

# Maritime Boundary Delimitation in the Gulf of Tonkin

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*The issue of the Gulf of Tonkin is one of the unresolved boundary issues between China and Vietnam. While China and Vietnam took different positions on and viewpoints regarding the principles and standards for the maritime delimitation of the Gulf of Tonkin, they agreed to seek an equitable solution. This article attempts to explore and assess the legal issues relating to the boundary delimitation of the Gulf of Tonkin within the context of the United Nations Convention on the Law of the Sea.*

**Keywords** Bach Long Vi Island, China, Gulf of Tonkin, maritime boundary delimitation, Vietnam

## Background

The Gulf of Tonkin (Beibu Gulf in Chinese and Bac Bo Gulf in Vietnamese) is a shared water area between China and Vietnam. It has an area of 44,238 square kilometers (about 24,000 square nautical miles). The gulf has an average depth of 38 meters and the maximum depth is no more than 90 meters. The topography of the seabed is smooth.<sup>1</sup> Geographically, it is categorized as a semi-enclosed gulf because it is embraced by the northern part of Vietnam, China's Guangxi Province, the Leizhou Peninsula, and the Hainan Island. The gulf measures 170 nautical miles at its widest and has two outlets: the Qiongzhou Strait between the Hainan Island and the Leizhou Peninsula, approximately 19 nautical miles in width; and the major passage to the south, 125 nautical miles wide at its narrowest point.<sup>2</sup> Although peacefully used by the people of the two countries for centuries, the Gulf itself has brought up a number of issues in the political, legal, and economic spheres. The occurrences of disputes are not unusual for the two nations in the past and at present. After the 1982 adoption of the United Nations Convention on the Law of the Sea (1982 Convention),<sup>3</sup> some of the disputes have become more intensive and complicated because either of the two countries has the right under the Convention and customary law to extend its jurisdictional waters, leading to overlapping claims in the Gulf of Tonkin.

Under the present political and economic circumstances, the control of the sea areas is mainly for the control of the natural resources, particularly after the establishment of

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the exclusive economic zone (EEZ) of up to 200 nautical miles under the 1982 Convention. Natural resources are rich in the Gulf of Tonkin. The fisheries in the Gulf of Tonkin comprises one of the main fishing grounds in China, with the size of 128,000 square kilometers and with a multitude of fish stocks and other aquatic species. It is also one of the principal fishing grounds for Vietnam. There are also plentiful mineral resources, especially oil and gas. The thick Leizhou sedimentary basin that underlies the Gulf is an obvious target for oil exploration.<sup>4</sup> According to the prediction of the China Marine Petroleum Company, the Gulf area is one of the biggest oil and gas concentrations in the world, having an oil deposit of about 2.29 billion tons and natural gas deposits of about 1,444 billion cubic meters.<sup>5</sup> It is reported that the South China Sea Offshore Oil Company pumped 14.2 million tons of crude oil in 1997, up nearly 10 percent to rank first among China's offshore oil producers.<sup>6</sup> In addition, the Gulf is an important sea route of communication for Vietnam and China.<sup>7</sup> These economic factors are influential for the delimitation of the Sino-Vietnamese maritime boundary in the Gulf of Tonkin.

There are established norms governing international relations in general and the Sino-Vietnamese bilateral relations in particular. Although the boundary issue on the Gulf of Tonkin is multifaceted, the focus of the present article is confined to the field of international law, particularly the law of the sea and international norms of territorial sovereignty. In addition, the respective domestic laws of either China or Vietnam which have impact upon the Gulf of Tonkin will be examined. The Gulf of Tonkin boundary is one of three main unresolved boundary issues between China and Vietnam. For this reason, the settlement of the land boundary between China and Vietnam is a relevant issue. Furthermore, viewing it broadly, the issue of the Gulf of Tonkin constitutes a part of the whole South China Sea question.

The Sino-Vietnamese border was basically demarcated by the Sino-French Treaty of 1887 as a result of the Sino-French War of 1884–1885 and was finalized in 1895.<sup>8</sup> The relevant version of the Sino-French Treaty contains the following provision: “The islands which are east of the Paris meridian of 105°43' east [108°03' east of Greenwich], that is to say the north-south line passing through the eastern point of Tch'a Kou or Quan-Chan [Tra Co], which forms the boundary, are also allocated to China. The island of Gotho [Kao Tao] and other islands west of this meridian belong to Annam.”<sup>9</sup> Since the arrangements made under the treaty, the border situation has been relatively calm, and there existed a traditional customary line of jurisdiction along the border areas of the two countries. However, the boundary, including the area of the Gulf of Tonkin, has never been accurately demarcated. The unclear situation of boundaries has caused problems when the two countries have had tensions or conflicts. Thus, for the sake of permanent peace and stability, the two sides have reached a consensus that a clear delimitation of the boundaries between the two is necessary.

The negotiation on the delimitation of the maritime boundary in the Gulf of Tonkin was actually initiated by Vietnam. In late December 1973, Vietnam informed China of its intention to prospect for oil in the Gulf and proposed to launch official negotiations between the two sides to delineate the maritime boundary in the Gulf.<sup>10</sup> It should be pointed out that the Gulf of Tonkin was the first proposed topic among the three major border issues between China and Vietnam, which clearly signified its central importance in the whole territorial dispute of the two countries.<sup>11</sup> The relevant negotiations first began in Beijing in August 1974, but they brought no result broke down even prior to the Sino-Vietnamese armed conflict in 1979.

The two sides did not resume negotiations until 1993 when they attempted to re-

solve the issue again. As of May 1998, ten rounds of talks had been held but no substantial progress had been made. It is reported that the tenth round of negotiations on the delimitation of the Gulf of Tonkin, held between March 24 and 30, 1998, like all the previous talks, ended without any concrete results.<sup>12</sup> The only significant progress was made in 1993, when the general agreement on the basic principles for settling the disputes relating to the land border and to delimitation of the Gulf of Tonkin was adopted by the two parties. The dispute settlement is still pending (see Figure 1).

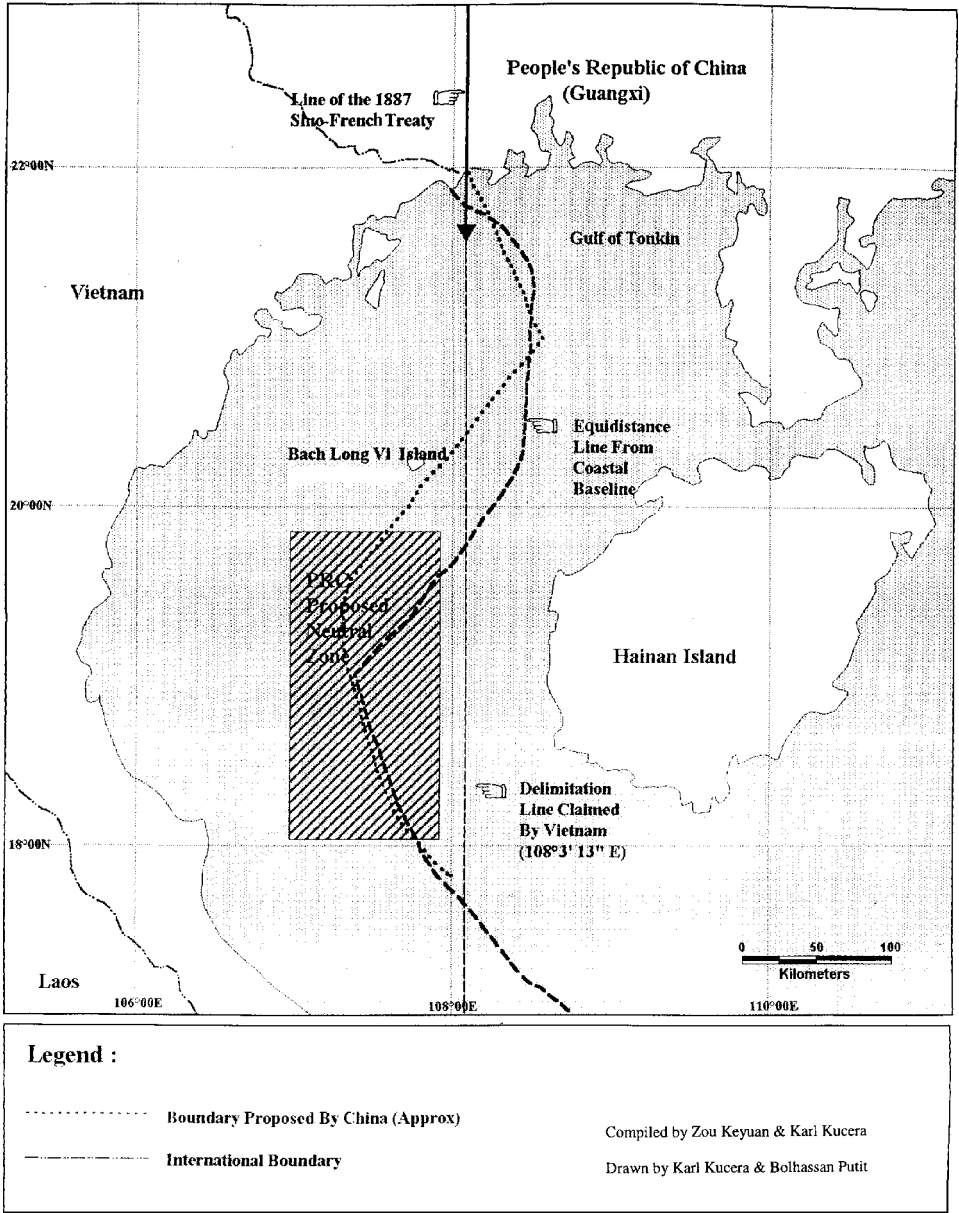


Figure 1. Maritime boundary in the Gulf of Tonkin.

## Basic Issues

The critical differences between the two sides rest with their disagreement over the standards for delimiting the sea areas of the Gulf of Tonkin. Both sides put forward various arguments to support their respective negotiation positions.

At the beginning of the negotiations, Vietnam took the view that the Gulf of Tonkin had already been divided by the 1887 Sino-French Treaty and that the line of 108°3'13" east longitude was the maritime boundary line in the Gulf. It further proposed to treat the whole Gulf as historic waters belonging to Vietnam and China. This view was rejected by the Chinese side. According to the Chinese, the line in the said treaty was not a maritime boundary line. Neither China nor Vietnam had ever exercised sovereignty over or jurisdiction in the gulf area beyond their territorial seas.<sup>13</sup> On January 18, 1974, China, while agreeing to hold negotiations with Vietnam, proposed that a rectangular area in the middle of the Gulf, bounded by the 18° and 20° parallels and the 107° and 108° meridians, be kept free from any oil exploration until the two parties reached an agreement on the delimitation of the Gulf. China further put forward that "[e]ach side shall respect the other side's sovereignty over its 12 nautical miles [sic] territorial sea, and the two sides shall demarcate their respective economic zones and continental shelves in the Beibu Gulf and other sea area [sic] in a fair and reasonable way in accordance with the relevant principles of present-day international law of the sea."<sup>14</sup>

The above differences indicate that there are several intermingled legal issues to be resolved, including, *inter alia*, (1) whether the maritime boundary in the Gulf of Tonkin was already decided under the 1887 Treaty, (2) if not, whether the waters in the Gulf of Tonkin are historic waters, and (3) if not, how to delimit the respective jurisdictional areas for China and Vietnam.

The 1887 Treaty and subsequent documents were made in both Chinese and French. However, there are different expressions in the two official texts. To try to make a clearer explanation, Pao-min Chang offered two English translations, one from the French text and the other from the Chinese text of the 1887 Sino-French Treaty. The translated Chinese version reads as follows:

As far as the islands in the sea are concerned, the red line drawn by the officials of the two countries responsible for delineating the boundary shall be extended southward from the eastern hill-top of Chagushe [or Wangzhu in Chinese] and constitutes the dividing line. The islands lying east of this line shall belong to China. The islands of Jiutousan (Gotho in Vietnamese) and other small islands west of this line shall belong to Vietnam.<sup>15</sup>

The translation from the French version is:

The islands east of the meridian 105°43' east of the Paris meridian (i.e. the meridian 108°03'08" east of the Greenwich meridian), that is, east of the north-south line passing through the eastern tip of the Tch'a-kou or Ouan-chan (Tra-co) and forming the boundary, are all assigned to China. The Gotho islands and other islands lying west of that meridian belong to Annam.<sup>16</sup>

Due to the different texts of the Treaty, different interpretations may occur. There are some general rules in international law to govern the interpretation of a treaty. According to the law of treaties, if there is a provision in the treaty which gives the priority to

one text, then this text should prevail once different interpretations occur from different texts.<sup>17</sup> There was no such provision in the Sino-French Treaty.<sup>18</sup> Therefore, the two versions are equally authentic. Under these circumstances, the interpretation of a treaty should be made according to the law of treaties by considering any agreement relating to the treaty and any instrument in connection with the conclusion of the treaty in addition to the text, including its preamble and annexes. Furthermore, supplementary means of interpretation may also be used, such as the preparatory work of the treaty and the circumstances of its conclusion in order to try to find the same meaning of the different expressions in each authentic text.<sup>19</sup> Thus rationality and good faith in terms of treaty interpretation are very important, and sometimes critical.

Upon careful examination of the texts of the Treaty, it is discovered that the meaning of the above Chinese version indicates that the red line drawn on the attached map was a line to divide the islands in the Gulf of Tonkin rather than a line of maritime boundary. The line, which ended at about 21°23' north latitude on the map, involved only the land and coastal islands of the two sides. Such a line was simply a form of geographical shorthand to avoid the need to name all the islands, and such a technique was used widely at that time in state practice.<sup>20</sup> Even from the French version, it is hardly asserted that the wording "forming the boundary" be a line of maritime boundary. It is actually a line equivalent to the red line mentioned in the Chinese version.<sup>21</sup> As is revealed in history, the purpose of concluding this treaty was to demarcate the boundary between China and Vietnam according to the Sino-French Treaty of June 9, 1885.<sup>22</sup> There was no mention of the Gulf of Tonkin and only part of the Gulf close to the land was shown on the attached map. Thus the representatives from both parties had no authorization and/or intention to delimit the maritime boundary in the Gulf of Tonkin.<sup>23</sup> Moreover, at the time when the freedom of the seas prevailed, it was beyond imagination that the two countries could divide between themselves a vast gulf like the Gulf of Tonkin into two respective jurisdictional waters. The prevailing limit of the territorial sea for a coastal state at that time was out to three nautical miles.<sup>24</sup> It is impossible that China and Vietnam could have endorsed the modern concepts of the law of the sea to delimit the Gulf of Tonkin. Clearly, therefore, the 1887 Treaty did not divide the Sino-Vietnamese maritime boundary in the Gulf of Tonkin.

Additionally, the Vietnamese argument that the maritime boundary was decided by the 1887 Treaty was impractical in theory. As correctly pointed out by Prescott, a renowned Australian specialist in maritime boundary delimitation, Vietnam would face four serious difficulties for sustaining its arguments. First, the meridian in the Treaty has no termini. Second, if the meridian was the maritime boundary it would mean that Vietnam was not entitled to any territorial waters off the eastern tip of Tra Co. Third, if this meridian was meant to be a maritime boundary, it was so far out of character with the prevailing concepts of maritime sovereignty of the period that it would have been given special mention in the text. Fourth, there is nothing in the treaty to distinguish the use of this meridian from the use of straight lines by other colonial powers in other treaties to separate island groups.<sup>25</sup>

Perhaps the Vietnamese had realized the obstacles to their insistence on the meridian. In its own practice, Vietnam rejected a similar line, called the "Brévie Line," drawn in 1939 in the Gulf of Thailand as a line that could divide the areas of the seabed between Cambodia and Vietnam.<sup>26</sup> Although there is no indication that Vietnam has abandoned its former position, the fact that Vietnam agreed to delimit the Gulf clearly indicates that the delimitation issue had not been resolved under the 1887 Sino-French Treaty. In fact, as early as December 1973, the Vietnamese vice foreign minister ex-

pressed the view that the Bac Bo Gulf had not been delimited because of the war in Vietnam.<sup>27</sup>

However, Vietnam should not be blamed for invoking the meridian line to defend its interest in the Gulf of Tonkin. It is a political act. If its argument were accepted by China, then Vietnam could obtain two-thirds of the water area in the Gulf after delimitation. The question is whether its argument is tenable in practice and in theory. Otherwise it could easily be defeated. The meridian line mentioned in the 1887 Treaty was also once invoked by the Chinese side. As early as 1930s, when the French authority in Vietnam occupied some islands in the South China Sea, the then Chinese Government argued that the meridian line in the 1887 Treaty showed that Vietnam had no rights to the islands east of this line.<sup>28</sup> It is therefore understandable that Vietnam used the meridian line in the Treaty to support its own claim. The line might play a role in the delimitation of the Gulf of Tonkin as one reference of indirect evidence, which could favor the Vietnamese side. In history, the line was used several times for the convenience of exercising some jurisdictional functions for the two countries, such as criminal jurisdiction after 1887 and possession of specimens from scientific investigation in the Gulf in 1961.<sup>29</sup> These historical encounters have already been invoked by the Vietnamese side to justify its position, but the Chinese side has different interpretations.<sup>30</sup>

This is not to say that the line mentioned in the 1887 Sino-French Treaty could not become a line of maritime boundary line provided that both China and Vietnam have intended to use it as such. For example, the line drawn under the 1867 U.S.–Russia convention on the cession of Alaska was originally a line to divide the land territories of the two countries.<sup>31</sup> But later, in 1990, the two sides considered the scope of its application and agreed that that line, as defined in the 1867 treaty, was the maritime boundary between the two countries, with some minor adjustments.<sup>32</sup> In the case of the Gulf of Tonkin, the problem lies in how Vietnam could persuade China to accept the Vietnamese proposal to jointly recognize the line as a line of maritime boundary.

### **Gulf of Tonkin as Historic Waters?**

Whether the Gulf of Tonkin is an area of historic waters is another issue brought up by the Vietnamese arguments. Generally speaking, a bay or gulf can become historic waters of a coastal state under certain conditions in international law. Though not clearly defined in international law, historic waters usually refer to “the waters over which the coastal State, contrary to the generally applicable rule in international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereign rights with the acquiescence of the community of States.”<sup>33</sup> There are three conditions to be fulfilled to sustain an historic waters claim: (1) the exercise of the authority over the area; (2) the continuity over time of this exercise of authority; and (3) the acquiescence of foreign states to the claim.<sup>34</sup> Thus, if a gulf meets the conditions set forth in international law, the coastal state has a right to claim it as historic waters. Usually, in the late 19th century and early 20th century, since the width of the territorial sea was 3 nautical miles, a bay could be enclosed as historic waters when its entrance was no more than 6 nautical miles. However, in some circumstances, the limit could be extended to more than 6 miles by continued and well-established usage.<sup>35</sup> The closing line of the Gulf of Tonkin is about 150 nautical miles, far exceeding the width limit at that time. It was impossible for France, Vietnam's then-protector, to declare the historic status of the Gulf. In fact there was no such declaration even when France regarded its other bays as its historic waters, such as the Bay of Cancale with a breadth of 17 nautical miles at the entrance.<sup>36</sup>

Historic factors are of course critical in the claim of historic waters. To declare a certain bay or gulf as historic waters is the first step to consolidate a claim by a coastal state. Then the state should continuously exercise its authority over the claimed area, preventing third parties from encroaching on its claim. Vietnam declared the Gulf of Tonkin as historic waters as recently as 1982 in its Statement on the Territorial Sea Baseline of Vietnam, claiming that the part of the Gulf appertaining to Vietnam constituted historic waters and should be subjected to the juridical regime of internal waters of Vietnam.<sup>37</sup> It may be difficult for Vietnam to maintain its claim without proof of historic continuity of its authority in the Gulf of Tonkin.

The general standards relating to historic waters are usually applicable for a bay or gulf owned by a single state. It is difficult for gulfs and bays claimed by more than one country to be recognized as historic waters. The legal doctrine in this respect is rather passive. Oppenheim states that “[a]s a rule, all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial. They are parts of open sea, the marginal belt inside the gulfs and bays excepted.”<sup>38</sup> Blum also shares the same view and points out that historic bays lose that character when they become multinational.<sup>39</sup>

However, a few exceptions exist in state practice. The best known example is the Gulf of Fonseca, situated in Central America. Its historic character was affirmed by the Central American Court of Justice in 1916.<sup>40</sup> Spain had possessed the Gulf of Fonseca from its discovery in 1522 until 1821, and this exclusive possession continued throughout the period of the existence of the successor state, the Federal Republic of Central America. In the beginning of 1839 it was vested in three successor states of the Federal Republic: Nicaragua, Honduras, and El Salvador. The historic status of this gulf remained unchanged as the territory passed to the successor states.<sup>41</sup> Its historic status was reaffirmed by the International Court of Justice in 1992.<sup>42</sup> This case opens up the possibility that if territorial changes occurred along the coast of an existing historic gulf, which was formerly enclosed by a single state, then the change would not affect its status as an historic gulf. The case has some relevance to the Gulf of Tonkin in that Vietnam was part of China for more than a thousand years, until 939.<sup>43</sup> If evidence could be found that, before the separation, the Gulf of Tonkin had already become an historic gulf, then Vietnam, as a successor state, could reasonably assert its historic rights to the gulf. In general, the burden of proof of title to historic waters rests on the claiming state. If the state cannot prove its claim to the satisfaction of the necessary requirements in international law, the claim to the title should be disallowed.

A relevant example from China is Bohai Bay. China declared Bohai Bay as its historic bay in its Territorial Sea Declaration in 1958, which provides that Bohai Bay constitutes part of the Chinese inland waters.<sup>44</sup> China justified its claim by saying that Bohai Bay was completely inside the straight baseline of China's territorial sea; the breadth of the largest entrance along the closing line of the bay was 22.5 nautical miles,<sup>45</sup> less than 24 nautical miles; and for thousands of years it has been constantly under the actual jurisdiction of China.<sup>46</sup> Compared with Bohai Bay, the Gulf of Tonkin seems geographically unlucky, which added to other problems, has prevented it from being an historic gulf. Both China and Vietnam use straight baselines to measure their respective territorial seas. However, the Gulf cannot be enclosed within their baselines. The entrance is much wider than that of Bohai Bay.

The most perplexing problem for Vietnam regarding its argument on historic waters in the Gulf of Tonkin perhaps lies on the fact that China, the only other country with rights there, has refused to recognize such historic status for the Gulf. It should be

absurd and illogical if half of the waters in the Gulf were historic and the other half were not. Thus the Gulf of Tonkin cannot be regarded as historic waters as Vietnam has claimed. If Vietnam insists on its historic waters claim based upon the 1887 line, there will be no hope for a solution of the boundary delimitation. It is clear that the waters beyond the territorial seas of the two countries in the Gulf are within the definition of EEZ and the continental shelf in the 1982 Convention.<sup>47</sup>

The Chinese practice in terms of historic waters suggests that China might not oppose the view that the Gulf of Tonkin is an historic gulf. China claimed Bohai Bay as its historic waters and also supported the Russian claim to Peter the Great Bay as historic waters.<sup>48</sup> What China is against is the Vietnamese position that the historic bay claim is based upon the line in the 1887 treaty. There should be no reason why China would not agree if the Gulf could be divided half-and-half between the two countries. If China could agree with Vietnam, then such agreement could reinforce the status of the Gulf as historic waters. As it was expressed by the Office of the U.S. Department of State, “[t]he Vietnamese claim to historic waters is questionable because China, which also borders the Gulf of Tonkin, does not claim the gulf as historic waters and disputes the Vietnamese claim to the meridional boundary within the Gulf.”<sup>49</sup>

The concept of juridical bay may also apply to the Gulf of Tonkin because this concept is closely related to the concept of historic waters, particularly of historic bays. The concept of juridical bay is enshrined in the 1982 Convention, which defines a juridical bay as a bay that

is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.<sup>50</sup>

In addition, such a bay should belong to a single state. It is obvious from the above stipulations that the conditions for a juridical bay are stricter than those for an historic bay. Accordingly, the Gulf of Tonkin is not a juridical bay either, because it cannot meet the conditions set forth in the 1982 Convention. First, it is bordered not by a single state, but by two states. Second, the closing baseline is much wider than the required maximum of 24 nautical miles. Finally, it is more difficult for a bay or gulf that cannot be regarded as an historic bay to meet the requirements for a juridical bay.

### **Considerations for Boundary Delimitation**

As far as maritime boundary delimitation is concerned, there are a number of established rules in international law that could become the basis for the resolution of the Gulf of Tonkin issue. Since both China and Vietnam have ratified the 1982 Convention, this treaty can be a basic guideline to govern the delimitation of the Gulf. According to Articles 74 and 83 of the Convention, delimitation of the EEZ and the continental shelf between states with opposite or adjacent coasts should 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,<sup>51</sup> in order to achieve an equitable solution. These provisions, however, are general and indeterminate and their implementation lies to a large extent upon state practice and international judicial decisions. As for the delimitation of territorial seas, the equidistant line is normally adopted in state practice in accordance with the 1982 Convention.<sup>52</sup>



The principle of equidistance usually provides an equitable delimitation when two countries concerned face each other, like the case of the Gulf of Tonkin in general. This principle has been regarded as a rule in international customary law.<sup>53</sup> A median line is a line “every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured.”<sup>54</sup> To avoid possible inequitable results from using such a method, various factors should be considered at the same time, including navigational, historical, geographical, resource locations, and other pertinent factors. The equidistance principle does not apply when there are “special circumstances,” particularly when the delimitation is affected on the basis of “historic title.”<sup>55</sup> Since the Gulf of Tonkin cannot be regarded as historic waters, there should be no problem for such a principle to apply, subject, of course, to the agreement of the two parties concerned.

In state practice, the equidistant line is frequently used for maritime boundary delimitation. The relevant examples comparable to the Gulf of Tonkin include: the Iran–Saudi Arabia maritime boundary in the Arabian/Persian Gulf; the Canada–Greenland (Denmark) maritime boundary in the Baffin Bay; and the Finland–Sweden maritime boundary in the Gulf of Bothnia.<sup>56</sup> Thus the equidistance principle has been confirmed in recent state practice, which has to some extent denied a previous scholarly approach that equidistance was no longer a governing principle of international law,<sup>57</sup> though it is not a compulsory principle. Furthermore, the pronouncements that the equidistant rule found in the 1958 Convention on the Continental Shelf<sup>58</sup> had not emerged as customary international law, made by the International Court of Justice in the *North Sea Continental Shelf* cases in 1969,<sup>59</sup> has also been greatly eroded by its subsequent judgments on the maritime boundary delimitation,<sup>60</sup> the detailed analysis of which is beyond the scope of the present article. It is recommended that this principle be applied as a basis for the delimitation of the Gulf of Tonkin while considering any other particular factors existing in history and in law so as to make some adjustments if necessary.<sup>61</sup> It is recalled that in the *Jan Mayen* case, the International Court of Justice used the equidistant line at first as a provisional line, then, based upon that line, the Court decided the final line for the maritime boundary between Greenland (Denmark) and Norway.<sup>62</sup>

As is demonstrated in the maritime boundary literature, the use of an equidistant line is much more frequent than that of all the other methods of maritime boundary delimitation. It is rightly predicted that the judicial organs as well as coastal states will make further use of the equidistant line in appropriate cases as the boundary line or as one basis for analyzing the maritime boundary situation.<sup>63</sup>

The maritime boundary delimitation in the Gulf of Tonkin is concerned with not only with the delimitation of both EEZs and the continental shelves, but also with the delimitation of the territorial seas. The geographical character in the Gulf suggests that the delimitation either be opposite (*vis à vis* Hainan Island) or be adjacent (seaward of the Sino-Vietnamese land border). For the delimitation of the three different sea zones, the question arises as to whether there should be a single line for all of them or different lines for each different zone. It is also relevant to the question as to whether the equidistance principle should apply. The equidistance principle has become an established rule for the delimitation of the territorial seas according to the 1982 Convention.<sup>64</sup> For the delimitation of EEZs, there are few obstacles to prevent the application of the equidistance principle. The problem lies with the delimitation of the continental shelves, because different standards exist in this respect.

According to some analysts, Vietnam asserted an approach of natural prolongation to claim its continental shelf in the Gulf of Tonkin. If its assertion could be established,

then it would offset the equidistance principle. For China, the approach of natural prolongation was also invoked in the East China Sea against the claims of Japan. Therefore, it is argued that China's assertion to the East China Sea continental shelf would put itself in a disadvantageous position in the case of the Gulf of Tonkin because the natural prolongation approach favors the Vietnamese side.<sup>65</sup> Nevertheless, this view may not be correct since geographically China and Vietnam share the same continental shelf in the Gulf so that the natural prolongation approach does not apply.<sup>66</sup> Under these circumstances, the boundary line for the EEZ and the continental shelf should be a single line rather than two different lines. A single maritime boundary is convenient and practical.<sup>67</sup> It is expected that China and Vietnam will adopt a single line to define their respective sea areas with different legal statuses in the Gulf of Tonkin.

The possibility of joint development has also been considered by some writers. It seems to them that the rectangular zone in the middle of the Gulf of Tonkin should become a zone of joint development between China and Vietnam.<sup>68</sup> Joint development in the maritime boundary delimitation practice is common, usually as an interim measure. There are a number of examples in East Asia, such as the Japanese–Korean Joint Development Zone in the East China Sea<sup>69</sup> and the Malaysian–Thailand Joint Development Zone in the Gulf of Thailand.<sup>70</sup> There are two types of joint development arrangements: One is pending delimitation, and the other is after-boundary delimitation. The advantages of joint development are as follows: to facilitate the settlement of boundary disputes; to ensure the equitable distribution of the shared resources; and to avoid potential conflict that may escalate from a territorial dispute. On the other hand, the concept of joint development has its limitations as well, such as its temporary nature when boundary delimitation is pending, and the fact that joint development is usually confined to mineral resources. Recently China put forward a proposal to shelve the sovereignty issue on the Spratly Islands and to develop the resources there jointly with other interested countries. The 1998 Chinese White Paper on Marine Development reaffirmed this policy.<sup>71</sup> Vietnam has made an arrangement of between joint development with Malaysia.<sup>72</sup> Even as early as 1980, despite the poor relationship the two countries, Nguyen Co Thach, the then–Vietnamese Foreign Minister, proposed that Vietnam and China undertake a joint development program in the Gulf.<sup>73</sup> Thus the attitudes of the two sides are positive towards joint development. It would still be possible for China and Vietnam to consider some kind of joint development in the Gulf of Tonkin if they could not decide the boundary delimitation, whether as a whole or in part.<sup>74</sup>

Any joint development arrangement in the Gulf of Tonkin would be expected not only to address oil and gas exploitation but also, perhaps more importantly, the management of fish stocks. Even without an arrangement for oil and gas, a joint management of fisheries after delimitation would be necessary. In November 1997, China and Japan signed a new agreement on fisheries.<sup>75</sup> According to this agreement, a joint fishery zone with provisional measures has been established in the East China Sea.<sup>76</sup>

Since the main fishing ground is located on the Vietnamese side from the middle line in the Gulf of Tonkin,<sup>77</sup> China may defend its traditional fishing rights in the negotiations on the maritime boundary delimitation by citing some existing examples in state practice, such as the 1986 France–Italy Agreement on the Delimitation of the Maritime Boundaries in the Area of the Strait of Bonifacio,<sup>78</sup> the 1984 France–Monaco Maritime Delimitation Agreement,<sup>79</sup> and the 1974 India–Sri Lanka Agreement on the Boundary in Historic Waters between the Two Countries,<sup>80</sup> in which there is a provision to the effect that the boundary established is not to affect the traditional fishing activities of fishermen from each state and that such traditional fishing operations may continue

undisturbed. Though it is unclear to what extent the fishery factor would be taken into account, it should be one of the considerations in the negotiations and may be reflected in the final agreement to be reached between China and Vietnam. Some historical factors may be also considered in the negotiations. China and Vietnam have signed a number of agreements regarding fishing operations in the Gulf of Tonkin. The most recent one was concluded in August 1963 but expired in July 1969.<sup>81</sup> In these agreements, the two parties made some arrangements for cooperation and management, such as agreed lines for dividing the respective fishing activities in their coastal sea areas and providing that the fishing vessels from one party could not enter into such sea areas of the other party without prior permission,<sup>82</sup> but beyond these coastal areas, fishing vessels from both sides had the right to operate in the Gulf.

### **Role of Islands in Boundary Delimitation**

The maritime boundary delimitation will be further complicated by the existence of islands in the disputed area. In the case of the Gulf of Tonkin, there are generally two categories of islands in addition to Hainan Island. One is that of the adjacent islands along the coasts of China and Vietnam, and the other refers to the outlying islands in the Gulf. For the first category, the islands are most likely to be enclosed within the straight baselines of the two countries and some of them will be selected to become basepoints. The respective baselines will no doubt affect the delimitation of the EEZ and the continental shelf in the Gulf. In 1996, China publicized part of its baseline system along most of its mainland coast, Hainan Island and the Paracel Islands.<sup>83</sup> The baseline segments from Point 40 (Jinmu Jiao) to Point 49 (Junbi Jiao) along Hainan Island will affect the delimitation of the Gulf. Vietnam protested against China's proclamation of these baselines.<sup>84</sup> On the other hand, Vietnam also claims a baseline system, but has not yet claimed any baselines for its coast on the Gulf of Tonkin. While no official explanation is given for this omission, the reason may be that the Gulf of Tonkin close to the Vietnamese side is Vietnam's historic waters, and there is thus no need for a baseline because it is already regarded as Vietnam's internal water or territorial sea. However, since the claim of historic waters has not been recognized by China and a delimitation is required, it is necessary for Vietnam to consider asserting a baseline for the coastal areas of the Gulf. Otherwise, there would be difficulties in delimitation processes. We recall that in September 1964, Vietnam declared a 12-nautical-mile territorial sea and published a map that included the marking of the territorial sea in the Gulf of Tonkin.<sup>85</sup> It is not clear whether this territorial sea status is still recognized. Judging from the 1982 Statement of Vietnam, it seems that this earlier-defined territorial sea has been replaced by the newly claimed historic waters.

The critical island in the delimitation of the Gulf of Tonkin is Bach Long Vi Island, approximately 1.6 square kilometers and 53 meters above sea level, which is proximate to the middle line of the gulf, but a bit closer to the coast of Vietnam (38 nautical miles from the nearest Vietnamese coast). It was reported that this island formerly belonged to China and had Chinese inhabitants for centuries.<sup>86</sup> It is unknown whether this island was one of the contested areas in the Sino-French boundary negotiations in 1887 since the 1887 boundary line decided only the ownership of the coastal islands and did not include mid-ocean islands such as Bach Long Vi Island in the Gulf of Tonkin. However, during the 1950s, in order to show the solidarity of the Sino-Vietnamese friendship and brotherhood, the island was handed over to Vietnam under a decision of the Chinese communist leaders led by Mao Tse-tung.<sup>87</sup> Since the agreement for this matter

is not available to the public, research into this issue is considerably limited. Nevertheless, one thing is certain: The hand-over has put China in a more embarrassed and awkward position in the current negotiations. The two sides are certainly expected to engage in a dispute over the effect of the island on the delimitation of the sea areas in the Gulf.

If both China and Vietnam prefer to apply the equidistance principle, then the effect resulting from the existence of Bach Long Vi Island must be considered, since terms such as “full weight” or “partial effect” are used in conjunction with a discussion of islands in the maritime boundary decisions and literature.<sup>88</sup> Thus the problem is whether this island should be valued fully or partially, or be ignored in the delimitation of the Gulf.

In international practice, there are quite a number of precedents in which special treatment has been given to islands. In the 1982 Libya/Malta case, the ICJ did not allow Malta, an independent island state, to receive full consideration in the establishment of its boundary with Libya.<sup>89</sup> In the 1977 Anglo-French Award, the British Scilly Islands were not given full weight in the delimitation.<sup>90</sup> In the Italy–Tunisia agreement, some islands belonging to Italy but near the Tunisian coast were not considered in the boundary delimitation.<sup>91</sup> In state practice, midway islands are treated differently under different circumstances, subject to the agreement of the parties concerned. Some islands are given full weight despite their proximity to a mainland-to-mainland equidistant line.<sup>92</sup> Examples include the 1965 Finland–U.S.S.R. agreement concerning the Gulf of Finland,<sup>93</sup> the 1984 Denmark–Sweden agreement,<sup>94</sup> and the 1976 Colombia–Panama agreement.<sup>95</sup> Another approach is to reduce the effect of the midway islands, and in such cases the relevant islands receive only a 3- or 12-nautical-mile arc of territorial sea. The 1969 Qatar–United Arab Emirates (Abu Dhabi) agreement, in which a modified equidistant boundary between the two adjacent states was made, allowed Daiyina, an island belonging to Abu Dhabi, a 12-mile limit.<sup>96</sup> Another example can be found in the Italy–Yugoslavia agreement, where the Yugoslav island of Pelagruz was given a 12-mile arc causing the equidistant line to “bulge.”<sup>97</sup> A final treatment of islands is to draw the line of equidistance between or from mainland coasts, ignoring the existence of the islands altogether, such as occurred in the 1958 Bahrain–Saudi Arabian agreement.<sup>98</sup> In the 1985 *Libya-Malta Continental Shelf* case before the International Court of Justice, the island of Filfla belonging to Malta was ignored as well.<sup>99</sup>

The first approach mentioned above is certainly the one most preferred by Vietnam, because if it were applied, Bach Long Vi Island would extend the line of equidistance in Vietnam's favor and would allocate an additional 1,700 square nautical miles of maritime area to Vietnam. In contrast, China would prefer the last approach, and would argue that the location of Bach Long Vi Island constitutes special circumstances that render its use in drawing a line of equidistance inappropriate. As perceived by Morgan and Valencia, “[d]iscounting Ile Bach-Long-Vi, a line of equidistance, which might be reasonable under the equity principle, would be advantageous to China.”<sup>100</sup> To reach an agreement, there should be some kind of compromise to coordinate the different positions regarding the effect of the island in the boundary delimitation. If partial effect were given to Bach Long Vi Island, then the question is to what extent the island should receive the effect in the boundary delimitation: 3, 12, or even 24 nautical miles—three standards existing in state practice? Another factor that is important in the light of the island's effect is the historical fact that this island formerly belonged to China. Bearing this in mind, the effect resulting from the island in the delimitation should be further reduced in order to reach an equitable solution.

Thus, in conclusion with respect to islands in the case of the Gulf of Tonkin, two issues remain to be resolved. One is how to treat Bach Long Vi Island in the maritime boundary delimitation. Whether full effect, partial effect, or even noneffect should be given to this island depends upon the decision to be made by the two negotiating parties. The other is the issue of using the coastal islands as basepoints. Since both parties have numerous islands along their mainland coasts, it is most likely that both parties would agree to treat them equally as basepoints for their respective straight baselines.

## **Future Prospects**

The relationship between China and Vietnam can be characterized as a “love/hate” relationship. Vietnamese attitudes towards China reflect genuine ambivalence: a “mixture of admiration, envy, resentment and fear”—admiration for Chinese culture and industriousness, but distrust of Chinese intentions and resentment of past arrogance.<sup>101</sup> However, history shows that the basis for bilateral cooperation is profound in terms of similarities in cultures, languages, traditions, social infrastructures, etc. In the Gulf of Tonkin, the two countries carried on a number of cooperative activities in the past. On June 27, 1959, China and Vietnam signed a protocol on the cooperation of the two sides for the comprehensive marine survey in Beibu Gulf.<sup>102</sup> Based on this document, scientists from the two countries conducted comprehensive marine surveys between December 1959 and December 1960, and between December 1961 and April 1963, including the investigations of marine biology and marine hydrology.<sup>103</sup> Fishery agreements in the Gulf were also concluded three times in recent history: in 1957, 1960, and 1963.<sup>104</sup>

On October 19, 1993, an agreement on the basic principles for the settlement of border territory issues was formally signed by the two states in Hanoi.<sup>105</sup> It clearly stipulates that “[w]hile negotiating to settle the issues, the two sides shall not conduct activities that may further complicate the disputes.”<sup>106</sup> For this reason, it is unlikely that the two sides would resort to the use of force to resolve their disputes. It is clear that a consensus has been reached for the two countries to settle their disputes according to established international norms, including the 1982 Convention. In July 1997, the two foreign ministers, Qian Qichen and Nguyen Manh Cam, agreed to speed up their boundary negotiations so that the land boundary issue and boundary delineation in the Gulf of Tonkin could be properly resolved at an early date.<sup>107</sup> During a visit to Beijing by then-Vietnamese Communist Party General Secretary Do Muoi in December 1997, China and Vietnam further agreed to accelerate negotiations with the aim of settling their disputes by the year 2000.<sup>108</sup> The sincerity of both sides cannot therefore be doubted, particularly Vietnam's. It is worth recalling that as early as 1973, when China proposed the rectangular area in the Gulf as a neutral zone, Vietnam suspended its negotiations or agreements with foreign oil companies for oil exploration in the Gulf, even though Vietnam did not expressly accept the Chinese proposal.

The Gulf of Tonkin dispute should be resolved by a principle of equality in international law in consideration of various other historical, economic, and cultural factors. It seems that both sides aspire to be cooperative members of the regional community and will resolve this issue peacefully in due time. The political climate is also good. Vietnam and China normalized their relationship in 1991. Vietnam was admitted into ASEAN. China and the relevant ASEAN members pledged to resolve their territorial disputes in the South China Sea by peaceful means in accordance with accepted international law.<sup>109</sup> Some of the recent successful examples of maritime boundary delimitation in this region can be used as references in the settlement of the Gulf of Tonkin issue. The latest one is

the Agreement on the Maritime Delimitation in the Gulf of Thailand between Vietnam and Thailand, which was signed on August 9, 1997, and ratified by both sides on December 26, 1997.<sup>110</sup> The agreement put an end to a maritime dispute that involved an overlapping area of about 6,500 square kilometers and that had lasted for more than a quarter of a century.<sup>111</sup> At the time the Vietnamese representative signed the agreement, he expressed his sincere resolve to use this example to facilitate the resolution of the maritime issue in the Gulf of Tonkin.<sup>112</sup>

Unlike other areas of contention in the South China Sea, the issue of the Gulf of Tonkin involves no overlapping territorial claims and there is no dispute over the ownership of any islands. It is a dispute of pure maritime character, pertinent only to the delimitation of maritime boundary. The issue could thus be much more easily resolved than other issues in the South China Sea. The possible success of the negotiations on the Gulf of Tonkin will no doubt set a good example for resolution of other Sino-Vietnamese territorial issues. On the other hand, this issue is closely interwoven with other territorial issues (the land border and the South China Sea) between China and Vietnam. If the two parties had chosen to negotiate for a comprehensive resolution to all issues at the same time, then it would take much longer and would create much more difficulty.

People may question whether it would be possible to submit the Sino-Vietnamese dispute to international judicial settlement should the negotiations fail. China's attitude towards the international judiciary, however, is negative. In its history of acceding to international treaties, it has made reservations in every treaty wherever there is a clause for compulsory third party settlement. Basically, the Chinese do not trust or have confidence in international tribunals, even though China has nominated its nationals to be appointed as judges in international tribunals. The 1982 Convention sets down compulsory procedures of settlement for which reservations are not allowed. Accordingly, a state shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention when signing, ratifying, or acceding to the Convention or at any time thereafter: (a) the International Tribunal for the Law of the Sea; (b) the International Court of Justice; (c) an arbitral tribunal; and (d) a special arbitral tribunal.<sup>113</sup> As a party to the 1982 Convention, China has to accept one of these means. China did not make any such declaration upon its signing or ratifying of the 1982 Convention, and therefore, according to the Convention,<sup>114</sup> China is deemed to have accepted arbitration, option (c) above, as its method of dispute settlement. However, submission of disputes relating to sea boundary delimitation to the compulsory mechanism is optional,<sup>115</sup> and China may not agree to submit the dispute over the Gulf of Tonkin to arbitration. Like China, Vietnam did not mention which compulsory procedure it accepts in its statement of ratification of the 1982 Convention,<sup>116</sup> and therefore Vietnam is deemed to have accepted arbitration as well. Though it remains unclear, Vietnam's attitude towards the international judiciary seems similar to China's. As a Vietnamese scholar suggests, "[i]t is not necessary to accept right away this or that form of tribunal. The jurisdiction of a tribunal may be accepted at any time when a coastal State makes a decision."<sup>117</sup> It is frankly unlikely that China and Vietnam would follow such a means of settlement. Rather, they prefer direct negotiations with each other.

Given the unsettled nature of the relationship between China and Vietnam and the problem of defining boundaries, the Gulf of Tonkin remains a potential flashpoint.<sup>118</sup> It will be interesting to see whether the two nations will reach an agreement on the Gulf of Tonkin and turn a disputed area into an area of great economic potential and of long-lasting peace instead of a potential source of conflict.

## Notes

1. See "Beibu Gulf," in *Encyclopaedia Sinica: Geography of China* (in Chinese) (Beijing: China Encyclopaedia Press, 1993), 23.
2. See Ewan W. Anderson, *An Atlas of World Political Flashpoints: A Sourcebook of Geopolitical Crisis* (London: Pinter Reference, 1993), 211.
3. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 21 I.L.M. 1261 [hereafter cited as 1982 Convention], reprinted in *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (New York: United Nations, 1983), 1–157.
4. J. R. V. Prescott, *The Maritime Political Boundaries of the World* (London: Methuen, 1986), 223–224.
5. See Sun Shangzhi, ed., *Study on the Comprehensive and Co-ordinated Development of China's Beibu Gulf Rim* (in Chinese) (Beijing: Meteorological Press, 1997), 10.
6. China Business Information Network, Feb. 26, 1998.
7. See Guo Min, ed., *Forty-Year Evolution of the Sino-Vietnamese Relationship* (in Chinese) (Nanning: Guangxi People's Publishing House, 1992), 140.
8. See Wang Tiewa, ed., *A Comprehensive Compilation of Old Sino-Foreign Treaties and Agreements* (in Chinese) (Beijing: San Lien Publishing Co., 1982), 1:513.
9. Quoted in J. R. V. Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map* (Honolulu, Hawaii: East-West Environment and Policy Institute, East-West Center, 1981), 11.
10. See *Beijing Review*, Dec. 29, 1978, 23.
11. Pao-min Chang, *The Sino-Vietnamese Territorial Dispute*, The Washington Papers, 118 (New York: Praeger, 1986), 24.
12. Agence France-Presse, Mar. 31, 1998.
13. See *Beijing Review*, May 25, 1979, 16–17. During the fourth round of the negotiations in 1974, Han Nianlong, Head of the Chinese Delegation, stated that the so-called "maritime boundary line" never existed. The Vietnamese side totally misinterpreted the 1887 Sino-French treaty despite the language of the treaty and the historical facts. Yang Wanxiu, "The Sovereignty Dispute on Xisha and Nansha in China-Vietnam Relations," in *Prospects for the China-Southeast Asian Relations Around 2000* (in Chinese), ed. Southeast Asian Institute, Zhongshan University (Guangzhou: Zhongshan University Press, 1991), 135.
14. *Beijing Review*, May 4, 1979, 17.
15. Chang, *Sino-Vietnamese Territorial Dispute*, 13.
16. *Ibid.*, 14. The French version is recorded here:  
 Au Kouang-Tong, il est entendu que les points contestés qui sont situés à l'est et au nord-ouest de Monkai, au delà de la frontière telle qu'elle a été fixée par la commission de delimitation, sont attribués à la Chine. Les îles 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'île de Teha-Kou ou Ouan-chan (Tra-co) et formant la frontière sont également attribuées à la Chine. Les îles Go Tho et les autres îles qui sont à l'ouest de ce méridien appartiennent à l'Annam.  
 Reprinted in *Recueil des traités de la France* 17 (1886–1887): 387.
17. Article 33(1) of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, provides that "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail." China acceded to this convention on May 9, 1997. See *People's Daily* (Beijing) (in Chinese), May 10, 1997.
18. The whole version, in Chinese, is reprinted in *A Comprehensive Compilation of Old Sino-Foreign Treaties and Agreements* (in Chinese), ed. Wang Tiewa (Beijing: San Lien Publishing Co., 1982), 1:512–514. It is interesting to note that the 1884 Sino-French Treaty regarding the Sino-Vietnamese border provided that the treaty be written both in Chinese and in French and that the French version should be authoritative, according to the rules of public law. See *ibid.*, 455.

19. See Vienna Convention on the Law of Treaties, arts. 31 and 32. For reference, see Li Haopei, *Introduction to the Law of Treaties* (in Chinese) (Beijing: Law Press, 1987), 439–441.

20. As Prescott surveyed, the technique was used by Russia and the United States in 1867, by Britain when it allowed Queensland to annex the Torres Strait Islands in 1879, by Spain and the United States in 1898 when they defined the islands of the Philippines, by Britain and Germany when they divided the Solomon Islands in 1899, and by Britain and the United States when they distinguished their possessions in the Sulu Archipelago in 1930. Prescott, *Maritime Political Boundaries*, 225.

21. As Johnston and Valencia state, “[t]he text of the 1887 Sino-French convention does use the term ‘frontière,’ which at that time usually had a territorial significance, but a close reading suggests that the purpose was functionally restrictive: to divide the islands into administrative zones, not to allocate waters or seabed or their resources.” See Douglas M. Johnston and Mark J. Valencia, *Pacific Ocean Boundary Problems: Status and Solutions* (Dordrecht: Martinus Nijhoff, 1991), 149.

22. Reprinted in *Comprehensive Compilation of Old Sino-Foreign Treaties*, 466–469.

23. See Chen Tiqiang and Zhang Hongzheng, “The Issue of Delimiting the Beibu Gulf Sea Areas,” in Chen Tiqiang, *Collected Works of International Law* (in Chinese) (Beijing: Law Press, 1985), 186–187.

24. As Kittichaisaree observes, “[i]t seems unlikely that this division was intended to allocate to either China or Vietnam a maritime area of more than 3 nm from the coast, bearing in mind the 3 nm maximum breadth of the territorial sea at that time.” Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (Singapore: Oxford University Press, 1987), 43.

25. Prescott, *Maritime Political Boundaries*, 225.

26. See *ibid.*, 225–226.

27. Chen and Zhang, “Issue of Delimiting the Beibu Gulf Sea Areas,” 194.

28. In a diplomatic note dated September 29, 1932, China argued that the 1887 Sino-French Convention clearly indicated that the Paracels belonged to China. See Marwyn S. Samuels, *Contest for the South China Sea* (New York: Methuen, 1982), 61. See also Greg Austin, *China’s Ocean Frontier: International Law, Military Force, and National Development* (St. Leonards, NSW, Australia: Allen & Unwin Australia, 1998), 110–111.

29. See Chen and Zhang, “Issue of Delimiting the Beibu Gulf Sea Areas,” 192 and 193. The Sino-Vietnamese Protocol on the Comprehensive Marine Investigation in the Beibu Gulf was first signed on June 27, 1959. *People’s Daily* (Beijing) (in Chinese), June 28, 1959.

30. For details, see Chen and Zhang, “Issue of Delimiting the Beibu Gulf Sea Areas,” 192–194.

31. Article 1 of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary provides that “[t]he parties agree that the line described as the ‘western limit’ in Article 1 of the 1867 Convention, as defined in Article 2 of this Agreement, is the maritime boundary between the United States and the Soviet Union.” The full text of the Agreement is reprinted in *Maritime Boundaries*, ed. Gerald H. Blake (London: Routledge, 1994), 100–102.

32. For details, see Robert W. Smith, “United States–Russia Maritime Boundary,” in *Maritime Boundaries*, 91–102.

33. Leo J. Bouchez, *The Regime of Bays in International Law* (Leyden: A. W. Sythoff, 1964), 281.

34. See “Juridical Regime of Historic Waters, Including Historic Bays,” *Yearbook of the International Law Commission*, 1962, vol. 2, p. 6.

35. See Antonio Sanchez de Bustamante, *The Territorial Sea* (New York: Oxford University Press, 1930), 37.

36. In fact, France protested such a Vietnamese claim in 1983. See J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, 2d ed. (The Hague: Martinus Nijhoff, 1996), 52–53 n. 33.



37. See United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Baselines: National Legislation with Illustrative Maps* (New York: United Nations, 1989), 384.

38. L. Oppenheim, *International Law: A Treatise*, 8th ed., ed. H. Lauterpacht (London: Longmans, Green, 1955), 1:508.

39. Yehuda Zvi Blum, *Historic Titles in International Law* (The Hague: Martinus Nijhoff, 1965), 269–270.

40. For reference, see *The Republic of El Salvador v. the Republic of Nicaragua* (Mar. 9, 1917), *Anales de la Corte de Justicia Centroamericana* 6 (1917): 140 et seq., reprinted in *American Journal of International Law* 11 (1917): 674–730.

41. See Blum, *Historic Titles in International Law*, 278. However, many scholars are not satisfied with the decision made in the court. Gidel considers this decision as “une anomalie tout à fait notable dans le système logique des baies historiques.” Gilbert Gidel, *Le droit international public de la mer* (Chateauroux: Mellottée, 1932–1934), 3:627.

42. See *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening)*, 1992 I.C.J. 351 (Judgment of Sept. 11).

43. For reference, see Oscar Chapuis, *A History of Vietnam: From Hong Bang to Tu Duc* (Westport, CN: Greenwood Press, 1995).

44. Declaration of the Government of the People's Republic of China on China's Territorial Sea, Sept. 4, 1958, in State Oceanic Administration, Department of Ocean Management and Monitoring, Office of Laws and Regulations, *Collection of the Sea Laws and Regulations of the People's Republic of China* (Beijing: Ocean Press, 1991), 3–4.

45. The mouth of the Bohai Bay connects the Liaodong Peninsula and the Shandong Peninsula, a distance of 45 nautical miles.

46. Fu Zhu, *On the Question of China's Territorial Sea* (Beijing: World Knowledge Press, 1959), translated in Jerome A. Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* (Princeton, NJ: Princeton University Press, 1974), 1:483–484.

47. According to the 1982 Convention, every coastal state is entitled to have sovereign rights in the exclusive economic zone, which shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Articles 56–57). Similar rights to the continental shelf exist, except in some cases in which such rights may extend up to 350 nautical miles (Articles 76–77).

48. See *People's Daily* (Beijing) (in Chinese), Sept. 23, 1957. The Soviet claim was protested by the United States and other western countries. For reference to the protests from other countries, see Merrill Wesley Clark, Jr., *Historic Bays and Waters: A Regime of Recent Beginnings and Continued Usage* (New York: Oceana Publications, 1994), 178–180 and 191–197.

49. Roach and Smith, *United States Responses*, 53.

50. 1982 Convention, art. 10(2).

51. Article 38 of the Statute of the International Court of Justice provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Quoted in Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (New York: Praeger, 1950), 874; also reprinted in *Documents on the International Court of Justice*, comp. and ed. Shabtai Rosenne (Leiden: A. W. Sijthoff, 1974), 77.

52. 1982 Convention, art. 15.

53. See Prosper Weil, *The Law of Maritime Delimitation—Reflections*, trans. Maureen MacGlashan (Cambridge: Grotius Publications, 1989), 159–169; and Surya P. Sharma, *Delimitation of Land and Sea Boundaries between Neighbouring Countries* (New Delhi: Lancers Books, 1989), 100–122.

54. 1982 Convention, art. 15.

55. *Ibid.*

56. Rodman R. Bundy, “State Practice in Maritime Delimitation,” in *Maritime Boundaries*, 24.

57. Johnston and Valencia, *Pacific Ocean Boundary Problems*, 149.

58. Convention on the Continental Shelf, Apr. 29, 1958, art. 6(1) and (2), 499 U.N.T.S. at 316.

59. North Sea Continental Shelf (Germany v. Denmark; Germany v. Netherlands), 1969 I.C.J. at 45 (Judgment of Feb. 20).

60. The recent use of the equidistant line by the ICJ was perceived as “rehabilitation of the equidistant line.” See Jonathan I. Charney, “Progress in International Maritime Boundary Delimitation Law,” *American Journal of International Law* 88 (1994): 256.

61. According to a confidential source in 1997, Vietnam will settle for a median line provided that its Bach Long Vi Island is given some effect in drawing the line, rather than being ignored in a median line drawn between Hainan Island and Vietnam’s mainland coast. This would also mean that Vietnam would abandon any reliance on the 1887 line. Austin, *China’s Ocean Frontier*, 218–219.

62. See Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), 1993 I.C.J. at 81–82 (Judgment of June 14).

63. Charney, “Progress in International Maritime Boundary Delimitation,” 245.

64. 1982 Convention, art. 15.

65. Johnston and Valencia, *Pacific Ocean Boundary Problems*, 149; see also Choon-ho Park, *East Asia and the Law of the Sea* (Seoul: Seoul National University Press, 1983), 263.

66. In addition, the recent trend in international practice has indicated that the principle of natural prolongation will play less and less a role in the delimitation of the continental shelf. See Stuart B. Kaye, “The Australia-Indonesia Maritime Boundary Treaty: A Review,” *Maritime Studies*, May–June 1997, 28.

67. D. B. Hamman, “The Single Maritime Boundary—A Solution for Maritime Delimitation between Namibia and South Africa?” *International Journal of Marine and Coastal Law* 10 (1995): 369–388.

68. See, e.g., Mark J. Valencia, *China and the South China Sea Disputes*, Adelphi Papers, no. 298 (Oxford: Oxford University Press, 1995), 37.

69. See Jonathan I. Charney and Lewis M. Alexander, eds., *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff, 1993), 1:1057–1089. China protested this arrangement, saying that it encroached on the sovereign rights of China. See *People’s Daily* (Beijing) (in Chinese), Feb. 5, 1974.

70. Agreement between the Government of Malaysia and the Government of the Kingdom of Thailand on the Constitution and Other Matters Relating to the Establishment of the Malaysia-Thailand Joint Authority, May 30, 1990, reprinted in David Ong, Current Legal Developments, “Thailand/Malaysia: The Joint Development Agreement 1990,” *International Journal of Estuarine and Coastal Law* 6 (1991): 64–72.

71. As it stated, “[w]ith regard to issues that cannot be solved for the time being, China stands for pigeonholing them for strengthened co-operation and joint development.” White Paper on Marine Development, in *China Daily* (Beijing), May 29, 1998, 4.

72. The Vietnam-Malaysia Memorandum of 5 June 1992 on Joint Development Arrangement. See *Asian Political News* (Kyodo News International), June 8, 1992.

73. See Epsy Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (The Hague: Martinus Nijhoff, 1998), 251.

74. A Chinese scholar suggested that China should consider establishing a bilateral joint development regime for the Gulf of Tonkin. See Lin Zhong, "Scholarly Discussion on China and Joint Development," *Modern Law Science* (in Chinese), 1998, no. 1: 78.

75. Sino-Japanese Agreement on Fisheries (in Chinese), Nov. 11, 1997 (on file with author).

76. The "Water Area for Provisional Measures" is enclosed by the connection of the following coordinates: (1). 30°40'N, 124°10.1'E; (2). 30°N, 123°56.4'E; (3). 29°N, 123°25.5'E; (4). 28°N, 122°47.9'E; (5). 27°N, 121°57.4'E; (6). 27°N, 125°58.3'E; (7). 28°N, 127°15.1'E; (8). 29°N, 128°0.9'E; (9). 30°N, 128°32.2'E; (10). 30°40'N, 128°26.1'E; (11). 30°40'N, 124°10.1'E. See *ibid.*, art. 7.

77. See Huang Shuolin, "Impact of the Entry into Force of the Law of the Sea Convention on the Marine Fishery," in *Proceedings of the Conference on International Fishery Laws and Regulations* (in Chinese), ed. Centre of Ocean Fishery Development Research, Bureau of Fishery, Ministry of Agriculture (Beijing: Centre of Ocean Fishery Development Research, 1995), 68.

78. See United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Maritime Boundary Agreements (1985–1991)* (New York: United Nations, 1992), 30.

79. See *ibid.*, 32.

80. See United Nations, 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), 225.

81. See Huang Shuolin, *The Law of the Sea and Fishery Regulations* (in Chinese) (Beijing: China Agricultural Press, 1995), 125.

82. See *ibid.*, 124–125.

83. Declaration of the Government of the People's Republic of China on the Baseline of the Territorial Sea of the People's Republic of China, May 15, 1996, in *People's Daily* (Beijing) (in Chinese), May 16, 1996.

84. UN Doc. A/51/645 (1996), 12.

85. See Chen and Zhang, "Issue of Delimiting the Beibu Gulf Sea Areas," 193.

86. According to internal Chinese government sources, there were 267 Hainan inhabitants on this island in 1957 before the hand-over.

87. See Ai Hongren, *Perspective of the Chinese Navy* (in Chinese) (Hong Kong: Wide Angle Press, 1988), 40. The hand-over is explained by the Vietnamese side by noting that the island was under Chinese trusteeship for a time and recovered by Vietnam in 1957. See Vietnamese Foreign Ministry, "Hoang Sa and Truong Sa and International Law" (in Chinese) (April 1988), translated in *International Law Materials*, ed. Chinese Society of International Law (Beijing: Law Press, 1990), 161.

88. Robert W. Smith and Bradford L. Thomas, *Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes*, Maritime Briefing, vol. 2, no. 4 (Durham, UK: International Boundaries Research Unit, University of Durham, 1998), 23.

89. Continental Shelf (Libya v. Malta), 1982 I.C.J. 554 (Order of July 27). See Charney and Alexander, *International Maritime Boundaries*, 2:1649–1662.

90. Delimitation of the Continental Shelf (United Kingdom v. France), Cmnd. 7438 (Court of Arbitration, Award of June 30, 1977). See Charney and Alexander, *International Maritime Boundaries*, 2:1735–1754.

91. For the text of the Italy–Tunisia agreement, see Charney and Alexander, *International Maritime Boundaries*, 2:1621–1625. See also *ibid.*, 1611–1620.

92. See Derek Bowett, "Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations," in *International Maritime Boundaries*, ed. Jonathan I. Charney and Lewis M. Alexander (Dordrecht: Martinus Nijhoff, 1993), 1:141.

93. For the text, see Charney and Alexander, *International Maritime Boundaries*, 2:1966–1969.

94. For the text, see *ibid.*, 2:1939–1941.

95. For the text, see *ibid.*, 1:532–535.

96. See Bowett, "Islands, Rocks, Reefs, and Low-Tide Elevations," 143. For the text of the Qatar–United Arab Emirates agreement, see Charney and Alexander, *International Maritime Boundaries*, 2:1547–1548.

97. Bowett, "Islands, Rocks, Reefs, and Low-Tide Elevations," 143. For the text of the Italy-Yugoslavia agreement, see Charney and Alexander, *International Maritime Boundaries*, 2:1634–1637.
98. D. P. O'Connell, *The International Law of the Sea* (Oxford: Clarendon Press, 1982–1984), 2:716. For the text of the Bahrain–Saudi Arabia agreement, see Charney and Alexander, *International Maritime Boundaries*, 2:1495–1497.
99. Continental Shelf (Libya v. Malta), 1985 I.C.J. at 48 (Judgment of June 3).
100. Joseph R. Morgan and Mark J. Valencia, *Atlas for Marine Policy in Southeast Asian Seas* (Berkeley: University of California Press, 1983), 50.
101. Eugene K. Lawson, *The Sino-Vietnamese Conflict* (New York: Praeger, 1984), 19. For details, see Douglas E. Pike, *Vietnam and China: A Reader* (Berkeley: Institute of East Asian Studies, University of California, Berkeley, 1989), 95–97.
102. See Luo Yuru and Zeng Chengkui, eds., *Marine Affairs of Contemporary China* (in Chinese) (Beijing: China Social Science Publishing House, 1985), 416.
103. See *ibid.*
104. See Huang, *The Law of the Sea and Fishery Regulations*, 124–125.
105. See Ramses Amer, "The Territorial Disputes between China and Vietnam and Regional Stability," *Contemporary Southeast Asia* 19, no. 1 (1997): 90. The entire text of the agreement is not available.
106. See "Chinese Rig Clearly Violates Vietnam's Sovereign Rights, Says Lawyer," *Vietnam Law & Legal Forum* 3, no. 31 (Mar. 1997): 9.
107. See "Vietnam, China to Sign Border Pact Before 2000, FM Says," *Saigon Times Daily*, July 21, 1997.
108. Agence France-Presse, Mar. 31, 1998.
109. See "Joint Statement of Summit Meeting between China and ASEAN," Kuala Lumpur, Dec. 16, 1997, *Xinhua Monthly* (Beijing) (in Chinese), 1998, no. 1: 113.
110. See Nguyen Hong Thao, "The First Agreement on Maritime Delimitation for Vietnam," *Vietnam Law & Legal Forum* 4, no. 42 (Feb. 1998): 18–19.
111. See *ibid.*, 16–19.
112. See Agence France Presse, Aug. 11, 1997.
113. 1982 Convention, art. 287(1).
114. *Ibid.*, art. 287(3).
115. *Ibid.*, art. 298(1)(a)(i).
116. Vietnam's statement is in United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, "Declarations and Statements" (Available on the World Wide Web at [http://www.un.org/Depts/los/los\\_decl.htm](http://www.un.org/Depts/los/los_decl.htm) (access date: Mar. 18, 1998)).
117. Nguyen Hong Thao, "Vietnam and the 1982 UN Convention on the Law of the Sea," *Vietnam Law & Legal Forum* 3, no. 35 (July 1997): 22.
118. See Anderson, *Atlas of World Political Flashpoints*, 213.