six months and thus provoked, at last, the armed border conflict.

Numerous indisputable facts prove that it is none other than the Vietnamese authorities themselves who have violated the principles affirmed in the letters exchanged between the two parties and have constantly upset the *status quo* on the border in an attempt to alter the boundary line fixed by the Sino-French boundary accords. The serious deterioration in the situation along the Sino-Vietnamese border is wholly the making of the Vietnamese authorities.

3. Why did the previous two rounds of negotiations fail to yield results?

In August 1974, negotiations were held between China and Viet Nam at the Vice-Minister for Foreign Affairs level on the division of the Beibu Gulf sea area. In October 1977, negotiations at the same level were again held between the two sides on the boundary question and the division of the Beibu Gulf sea area. No results were achieved at either round of negotiations, mainly because the Vietnamese side disregarded the historical facts, distorted the Sino-French boundary accords and tried to impose on the Chinese side a so-called "sea boundary line in the Beibu Gulf", which was a pure figment of its imagination.

In December 1973, a Vietnamese Vice Minister for Foreign Affairs clearly stated that "the Beibu Gulf sea area has not been divided between the two countries because Viet Nam has been at war all the time". But when the negotiations started in August 1974, the Vietnamese side suddenly asserted that in the Beibu Gulf "the boundary line was delimited long ago", alleging that the 1887 Sino-French Convention on the delimitation of the frontier between China and Tonkin made longitude 108°3'13"E the "sea boundary line" between the two countries in the Beibu Gulf. It asserted that for the last century all Governments of the two countries had "exercised sovereignty and jurisdiction according to that line and that the Beibu Gulf was a "historical gulf" belonging to China and Viet Nam. By making these assertions, the Vietnamese side aimed at taking possession of two thirds of the Beibu Gulf sea area for itself.

It is stipulated in the paragraph about Guangdong in the Chinese text of the 1887 Sino-French Convention that "as for the islands in the sea, those to the east of the southward red line drawn by the commissioners of the two countries, passing through the hill at the eastern tip of Tra-Co (Wanzhu in Chinese), which is to the south of Mong Cai and southwest of Zhushan), belong to China, and those to its west Jiutoushan Island (Co To Island in Vietnamese) and the other islands, belong to Annam". The French text of the Convention describes the red line as the meridian of Paris 105°43' of east longitude, which is Greenwich longitude 108°3'13"E. Clearly, this red line only indicates the ownership of the islands but is no "sea boundary line" between the two countries in the Beibu Gulf. Moreover, the term "Gulf of Tonkin" does not occur at all in the Convention, nor is the Gulf of Tonkin included in its entirety in the map attached to the Convention. Moreover, in the historical circumstances at the signing of the Convention, in the late nineteenth century, when the "doctrine of the freedom of the seas" was in vogue, it was inconceivable that China and France should regard such an expanse of the high seas as the Gulf of Tonkin as an island sea and divide it. The fantastic interpretation by the Vietnamese side of the Convention in disregard of its terms and the actualities of history is indeed a rare case in the history of international relations.

As for the assertion by the Vietnamese side that for nearly a hundred years the Governments of the two countries have always exercised their sovereignty and jurisdiction in accordance with the above-mentioned longitude, it is not at all based on facts. Everyone knows that the previous Governments in China and the French colonial authorities observed the 3-nautical-mile principle in regard to the territorial sea. The Government of the People's Republic of China declared a 12-nautical-mile territorial sea in September 1958. China has never exercised sovereignty over or jurisdiction in the Beibu Gulf sea area beyond its territorial sea. In September 1964, the Vietnamese Government also declared its territorial sea to be 12 nautical miles wide and published a map showing its territorial sea boundary in the Beibu Gulf. If, as the Vietnamese side claims, the vast sea area

in the Beibu Gulf west of 108°3'13"E was its inland sea long ago, why did it draw another territorial sea boundary within its own inland sea? The Vietnamese assertion is absurd from the viewpoint of international law and is illogical and self-contradictory. Has any ship had to ask for permission from the Vietnamese authorities for entry into the sea west of 108°3'13"E? The "sea boundary line", a brain-child of the Vietnamese authorities, has never existed either in historical agreements or in reality. As for the assertion that the Beibu Gulf is a historical gulf belonging to China and Viet Nam, it is really news to us. We have no knowledge at all about such a declaration by previous Governments of the two countries at any time. Vietnamese insistence on this unreasonable proposition prevented any results in the negotiations, which went on for three months in vain. The division of the Beibu Gulf sea area between the two countries is still an unresolved issue.

After 1975, the Chinese side proposed on many occasions to hold negotiations on the boundary question. But the Vietnamese side always found excuses to put them off until June 1977 when it reluctantly agreed as Vice-Premier Li Xiannian personally made the proposal in a meeting with Premier Pham Van Dong. It was agreed that the division of the Beibu Gulf sea area be included as a topic in the boundary negotiations.

Negotiations started at Beijing in October 1977. The Chinese delegation suggested that the boundary question should be the first item for discussion and put forward a proposal consisting of five principles for the settlement of the boundary question. The following are the main points:

(a) Since the Sino-Vietnamese boundary is a determined boundary, the two sides should base themselves on the Sino-French boundary accords in rechecking the alignment of the entire boundary and settling all boundary and territorial disputes;

(b) Areas under the jurisdiction of one side which lie beyond the boundary line should, in principle, be returned to the other side unconditionally;

(c) The two sides should settle through friendly consultations any differences they may have as to the alignment of the boundary line in certain sectors;

(d) The two sides should then conclude a Sino-Vietnamese boundary treaty to replace the Sino-French boundary accords, delimit the national boundary and erect the boundary markers anew.

The Vietnamese side did not show interest in the fair and reasonable Chinese proposals. It clung to the unreasonable view that the sea boundary in the Beibu Gulf "was delimited long ago", and linked the question of dividing the Beibu Gulf with the boundary question. Insisting that "a border line between Viet Nam and China on land and in the Beibu Gulf has been delimited" in the Sino-French boundary accords, it claimed that "this is the most basic principle for the settlement of all kinds of boundary questions between the two countries", since it was the "basis" for the entire negotiations, it must be discussed first. This was tantamount to raising a pre-condition which placed a great obstacle in the way of the negotiations. Although the Vietnamese side later agreed that the two sides should first discuss questions relating to the boundary, it played a new trick by submitting a "draft agreement on the national land border", insisting that the two Governments shelve their boundary disputes and first conclude an official boundary agreement. Obviously, the Vietnamese side harboured ulterior motives when it showed no interest in settling boundary disputes and easing the tension along the border while wanting first of all to conclude "a boundary agreement".

Desiring to facilitate the negotiations, the Chinese side gave full consideration to the Vietnamese views and, working on the basis of its original five-point proposal, presented for consultations with the Vietnamese side a comprehensive proposal listing nine principles for the settlement of the boundary question. The nine-point Chinese proposal provided in the main the following:

(a) The two sides should check the alignment of the entire boundary line between China and Viet Nam, basing themselves on the documents with attached maps relating to the delimitation of the boundary concluded by the then Chinese and French Governments and on the boundary markers erected according to those documents and maps;

(b) To facilitate the work of checking the alignment of the boundary, the two sides should exchange maps showing the boundary line between the two countries;

(c) During the process of checking the boundary alignment, if the two sides do not agree on the alignment of the boundary line in certain sectors, they should seek a fair and reasonable settlement through friendly consultations in a spirit of mutual understanding and mutual accommodation;

(d) After a joint check, the areas either side administers beyond the boundary should, in principle, be returned to the other side unconditionally; with due attention to the interests of the local inhabitants, readjustments on a fair and reasonable basis may be made in a small number of cases where both sides agree;

(e) Where the boundary follows rivers, it shall follow the central line of the main channel in the case of navigable rivers and the *thalweg* of the main channel in the case of unnavigable rivers; the ownership of the islands and sand-bars in these rivers shall be determined accordingly;

(f) After checking the alignment of the entire boundary and settling the boundary and territorial disputes, the two sides shall conclude a Sino-Vietnamese boundary treaty, set up a joint commission for delimiting the boundary on the ground and erecting boundary markers, sign a boundary protocol and draw up maps of the boundary;

(g) Pending the coming into force of the Sino-Vietnamese boundary treaty, the two sides shall respect the principles affirmed in the letters exchanged between the Central Committees of the Chinese and Vietnamese Parties in 1957-1958, maintain the *status quo* of the border and make no unilateral attempts in whatever form and on whatever pretext to change the extent of actual jurisdiction so as to maintain tranquillity along the border and the friendly and good-neighbourly relations between the two countries.

To our surprise, however, the Vietnamese side deliberately distorted this sincere and reasonable Chinese proposal, picked faults with it and levelled the groundless charge that it sought to "alter the historical boundary line". The negotiations lasted more than 10 months, yet in all that time the two sides failed even to reach agreement on the procedure for conducting negotiations on the boundary question.

The above facts clearly show that the responsibility for the failure of the previous two rounds of negotiations to yield results rests squarely with the Vietnamese side. Frankly speaking, the basic reason why there has not been a negotiated settlement of the Sino-Vietnamese boundary question is that the Vietnamese authorities want to use this question as a means internally to fan up nationalistic anti-China sentiments and divert the discontent of their people and externally to cover up their aggression in Kampuchea and their control over Laos in pursuit of regional hegemonism to suit the needs of the Soviet southward drive strategy. We cannot but point out that you are following a dangerous course.

4. China's eight-point proposal provides a fundamental solution for the disputes between China and Viet Nam.

To achieve their great goal of socialist modernization, the Chinese people have a long-lasting need for an international environment of peace and a peaceful and tranquil border. The Chinese Government has always pursued a foreign policy of peace, and wishes to live in amity with all countries, irrespective of size, on the basis of the five principles of peaceful co-existence. The Chinese Government wishes to seek a fair and reasonable solution to all outstanding issues with other countries through negotiation.

China and Viet Nam are linked by common mountains and rivers, and there is a long, traditional friendship between the two peoples. Though there are serious differences between them

on a number of issues and there did occur some unpleasant things, the disputes between them are not impossible to resolve. The eight-point proposal on the handling of the relations between China and Viet Nam, which the Chinese Government delegation put forward at the second plenary meeting, has laid a solid foundation for a fundamental solution of the disputes between the two countries and for a real improvement in their bilateral relations. Moreover, it provides guiding principles for a definitive solution of the boundary and territorial disputes between the two countries. A fair and reasonable solution of the boundary question can be achieved only by honouring the Sino-Vietnamese boundary delimited in the Sino-French boundary accords. Otherwise, there will be no common basis for a solution. Prior to the holding of negotiations on the boundary question by the two Governments, border disputes could have been avoided and armed conflict averted if the Vietnamese side had respected the principles affirmed in the letters exchanged between the Central Committees of the Chinese and Vietnamese Parties in 1957-1958, namely maintaining the *status quo* of the border and refraining from attempting forcibly to change the extent of actual jurisdiction. The Chinese proposal includes fundamental measures to eliminate tension and ensure peace and tranquillity along the border. The Vietnamese side professes to be most concerned about ensuring peace and stability in the border areas but in practice rejects the basic principle of "maintaining the *status quo* on the border". This fully shows that the Vietnamese side is aware of its untenable position and has ulterior motives. As to the division of the sea area in the Beibu Gulf, it is natural and indisputable that the two countries should define their respective economic zones and continental shelf in the Beibu Gulf in a fair and reasonable way, in accordance with relevant principles of present-day international law of the sea. As regards the Xisha and Nansha Islands, I have already cited many hard facts to show that the Vietnamese side had before 1974 explicitly recognized the Chinese Government's sovereignty over those two island groups. Our demand is that the Vietnamese side revert to its previous position of recognizing that fact and respect China's sovereignty over those two island groups and withdraw all its personnel from those islands in the Nansha group which it has occupied. In what sense can this demand be considered "unreasonable and arrogant"? It is the Vietnamese side that is unreasonable and when it shifts positions in a perfidious manner with a view to seizing and occupying Chinese islands and laying claim to Chinese territory. In a word, the Chinese eight-point proposal is directed at the root cause leading to the deterioration in Sino-Vietnamese relations and in the light of the facts of the disputes between the two countries. It is a fundamental solution to those disputes and sets forth basic principles for handling the relations between the two countries. It is reasonable and practicable. We still earnestly hope that the Vietnamese side will give it careful study and make a positive response so that there may be progress in our negotiations.

At the second and third plenary meetings, the Chinese Government delegation repeatedly proposed that the two sides reach a verbal agreement providing that all personnel captured in the armed conflict along the Sino-Vietnamese border shall, in principle, be repatriated as soon as possible and then turn the matter over to the Red Cross Societies of the two countries for concrete discussion and actual execution. The Vietnamese side, however, will not even agree to take up this question. Motivated by revolutionary humanitarianism, the Chinese Government is prepared at any time to release and repatriate all Vietnamese prisoners and demands the release and repatriation of all captured Chinese personnel by the Vietnamese side. Now, the Chinese side has decided unilaterally to release and repatriate the first group of captured Vietnamese armed personnel and hopes that the Vietnamese side will respond positively to this Chinese initiative.

Statement dated 28 November 1982 by the spokesman of the Ministry
of Foreign Affairs of the People's Republic of China

In its "Declaration on base line of Vietnam's territorial waters" issued on 12 November 1982, the Vietnamese Government groundlessly declared that the Boundary-Delimitation Convention signed between China and France in 1887 "had defined" the maritime boundary line in the Beibu Gulf, and even described China's Xisha Islands and Nansha Islands as Viet Nam's islands, announcing that base lines would be drawn for their territorial sea. This is a wilful distortion of the historical Sino-Vietnamese Boundary-Delimitation Convention and a gross violation of China's sovereignty and territorial integrity.

It must be pointed out that the Sino-Vietnamese boundary-Delimitation Convention signed between China and France in 1887 did not in any way delimit the maritime area in the Beibu Gulf. Therefore, no maritime boundary line has ever existed in the sea of the Beibu Gulf. On 26 December 1973, the Vietnamese Government formally stated to the Chinese Government that "owing to the fact that Viet Nam has been in a state of war, the maritime area of the Beibu Gulf has so far not been delimited between the two countries." This clearly indicated that originally, the Vietnamese Government also recognized the fact that China and Viet Nam had not delimited the Beibu Gulf.

The Government of the People's Republic of China hereby solemnly states that the so-called boundary line in the Beibu Gulf as asserted by the Vietnamese Government is illegal and null and void and reiterates that Xisha Islands and Nansha Islands are an inalienable part of China's sacred territory.

The Vietnamese Government's "Declaration on base line of Vietnam's territorial waters" has fully revealed the expansionist designs of the Vietnamese authorities to appropriate a vast sea area of the Beibu Gulf and to encroach upon China's territory. It is also a deliberate new step to further aggravate Sino-Vietnamese relations. The Vietnamese authorities must bear full responsibility for all the serious consequences that may arise therefrom.

Statement by New China News Agency (XINHUA)

The cooperation between Chinese and foreign companies in exploring oil and natural gas in the continental shelf of China's territorial sea is entirely a matter within Chinese sovereignty with which no countries have any right to interfere.

A recent statement by the Vietnamese authorities cannot block China's justifiable action in exploring resources in its territorial sea.

The statement by the Vietnam News Agency slanderously attacked Chinese and foreign companies' joint exploration and exploitation of petroleum in the Yingge Sea of the Beibu (Tonkin) Gulf as "violating Vietnamese sovereignty." It also said that those foreign companies cooperating with China should bear "all the consequences" arising from their actions. These brazen attacks and threats are based on the expansionist stand of the Vietnamese authorities.

In the "declaration on the base line of Vietnam's territorial waters" issued last November, the Vietnamese authorities not only laid claims to the Xisha and Nansha Islands which have always belonged to China, but also to a large portion of the Beibu Gulf sea area.

A spokesman of China's Foreign Ministry immediately made a solemn statement pointing out that "the so-called boundary line in the Beibu Gulf as asserted by the Vietnamese Government is illegal and null and void." In trying to impose its illegal and groundless territorial claims upon China, Hanoi is indulging in a wilful thinking. Should the Vietnamese authorities insist on invoking its illegal claims to obstruct China's legitimate action of exploring oil in its own territorial waters, they should bear the responsibility for the consequences arising therefrom.

A/38/97
S/15624
English

The Vietnamese authorities are obsessed by a wild ambition and their hands are stretching too far. They have not only occupied Kampuchea and controlled Laos by force, but also put their fingers into China's territorial waters and land. They are even coveting the territories of other southeast Asian countries. The Vietnamese authorities should understand that expansionists will surely eat their own bitter fruits.

Beijing, 18 February 1983

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Appendix IV

Dispute in the Gulf of Tonkin and Other Third States

1. Note de la France, 5 decembre 1983. Source: Office of the Special Representative of the Secretary-General for the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, New York, United Nations, 1987, at 153.
2. Statement by Thailand, 22 November 1985. Source: Office of the Special Representative of the Secretary-General for the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, New York, United Nations, 1987, at 147-148.
3. Note dated 5 December 1986 setting out the position of the Government of the Republic of Singapore on the Vietnamese claims concerning the so-called historical waters and the drawing of baselines. Source: Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989, at 84-85.
4. Note dated 17 June 1987 from the United States Mission to the United Nations referring to an accord entitled "Agreement on the historical waters of the Socialist Republic of Viet Nam and the People's Republic of Kampuchea", 7 July 1982. Source: Office for Ocean Affairs and the Law of the Sea, THE LAW OF THE SEA -- Current Developments in State Practice, No. II, New York, United Nations, 1989, at 86.

NOTE DE LA FRANCE
5 décembre 1983

[Original : français]

Le Représentant permanent de la France auprès des Nations Unies présente ses compliments au Secrétaire général de l'Organisation et a l'honneur de se référer à la déclaration du Gouvernement de la République socialiste du Viet Nam du 12 novembre 1982, concernant la ligne de base droite de la mer territoriale vietnamienne, distribuée comme document officiel de l'Assemblée générale sous la cote A/37/697.

Le Gouvernement français considère que le tracé de la ligne de base de la mer territoriale du Viet Nam, compris entre les points A1 et A7, est contraire aux règles bien établies du droit international en la matière, telles qu'elles sont reflétées à l'article 7 de la Convention des Nations Unies sur le droit de la mer; il lui est donc inopposable.

Par ailleurs, le Gouvernement français n'a pas connaissance de titres qui permettraient au Viet Nam de revendiquer comme eaux historiques la partie du Golfe de Bac Bo (golfe du Tonkin) qui relève de la juridiction du Viet Nam.

Le Représentant permanent de la France saisit cette occasion pour renouveler au Secrétaire général de l'Organisation des Nations Unies l'assurance de sa très haute considération.

Statement by Thailand*
22 November 1985

[Original: English]

Statement by the Ministry of Foreign Affairs of Thailand on the
Vietnamese claims concerning the so-called historical waters
and the drawing of baselines

The Ministry of Foreign Affairs of Thailand refers to the following transaction and statements:

- (1) The so-called "Agreement of 7 July 1982 between the Government of the Socialist Republic of Viet Nam and the Government of the People's Republic of Kampuchea on the historical waters of Viet Nam and Kampuchea", which was announced on 8 July 1982 through the Viet Nam News Agency in Hanoi;
- (2) The statement of 12 November 1982 by the Government of the Socialist Republic of Viet Nam on the territorial sea baseline of Viet Nam, which was circulated as an official document of the General Assembly (A/37/697, dated 6 December 1982);
- (3) The statement of 5 June 1984 by the Government of the Socialist Republic of Viet Nam on the airspace of Viet Nam, which was circulated as an official document of the General Assembly (A/39/309, dated 21 June 1984).

The Government of Thailand has carefully examined the claims thus asserted in the above-mentioned agreement and statements, and wishes to state its positions with respect thereto as follows:

Regarding the claims to the so-called "historical waters", which purport to appropriate and subject certain sea areas in the Gulf of Thailand and in the Gulf of Tonkin (Gulf of Bac Bo) to the régime of internal waters, the Government of Thailand is of the view that such claims cannot be justified on the basis of the applicable principles and rules of international law.

Regarding the statement defining the baselines for measuring the breadth of the territorial sea and other maritime zones of Viet Nam, the Government of Thailand considers that the drawing of the baselines of Viet Nam's territorial sea between points 0 and A7 is at variance with the well-established rules of international law, as codified in article 4 of the Convention on the Territorial Sea and Contiguous Zone of 29 April 1958, and confirmed once again in article 7 of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982, to which Viet Nam is a signatory.

* Previously circulated as document A/40/1033 of 12 December 1985.

In so far as the Vietnamese statement on the airspace of Viet Nam seeks to assert Vietnamese sovereignty over the so-called "historical waters" both in the Gulf of Thailand and in the Gulf of Tonkin, as well as over the waters enclosed within the said baselines, the Government of Thailand, consistent with its positions as stated above, feels bound to reject such claim as being contrary to international law.

Accordingly, the Government of Thailand reserves all its rights under international law in relation to the sea areas in question and the airspace above them.

Incidentally, in regard to the so-called agreement on the historical waters of Viet Nam and Kampuchea, the Government of Thailand wishes to reiterate that the so-called Government of the People's Republic of Kampuchea does not represent, and cannot be considered to represent, Kampuchea in any manner whatsoever, as only the Coalition Government of Democratic Kampuchea under the presidency of Samdech Norodom Sihanouk, which is the sole legitimate Government of Kampuchea overwhelmingly recognized in the United Nations, can represent Kampuchea. Therefore, any agreement or declaration which purports to be concluded or made by the so-called Government of the People's Republic of Kampuchea is utterly devoid of any legal effect.

Note dated 5 December 1986 setting out the position of the Government of the Republic of Singapore on the Vietnamese claims concerning the so-called historical waters and the drawing of baselines 1/

[Original: English]

The Permanent Mission of the Republic of Singapore to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the following documents:

(a) The so-called "Agreement on the historical waters of the Socialist Republic of Viet Nam and the People's Republic of Kampuchea", signed on 7 July 1982;

(b) The statement of 12 November 1982 by the Government of the Socialist Republic of Viet Nam on the territorial sea baseline of Viet Nam, which was circulated as an official document of the General Assembly (A/37/697, annex); 2/

(c) The statement dated 5 June 1984 by the Government of the Socialist Republic of Viet Nam on its airspace, which was circulated as an official document of the General Assembly (A/39/309, annex).

The Government of the Republic of Singapore is of the view that the baselines claimed by the Government of the Socialist Republic of Viet Nam in its statement of 12 November 1982 do not conform to the well-established rules of international law on the matter, as reflected in article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958 and article 7 of the 1982 United Nations Convention on the Law of the Sea, of which Viet Nam is a signatory.

In so far as the statement of 5 June 1984 seeks to assert Vietnamese sovereignty over the airspace of the so-called "historical waters" in the Gulf of Thailand and over other waters on the basis of the baselines claimed in the statement of 12 November 1982, the Government of the Republic of Singapore, consistent with its position on the baselines as stated above, feels compelled to reject such claim to airspace sovereignty as being contrary to international law.

The Government of the Republic of Singapore therefore protests the claims made by the Government of the Socialist Republic of Viet Nam in the statements of 12 November 1982 and 5 June 1984 and reserves its rights and those of its nationals in relation to the sea areas in question and the airspace above them.

1/ Previously circulated as General Assembly document A/41/967 of 15 December 1986.

2/ Reproduced in Current Developments in State Practice (United Nations publication, Sales No. E.87.V.3), p. 143.

Furthermore, in regard to the "Agreement on the historical waters of the Socialist Republic of Viet Nam and the People's Republic of Kampuchea", the Government of the Republic of Singapore wishes to state that the so-called Government of the People's Republic of Kampuchea does not represent, and cannot be considered to represent, Kampuchea in any manner whatsoever, as only the Coalition Government of Democratic Kampuchea, which is the sole legitimate Government of Kampuchea, overwhelmingly recognized as such in the United Nations, can represent Kampuchea. Therefore, any agreement or declaration that purports to be concluded or made by the so-called Government of the People's Republic of Kampuchea is devoid of any legal effect.

Note dated 17 June 1987 from the United States Mission to the United Nations referring to an accord entitled "Agreement on the historical waters of the Socialist Republic of Viet Nam and the People's Republic of Kampuchea", 7 July 1982

The Permanent Mission of the United States to the United Nations sent to the Secretary-General of the United Nations a note dated 17 June 1987 which reads as follows:

"The United States refers to an accord entitled 'Agreement on the historical waters of the Socialist Republic of Viet Nam and the People's Republic of Kampuchea', signed July 7, 1982.

"Under the terms of this agreement the parties purportedly claim as historic certain waters in the Gulf of Thailand extending from the mainland to Tho Chu and Poulo Wai Islands.

"As is well known under long-standing standards of customary international law and State practice, historic waters are recognized as valid only if the following prerequisites are satisfied: (A) the State asserting claims thereto has done so openly and notoriously; (B) the State has effectively exercised its authority over a long and continuous period; and (C) other States have acquiesced therein.

"In the case of the historic waters claim made by the parties to the above agreement, the claim was first made internationally no earlier than July 7, 1982, less than five years ago, notwithstanding the assertion in the agreement that the waters 'have for a very long time belonged to Viet Nam and Kampuchea due to their special geographical conditions and their important significance towards each country's national defence and economy'.

"The brief period of time since the claim's promulgation is insufficient to meet the second criterion for establishing a claim to historic waters, and there is no evidence of effective exercise of authority over the claimed waters by either country before or after the date of the agreement. Moreover, without commenting on the substantive merits or lack thereof attaching to the 'special geographic conditions' of the waters in question and their 'important significance towards each country's defence and economy', such considerations do not fulfil any of the stated customary international legal prerequisites of a valid claim to historic waters.

"Finally, the United States has not acquiesced in this claim, nor can the community of States be said to have done so. Given the nature of the claim first promulgated in 1982, such a brief period of time would not permit sufficient acquiescence to mature.

"Therefore, the United States views the historic claim to the waters in question as without foundation and reserves its rights and those of its nationals in this regard."

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