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# CHINA AND THE QUESTION OF TERRITORIAL SEA

HUNGDAH CHIU\*

## 1. Introduction

In recent years, the People's Republic of China (PRC) has become an ardent supporter and champion of the claim for the 200 nautical mile territorial sea right or maritime right<sup>1</sup> asserted primarily by many Latin American countries. This problem, in the PRC's view, is not only a problem concerning the law of the sea, but it is very significant in the struggle by the Third World countries, with which the PRC identifies itself, against the hegemony of the two superpowers—the United States and the Soviet Union.

A recent secret educational document on international situations distributed to the company level of the PRC army, viewed the struggle for a 200 nautical mile territorial sea right as a basic indicator of the struggle against the superpowers in Latin America. The document observed:

In Latin America, which used to be called the backyard of American imperialism, the fire has been lighted. Not long ago fourteen Latin American states jointly took action to oppose the unreasonable method of limiting the breadth of the territorial sea by the two superpowers. They have insisted that American countries have the right to define the limit of their territorial sea and have firmly defended their 200 nautical mile territorial sea rights.<sup>2</sup>

At the Third United Nations Conference on the Law of the Sea held at Caracas between June and August, 1974, the PRC actively supported the position of the Third World. In his policy speech delivered on July 2, the Leader of the PRC Delegation Chai Shu-fan said:

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<sup>1</sup> Until recently, the PRC referred to Latin American claims for 200 mile territorial sea, economic zone, or patrimonial sea generally as "ling-hai ch'uan" (territorial sea right). However, recent PRC documents and press reports began to use the term "hai-yang ch'uan" (maritime right) to refer to such claims. For the PRC's views on the difference between territorial sea or economic zone, see note 136 and accompanying text *infra*.

<sup>2</sup> CHINESE COMMUNIST DOCUMENT: OUTLINE OF EDUCATION ON SITUATION FOR COMPANIES 6 (with English translation). Lesson 1, at 2 (Chinese text) (Propaganda Division, Political Department, Kunming Military Region ed., 1973, distributed by Institute of International Relations, Taipei, 1974). I have translated the text from the Chinese.

The new legal regime of the sea must accord with the interests of the numerous developing countries, the basic interests of the people of the world and the direction in which the times are advancing. . . . Our common lot and common tasks provide a firm foundation for our unity in the fight. This is an important guarantee for our victory. . . .

Although we developing countries may have differences of one kind or another on certain specific issues, it is fully possible and essential for us, on the premise of mutual respect for sovereignty and of unity against hegemonism, to work out a reasonable solution through friendly consultations in a spirit of seeking common ground while reserving differences, and of equality and mutual benefit.<sup>3</sup>

Paralleling its growing interest in the law of the sea, the PRC has quietly built its naval force in recent years. A recent study indicates that the PRC's navy is the world's third largest, with a strength of 150,000 officers and men and more than 100 vessels in active service.<sup>4</sup>

In the past few years, the increase in the PRC's ocean-going merchant fleet has been dramatic. According to a reliable source, in 1961 the PRC fleet consisted of 141 ships totaling 696,000 deadweight tons. By 1969, this had increased to 1.3 million deadweight tons, a rise of 85 percent, and by the latter part of 1974 total deadweight tonnage was 2.5 million tons, an increase of 92 per cent over the 1969 figure.<sup>5</sup> It appears that the PRC is in the process of actively developing itself as a major maritime power.

In view of the foregoing, the importance of studying the PRC attitude toward the law of the sea is apparent. This article undertakes to study the PRC's view on one important aspect of the law of the sea—the question of territorial sea and its related problems. Although some recent studies have been done on PRC's territorial sea practice,<sup>6</sup> they concentrate primarily on the 1958 PRC Declaration on China's Territorial Sea and the practice

<sup>3</sup> At U.N. Conference on Law of the Sea, Chinese Delegation Leader Chai Shu-fan's Speech, 17 PEKING REVIEW 11, 14 (No. 28, July 12, 1974).

<sup>4</sup> See Uhlrig, *Red China's Navy is World's Third Largest*, SEAPOW 19-24 (Mar., 1973). It has 42 submarines, 4 destroyers, 20 frigates and escorts, 17 missile boats, 54 landing ships and landing craft, and other vessels. THE STATESMAN'S YEARBOOK 1973-1974, at 816-817 (John Paxton ed. 110th ed. 1973).

<sup>5</sup> Smith, *Voyage of the Fenghuang Chinese Shipping Success*, Hong Kong (UPI), The Daily Record, Mar. 5, 1975, at 1, 7. See also I-CHIU-CH'I-SAN CHUNG-KUNG NIEN-PAO (Yearbook on Chinese Communism, 1973) II-133 (Taipei, 1973).

<sup>6</sup> E.g., Cheng Tao, *Communist China and the Law of the Sea*, 63 AM. J. INT'L L. 47-73 (1969); HSIUNG, LAW AND POLICY IN CHINA'S FOREIGN RELATIONS 103-117 (1972).

before and immediately after this Declaration. Moreover, these studies pay only casual attention to pre-1949 China's practice and totally ignore the view of the Republic of China (ROC) on Taiwan after 1949. This is a serious deficiency in view of the ROC's strategic geographical location and its importance as a world maritime power.

The ROC not only controls the strategic island of Taiwan which faces the mainland Chinese provinces of Chekiang, Fukien and Kwangtung, but also has a sizable navy,<sup>7</sup> ocean-going maritime fleet, deep-ocean fishery industry, and a significant expanding shipbuilding industry.<sup>8</sup> In 1974, the ROC carried on a two-way international trade of more than 12 billion US dollars and almost all import and export goods were transported by maritime fleet.<sup>9</sup>

Until late 1971, the ROC government represented China at the United Nations and its specialized or affiliated agencies.<sup>10</sup> It represented China at the First and Second United Nations Conference on the Law of the Sea held separately in 1958 and 1960 at Geneva. Furthermore, the pre-1949 Chinese practice, including that of the ROC, has had upon several occasions a direct bearing on the PRC's practice. For instance, the PRC's extension in 1958 of its territorial sea to 12 nautical miles was prompted by its attempt to exclude United States intervention during its attempted capture of Quemoy, an offshore island held by the ROC.<sup>11</sup>

The focus of this article is both historical and analytical. It will begin with the introduction of the regime of territorial sea to China in the nineteenth century, analyze the ROC practice both before and after its removal to Taiwan, and finally examine the PRC's practice and its attitude toward the recent development of the law of territorial seas and related problems.

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Before proceeding to these problems, it would be helpful to give a general survey of physical features of China's coast and

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<sup>7</sup> In 1972, the ROC had 14 destroyers, 16 frigates, 3 escort vessels, 25 landing ships and other vessels. It had 38,000 naval officers and ratings and 34,000 marine officers and men. THE STATESMAN'S YEARBOOK 1973-1974, *supra* note 4, at 824.

<sup>8</sup> See notes 59, 60, and 61, and accompanying text, *infra*.

<sup>9</sup> Chung-yang jih-pao (Central daily news), Jan. 4, 1975, at 1; 16 FREE CHINA WEEKLY 4 (No. 3, Jan. 19, 1975).

<sup>10</sup> By Resolution 2758 (XXVI) adopted by the United Nations General Assembly on October 25, 1971, the Assembly decided that the PRC government should represent China in the United Nations and in all the organizations related to it. FRIEDMANN, LISSITZYN, & FUGH, INTERNATIONAL LAW 26-27 (Supp. 1972). Since then, the PRC government has represented China in all United Nations-affiliated or related organizations except the International Monetary Fund, International Finance Corporation, International Bank for Reconstruction and Development (World Bank), and International Development Association.

<sup>11</sup> See notes 75-78 *infra* and accompanying text.

adjacent sea-bed.<sup>12</sup> China's continental coastline begins at the mouth of the Yalu River on the Chinese-North Korean border and ends at the Peilun River on the Chinese-North Vietnamese border. It is approximately 11,900 kilometers<sup>13</sup> in length. Hanchow Bay divides China's coast into two parts. North of the bay the coast is sandy, with the exception of the rocky shores of the Shantung and Liaotung peninsula; south of the bay it is mostly rocky.

China has more than 3,500 islands, of which the two largest are Taiwan and Hainan. Most other islands are less than 1,000 square kilometers. Over 2,900 islands (mostly of the rocky type) are scattered along the coasts south of the Hanchow Bay. The coastline of China's continental coast and islands has a total length of 23,400 kilometers.

The seas facing China's coast include the Pohai (Gulf of Chili or Pohai) in the north, the Yellow Sea and the East China Sea in the middle, and the South China Sea in the south.

According to a report of the United Nations Economic Commission on Asia and the Far East (ECAFE) released in 1969, the seabed adjacent to the Chinese coast and beneath the Yellow and East China Seas has the following features:<sup>14</sup>

(1) The Yellow Sea area, comprising approximately 500,000 square kilometers is a flat region with depths that average about 55 meters,<sup>15</sup> and nowhere exceed 125 meters. The western side is bordered by the combined deltas of the Yellow and Yangtze Rivers plus the hilly projection of the Shantung Peninsula. The eastern side of the Yellow Sea is hilly and fringed by hundreds of small rocky islands. Lowlands border the mouths of the Han River of the Republic of Korea, the Yalu River of North Korea, and the Liao River of China in the Gulf of Pohai.

(2) Immediately following this area is a large continental shelf of approximately 110,000 square kilometers. At the north the shelf takes the form of Tsushima Strait between Korea and Japan, a width of about 150 kilometers. The middle part of the shelf fronts the Yellow Sea, and the southern part borders the Chinese mainland from the mouth of the Yangtze River to beyond Taiwan Strait. The outer edge of the shelf is off the Yangtze River where it reaches 450 kilometers; farther south-west the shelf narrows to about 125 kilometers in the Taiwan Strait.

<sup>12</sup> The description is generally based on CHIAO-MIN HSIEH, *ATLAS OF CHINA 19-20* (Salter ed. 1973) and *CHINA YEARBOOK 1972-1973*, at 47.

<sup>13</sup> One kilometer is about 3281 feet or five-eighths of a mile.

<sup>14</sup> Emory, *Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea*, 2 *TECH. BULL.*, ECAFE 13, 25, 26 (1969).

<sup>15</sup> One foot is about 0.3048 meter.

(3) At the edge of the continental shelf area is the Okinawa Trough. The deepest part, near the eastern part of Taiwan reaches 2,270 meters. East and south of the Trough are the Ryukyu Islands.

In the South China Sea area, the continental shelf extends from the Taiwan Strait to the Kwangtung Province, Hainan Island, and then to Vietnam. The width of the shelf is approximately 200 kilometers in Kwangtung, then gradually narrows to less than 100 kilometers in the southern part of Vietnam. Off the 200 meter depth line of the shelf, the seabed abruptly drops off to abyssal plains. The Paracel and Spratly Islands, about 230 nautical miles apart, sit mid-ocean where the depth drops immediately to almost 1,000 meters around the Paracels and about 3,000 meters at some points around the Spratlies.<sup>16</sup>

## 2. The Introduction of the Regime of Territorial Sea to China

Throughout the long history of China, Chinese merchant and naval vessels were quite active in the seas adjacent to the Chinese coast. The Chinese navy in the Ming Dynasty (1368-1644) was reported to make regular patrol for a long period in East China Sea and sailed as far as the present Tiao-yu-tai Islets (Senkaku Gunto).<sup>17</sup> The Chinese government enacted various laws and decrees concerning maritime matters. In the Ch'ing Dynasty, comprehensive provisions were enacted in the chapter on Military and Border Affairs of the Ch'ing Code for control of maritime trade and of persons sailing to the sea, and for punishment of crimes committed on the seas.<sup>18</sup>

In the Ch'ing Code, a distinction was made in a number of places between "nei-yang" (inner ocean) and "wai-yang" (outer ocean). In an 1817 case concerning the ship Wabash commanded by Captain Gant (or C. L. Gratt) from Baltimore, Maryland, the Ch'ing government noted that although the "barbarian merchant Ao-ti [Gant]" brought opium to China in violation of Chinese law, since the ship was anchored in the "outer ocean" and did not enter the Chinese port, the "barbarian merchant" should not be punished. On the other hand, several Chinese who tried to blackmail "the barbarian merchant" Ao-ti and his crew

<sup>16</sup> YA-KUANG YU-TI HSUEH-SHE, *Chart of Atlas of Islands in South China Sea*, in CHUNG-HUA JEN-MIN KUNG-HO-KUO FEN-SHENG TI-T'U (Atlas of the Provinces of the People's Republic of China) 41 (6th rev. ed. 1953).

<sup>17</sup> See *Map of Coastal Mountains and Sands*, in CH'OU-HAI T'U-PIEN (Maps concerning sea defense) 20 (Hu Chung-hsien ed., 1962). The map was reproduced in Inoue, *The History and Sovereignty of the Tiaoyu Islands* (Senkaku Gunto) (further study), CHUGOKU-KENKYU GEPPU (China Study Monthly), No. 292, at 8-9 (June, 1972).

<sup>18</sup> See 3 TA-CH'ING LU-LI HUI-T'UNG HSIN-TSUAN (Comprehensive New Edition of the Ch'ing Code) 1711-1755 (authors unknown, 1872 edition was reprinted in Taipei, 1964).

and robbed the ship and killed several crew members in the "outer ocean" were decapitated or otherwise severely punished.<sup>19</sup>

China's reluctance to extend its jurisdiction over aliens to the "outer ocean" is somewhat similar to the Western practice of this period, based on the distinction between territorial sea and high sea.<sup>20</sup> Research into Ch'ing history to date, however, has not revealed how the Chinese defined the extent of the "inner ocean" and the method of its measurement. It appears that this practice did not develop into a sophisticated regime similar to that of the territorial sea in western international law.

By the middle of the nineteenth century a number of commercial treaties concluded by China with western powers made explicit reference, in general terms, to Chinese jurisdiction over its adjacent maritime belt. Article 26 of the Sino-American Treaty of Peace, Amity, and Commerce signed at Wang Hiya on July 3, 1844, provided that "if the merchant-vessels of the United States, *while within the waters over which the Chinese government exercises jurisdiction*, be plundered by robbers or pirates, then the Chinese local authorities, civil and military, on receiving information thereof, will arrest the said robbers or pirates, and punish them according to law . . ." (Emphasis added).<sup>21</sup> Similarly, Article 19 of the Treaty of Peace, Friendship and Commerce, between Great Britain and China, signed at Tientsin on June 26, 1856, also provided that "if any British merchant vessel, *while within Chinese waters*, be plundered by robbers or Pirates, it shall be the duty of the Chinese authorities to use every endeavour to capture and punish the said robbers or Pirates . . ." (Emphasis added).<sup>22</sup> However, none of these provisions defined the extent of Chinese "waters," and the Chinese apparently were unaware of the existence of a regime of the territorial sea in international law until 1864, when W. A. P. Martin translated Wheaton's *Elements of International Law* into Chinese.<sup>23</sup>

<sup>19</sup> See 1 CH'ING-TAI WAI-CHIAO SHIH-LIAO, CHIA-CHING CH'AO, TAO-KUANG CH'AO (Historical Materials Concerning Foreign Relations in the Ch'ing Period, Chia-ch'ing Period, 1796-1820, Tao-Kuang Period to 1831) 678-686 (Palace Museum ed. 1931-1933, Taipei reprinted ed. 1968). For an English summary of this case, see 1 LO-SHU FU, A DOCUMENTARY CHRONICLE OF SINO-WESTERN RELATIONS (1644-1820) 408-418 (1966); 2 *id.* 621.

<sup>20</sup> The jurisdiction over the Chinese involved in the same case apparently was based on the nationality principle and the *locus criminis* was not therefore relevant.

<sup>21</sup> 6 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, 655 (Bevins, comp., 1971). Similar provisions were made in Article 26 of the Treaty of Peace, Amity, and Commerce between Sweden and Norway, and China, signed at Canton on March 20, 1847. 1 HERTSLET'S CHINA TREATIES 536 (3rd rev. ed., 1908).

<sup>22</sup> *Id.* art. 25.

<sup>23</sup> The relevant part of Wheaton concerning the breadth of territorial sea is as follows: "§6. Maritime territorial jurisdiction. The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation."

§7. Extent of the term coasts or shore. The term 'coasts' includes the natural appendages of the territory which rise out of the water, although these islands are not of sufficient

With the translation of Wheaton into Chinese, China's conception of its territorial sea became more sophisticated. In 1864, during the Prussian-Danish War, the Prussian minister to China, von Rehfues, arrived in the Gulf of Chili (Pohai) on a warship. Finding three Danish merchant ships in the Gulf, he captured them. The Chinese government protested on the ground that the capture was made within the Chinese "inner ocean" and somewhat vaguely cited principles of international law contained in Wheaton's Chinese translation to support its argument. Subsequently, the Prussian Minister acknowledged the illegality of the act, released two of the Danish ships, and paid compensation for the third. In Prince Kung's memorial to the Emperor, he pointed out that "foreign countries always maintain that the ocean 10 or more *li* [one *li* is about one-third of a mile] off the coast, which cannot be reached by guns and batteries, is considered the public area of all the countries and can be sailed and occupied as one wishes."<sup>24</sup> This was an apparent reference to the territorial sea and high sea in international law.

In 1874, when Chinese Viceroy Li Hung-chang sought to justify Korea's (then a tributary state of China) action in firing upon a Japanese warship that appeared near the Korean coast, one of the arguments he made was that, according to international law the width of the territorial sea was 10 *li* (approximately 3 nautical miles) and the Korean action was a legitimate response to the infringement of Korean territorial sea.<sup>25</sup>

Although Chinese knowledge concerning the Western concept of a regime of the territorial sea was growing, the scope of the territorial sea claimed by the Ch'ing remained unclear. In the Sino-Mexico Treaty of Friendship, Commerce and Navigation signed on December 14, 1899, the contracting parties, in Article 11, agreed to consider "a distance of 3 marine leagues [approximately 9 nautical miles], measured from the line of low tide, as

firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water. The rule of law on this subject is, *terrai dominium finitur, ubi finitur armorum vis*; and since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore." H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 233-234 (6th ed. 1855). This part was translated into Chinese in 2 WAN-KUO KUNG-FA (Laws and regulations of all states) 67 (W.A.P. Martin trans. 1864).

<sup>24</sup> 6 CH'OU-PAN I-WU SHIH-MO (The Complete Account of our Management of Barbarian Affairs) 658 (Chuan 26, at 29-30, 33, [Peking, Palace Museum ed. 1930], Taipei reprinted ed. 1963). See also *id.* 677 (Chuan 27, at 25-26). For a summary of the incident, see also, TENG & FAIRBANK, *CHINA'S RESPONSE TO THE WEST, A DOCUMENTARY SURVEY, 1839-1923*, at 97-99 (1954); T.F. Tsiang, *Bismarck and the Introduction of International Law into China*, 15 *THE CHINESE SOCIAL AND POLITICAL SCIENCE REVIEW* 98-101 (No. 1, Apr., 1931).

<sup>25</sup> See the minutes of the conversation between Li Hung-chang and the Japanese minister, Mori Arinori, annexed to the memorial submitted by the Tsungli Yamen to the Emperor on the Japanese intention to enter into friendly relations with Korea, dated Jan. 17, 1876, in 1 CH'ING KUANG-HSU CH'AO CHUNG-JIH CHIAO-SHE SHIH-LIAO (Historical materials relating to Sino-Japanese relations during the reign of the Kuang-hsu Emperor) 8 (Peiping, Palace Museum ed. 1932).

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."<sup>26</sup> The implication of this article is not clear, and there is no other evidence showing that the Ch'ing government had claimed a 9 nautical mile territorial sea.

In 1908, in a case involving the capture of a Japanese ship, the *Ta Tsu Maru*, the Ch'ing government claimed that the ship was arrested within 2 nautical miles of the Chinese coast.<sup>27</sup> It appears that China and Japan negotiated on the assumption that the generally accepted width of the territorial sea was 3 nautical miles.

In neither of the above two cases, however, can it be said that China was explicitly claiming a territorial sea of specified width. Rather, China utilized newly understood western concepts to its advantage without wholly embracing them as policy. Therefore, it seems that despite the increasing sophistication of the Ch'ing's understanding of the western concept of a regime of the territorial sea with clearly defined limits, the Ch'ing never defined for itself its own territorial sea.

### 3. The Republic of China and the Problem of Territorial Sea

In the first year of the Republic of China (1912), the Chinese government began seriously to consider the question of the width of the territorial sea. At that time, the Ministry of the Navy expressed its view to the Ministry of Foreign Affairs in a letter dated July 10:

Generally, the boundary of the territorial sea should be limited to 3 nautical miles [off the coast]. However, this limit was formulated according to the range of a cannon shot. Presently, the range of a cannon shot is much farther; therefore, Hall's public international law book said that at the Paris International Law Conference, the majority of the members approved the theory that the territorial sea should be extended to 6 nautical miles.<sup>28</sup> As a matter of fact, the farthest range

<sup>26</sup> 1 HERTSLET'S CHINA TREATIES, *supra* note 21 at 403-404. It was reported that in 1902 Mexico adopted the 3-mile territorial sea. 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 14 (1965).

<sup>27</sup> See WAI-CHIAO TA TZ'U-TIEN (Great Dictionary of Diplomacy) 722-23 (1965); 4 WHITEMAN, *supra* note 26. China subsequently released the ship for political reasons.

<sup>28</sup> The relevant provision from Hall follows:

"After being carefully studied and reported upon by a Committee of the Institut de Droit International, the subject was exhaustively discussed by the Institut at its meeting in Paris, in 1894, the exceptionally large number of thirty-nine members being present. With regard to the necessity of ascribing a greater breadth than three miles of territorial water to the littoral state there was no difference of opinion. As to the extent to which the marginal belt

of a cannon shot now can reach 10 nautical miles, so it seems that we should extend our territorial sea [to such a width] so as to protect our maritime rights.<sup>29</sup>

But, no decision was made on whether China should accept the 3 nautical mile limit or should have a broader width of the territorial sea.<sup>30</sup>

In 1921, the President of the Republic approved a proposal of the Ministry of Navy for setting up a Committee on Maritime Boundary to discuss the question of China's territorial sea. The committee decided at its fifth meeting, held on September 6, 1921, that China should follow the practice of other countries by prescribing its territorial sea as 3 nautical miles.<sup>31</sup> It is not clear whether the President took any action on the decision of the committee.<sup>32</sup>

It was not until the Nationalist government assumed the command of the Republic of China that China clarified its position on the territorial sea. At the 1930 Hague Conference on Codification of International Law, it took the position that the width of the territorial sea should be 3 nautical miles, measured from the low-water marks along the coast.<sup>33</sup> This position did not mean, however, that China was satisfied with the regime of a 3 nautical mile territorial sea. On July 5, 1929, the Vice-Commander of the Navy and member of the Northeast (Manchuria) Political Council, General Shen Hung-lieh, sent an official communication to the Ministry of Foreign Affairs, proposing that the Chinese territorial sea should be prescribed as 12 nautical miles and the Gulf of Pohai (Chili) as entirely China's

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should be enlarged and the principle upon which enlargement should be based, the same unanimity was not manifested; but ultimately it was resolved by a large majority that a zone of six marine miles from low water mark ought to be considered territorial for all purposes, and that in time of war a neutral state should have the right to extend this zone, by declaration of neutrality or by notification, for all purposes of neutrality, to a distance from the shore corresponding to the extended range of cannon." A TREATISE ON INTERNATIONAL LAW 154 (6th ed. by Atlay, 1909).

<sup>29</sup> CHUNG-JIH YU-YEH CHIAO-SHE (Sino-Japanese Fisheries Negotiations) (June 2 - Nov. 19, 1912, Diplomatic Archives, Taipei, Academia Sinica). Cited also in KAN HUANG, CHUNG-HUA MIN-KUO TI LING-HAI CH'I HSIANG KUAN CHIH-TU (The regime of territorial sea of the Republic of China) 5, 70 (1973).

<sup>30</sup> Before China joined the First World War on August 14, 1917, it enacted an "Act on Neutrality" which made a number of references to "ling-hai" (territorial sea) in its provisions, but the Act did not specify the width of China's territorial sea. In the application of the Act, it did not appear that there had been any significant cases between China and other countries concerning the width of China's territorial sea. For a summary of the cases contained in the diplomatic archives, see generally, KAN HUANG, *supra* note 29, at 125-137.

<sup>31</sup> The minutes of this meeting were sent to the Foreign Ministry on September 13, 1921. HAI-CHIEH T'AO-LUN AN (Case concerning maritime boundary discussions) (July 2 - Nov. 8, 1921, Diplomatic Archives, Taipei, Academia Sinica).

<sup>32</sup> According to Pao Tsun-p'eng, a presidential decree on the boundary of territorial sea was promulgated in March, 1924. See his 2 CHUNG-KUO HAI-CHUN SHIH (History of Chinese Navy) 523-524 (1970). However, he gave no reference to this decree and the author could not identify the source of this information.

<sup>33</sup> For conference documents concerning the width of territorial and the position of the Chinese Delegation, see 24 AM. J. INT'L. L. 25, 27, 234-235, 254 (Supp. 1930).

territorial sea as a matter of historical right.<sup>34</sup> While the Foreign Ministry did not take action on the proposal of 12 nautical miles territorial sea, it did instruct the Chinese delegate to the Hague Conference to make clear, at the appropriate occasion, that China regarded the Gulf of Pohai as her territorial sea on historical grounds.<sup>35</sup>

In 1930, the Headquarters of the General Staff of the Nationalist Government prepared a draft proposal on the boundary of the territorial sea and submitted it to the Executive Yuan in January, 1931.<sup>36</sup> This was the first attempt by the Chinese government to enact a comprehensive system of rules on the regime of the territorial sea. The document analysed in detail the advantages and disadvantages of a limited or extended territorial sea and noted that a weak country with "a weak naval force and a small number of commercial and fishing vessels absolutely does not dare to [encroach on] the territorial sea and the adjacent high sea of a strong power."<sup>37</sup> Moreover, since a weak country's "national power is not sufficient to protect its rights within the territorial sea, it can only think of relying on public international law to deter a strong power's encroachment on its fishery, to maintain its neutral rights in time of war and to facilitate its measures of sea defense."<sup>38</sup> It concluded that it is "advantageous for a weak country to support a regime of extended territorial sea."<sup>39</sup> The Headquarters of the General Staff, therefore, proposed that China should have a 12 nautical mile territorial sea. It also observed that by claiming a 12 nautical mile territorial sea, China could claim the entire Gulf of Pohai as internal waters.

After seriously considering the matter, the Executive Yuan took a compromise approach to the question. In the *Order Prescribing the Scope of the Territorial Sea as Three Nautical Miles* in April, 1931, it explicitly provided that although China accepted the 3 nautical mile territorial sea, it nevertheless claimed a 12 nautical mile limit for investigating smuggling.<sup>40</sup> In 1934, a Customs Preventive Law was enacted which set the limit for

<sup>34</sup> Official Communication from Shen Hung-lich to the Ministry of Foreign Affairs, July 5, 1929, on file in the Diplomatic Archives, Taipei, Academia Sinica.

<sup>35</sup> Correspondence between the Ministry of Foreign Affairs and Wu Chao-shu, Chief Chinese delegate to the Hague Codification Conference, March 14, 17, 19, 24, 26, 1930, on file in Diplomatic Archives, Taipei, Academia Sinica. The Hague Conference did not make any decision on historical bays or gulfs, so the Chinese delegate did not raise the question of the Gulf of Pohai at the Conference. Telegram from Wu Chao-shu to the Ministry of Foreign Affairs, April 12, 1930. *Id.*

<sup>36</sup> On file in Diplomatic Archives, *supra* note 34. The exact dates of the draft and the submission to the Executive Yuan cannot be determined.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> For the text of the order, see 3 CHUNG-HUA MIN-KUO FA-KUEI HUI-PIEN (Collection of laws and decrees of the Republic of China) Part IV, NEI-CHENG (Internal affairs) 715 (1934).

enforcing that law as 12 nautical miles off the coast.<sup>41</sup> Although the Republic of China has maintained this position since then, it has upon a number of occasions seriously considered expanding its territorial sea to 12 nautical miles.

After Japan surrendered to China and other Allied powers in 1945, the Ministry of Internal Affairs invited various units of the government to discuss the question of the limit of the territorial sea. At that time, the Fishing Department of the Ministry of Agriculture and Forestry proposed that the territorial sea should be 12 nautical miles. The Executive Yuan gave instructions that the proposal should be "temporarily deferred for consideration."<sup>42</sup> Two years later, however, in the *Measures on Permitting Japanese Fishing Vessels to Fish in the High Seas Off the Coast of China, Korea, and the Ryukyus*, promulgated jointly by the Ministry of Agriculture and Forestry and the Ministry of Foreign Affairs on February 13, 1947,<sup>43</sup> it was explicitly provided that Japanese fishing vessels should not fish within 12 miles of the Chinese coast. The decree seemed to indicate that in addition to customs preventive measures, China would claim a 12 mile limit to protect its economic interests in coastal fishing.<sup>44</sup>

When the United Nations International Law Commission began to discuss the codification of the law of the sea, the ROC government notified the Chinese member of the Commission, Dr. Shuhsi Hsu, that China preferred a 12 nautical mile territorial sea.<sup>45</sup> At the 166th meeting held on July 17, 1952, Dr. Hsu said that he was convinced that a 12 mile limit of territorial sea was the best solution to the problem of delimiting the territorial sea.<sup>46</sup> On June 9, 1955, at the 308th meeting of the Commission, he proposed the following amendment to Article 3 (Breadth of the Territorial Sea) of the Draft Articles on the Law of the Sea:

The coastal State may, however, extend the territorial sea up to a limit of 12 nautical miles from the baseline.<sup>47</sup>

<sup>41</sup> For relevant provisions of the law, see LAW AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA 113, U.N. Leg. Ser. ST./LEG./SER. B/6 (1956).

<sup>42</sup> CHANG PAO-SHU, HAI-YANG FA YEN-CHIU (Studies on the Law of the Sea) 39 (1957).

<sup>43</sup> KUO-MIN CHENG-FU KUNG-PAO (Gazette of the National Government), No. 2756, at 2 (Feb. 26, 1947).

<sup>44</sup> A United States Department of State study found that ROC practice in fact indicates a claim to a 12 nautical mile exclusive fishing zone. OFFICE OF THE GEOGRAPHER, UNITED STATES DEPT. OF STATE, INT'L BOUNDARY STUDY: LIMITS IN THE SEAS (Ser. A) (hereinafter cited as INT'L BOUNDARY STUDY), NATIONAL CLAIMS TO MARITIME JURISDICTION 18 (No. 43 1972).

An official of the ROC Ministry of Economics said, on April 23, 1970, that the Chinese exclusive fishing zone is 12 nautical miles off the low water line of the coast. Chung-kuo Shih-pao (China Times), April 24, 1970.

<sup>45</sup> CHANG PAO-SHU, *supra* note 42.

<sup>46</sup> [1952] 1 Y.B. INT'L L. COMM'N 158, U.N. Doc. A/CN.4/SER.A/1952.

<sup>47</sup> [1955] 1 Y.B. INT'L L. COMM'N 152, U.N. Doc. A/CN.4/SER.A/1955.

He observed that the 3 mile limit was not wide enough to satisfy many states in the Far East and in Latin America which, "although . . . like . . . China, had previously adopted the 3 mile limit, now desired to extend their territorial sea beyond 3 miles, partly in order to defend themselves against subversive activities and partly in order to protect their small fishery industry against ruinous competition by well-organized foreign fishing concerns."<sup>48</sup>

Ironically, Dr. Hsu's position ran counter to that of the United States, the ROC's friend and ally, and coincided with that of the Soviet Union, the ROC's enemy at the time. Therefore, after repeated requests from the United States government, Dr. Hsu softened its position on the 12 nautical mile limit of the territorial sea.<sup>49</sup> At the 361st meeting of the Commission held on June 6, 1956, he proposed the following compromise amendment to Article 3 of the Draft Articles:

1. The breadth of the territorial sea may be determined by each coastal State in accordance with its economic and strategic needs within the limits of 3 and 12 miles, subject to recognition by States maintaining a narrower belt.
2. In the event of disagreement, the matter shall be referred to arbitration.<sup>50</sup>

The amendment was rejected by 9 votes to 3 with 2 abstentions at the 363rd meeting of the Commission held on June 8, 1956.<sup>51</sup>

In the Draft Articles concerning the Law of the Sea, adopted by the Commission in 1956, there was no provision for the breadth of the territorial sea; and the report to the General Assembly merely noted that the Commission "considers that international law does not permit an extension of the territorial sea beyond 12 [nautical] miles" and the breadth "should be fixed by an international conference."<sup>52</sup> When the Draft Articles were sent to member states of the United Nations for comments, the ROC government's comment on Article 3 was essentially the same as that proposed by Dr. Hsu at the Commission in 1956. It said that the conference "may probably establish a maximum permissible breadth based on the findings

<sup>48</sup> Mr. Hsu's statement at the 312th meeting of the Commission held on June 15, 1955. *Id.* 172-173.

<sup>49</sup> CHANG PAO-SHU, *supra* note 42, at 76.

<sup>50</sup> [1956] 1 Y.B. INT'L L. COMM'N 163, Doc. A/CN.4/SER.A/1956.

<sup>51</sup> *Id.* 181.

<sup>52</sup> *Int'l Law Comm'n Report*, 17 U.N. GAOR, Supp. 9, U.N. Doc. A/3159 (1956); reprinted in 51 AM. J. INT'L L. 154, 161 (1957).

of the International Law Commission [i.e., 12 nautical miles] and, at the same time, leave to each State the right of not recognizing the breadth fixed by any other State, which, though not exceeding the maximum permissible limit, is greater than that of its own."<sup>53</sup>

With respect to the method of delimiting the territorial sea provided in Article 5 of the Draft Articles, the Chinese government, in principle, agreed that a straight baseline could be used in delimiting the territorial sea. However, it was noted that a maximum permissible length of the straight baseline should be worked out to avoid confusion and dispute.<sup>54</sup> Moreover, the ROC also supported the idea that coastal states should have exclusive fishing rights in their contiguous zone.<sup>55</sup>

At the Geneva Conference on the Law of the Sea, held in the spring of 1958, the ROC did not make any proposal on the limit of the territorial sea, but it rejected the view that the territorial sea could be unilaterally delimited by a coastal state to meet its particular needs. It observed that there must be a proper balance among three kinds of interests in deciding the limit of the territorial sea: the justifiable needs of coastal States; the general interests of the international community; and the interests of the maritime powers. The interests of coastal states should be given priority and then the general interest of the international community. The ROC also took the position that the interests of the maritime powers should not be overlooked, however, since many States whose maritime activities were underdeveloped, in addition to the landlocked countries, depended on these powers for essential services.<sup>56</sup>

In 1966-1967, several ministries and governmental agencies of the ROC government again studied the questions of China's territorial sea, fishing zone, contiguous zone and continental shelf. After receiving their report, the Executive Yuan made the following decision at its 1075th meeting, held on June 20, 1968:

<sup>53</sup> 1 U.N. CONF. ON THE LAW OF THE SEA, OFF. REC. 110 (1958), U.N. Doc. A/CONF. 13/37.

<sup>54</sup> *Id.* When the ROC government considered its comments on the Draft Articles on the Law of the Sea, the Chinese fishery industry expressed the view that the straight baseline method in delimiting territorial sea should be adopted. See *Our Fishing Industry's Recommendations on the Law of the Sea*, 74 YU-YU (Friends of Fisherman) 13 (Aug. 10, 1956). Before 1958, almost all Chinese writers considered that territorial sea should be measured from the low-water line along the coast.

<sup>55</sup> 1 U.N. CONF., *supra* note 53.

<sup>56</sup> Statement of Mr. Hsueh at the First Committee on March 11, 1958, 3 U.N. CONF. ON THE LAW OF THE SEA, OFF. REC. 29 (1958), U.N. Doc. A/CONF. 13/39.

At the Conference, the ROC voted against several proposals concerning the 12 nautical mile limit, abstained on the Canadian amendment that the territorial sea could only be extended to 6 nautical miles, and voted for a United States proposal that the territorial sea should be 6 nautical miles. The United States proposal was rejected, having failed to obtain the required two-thirds majority. *Id.* 175-180.

(A) Concerning the question of the breadth of the territorial sea, our country should have a flexible position, and take measures in response to the need of national interest and international situation.

(B) Concerning the question of the breadth of the fishing zone, our country should prescribe a 12 nautical mile limit in order to protect our fishing resources and in response to international trends. However, this limit may be adjusted in response to the need of reciprocity in international relations.<sup>57</sup>

In the fall of 1969, the United States requested the ROC to comment on a new US-USSR Draft Articles on the Law of the Sea which provided, *inter alia*, that a coastal state may extend the breadth of its territorial sea to 12 nautical miles and, for a state which has a narrower breadth of the territorial sea, may establish a fishing zone contiguous to its territorial sea. However, the total breadth of the territorial sea and fisheries zone should not exceed 12 nautical miles. A preliminary study by the ROC Foreign Ministry recommended that the ROC should accept this rule.<sup>58</sup>

From the preceding historical examination, it is clear that the ROC has not been satisfied with the traditional 3 mile limit of the territorial sea. It has not, however, taken any action to extend the breadth of its own territorial sea beyond this limit. This cautious attitude may be due to two reasons. First, the ROC has close relations with the United States which, until recently, favored a limited territorial sea, while the Soviet Union, a country hostile to the ROC, has always favored an extended territorial sea of 12 nautical miles. Therefore, the ROC has been reluctant to take a position which would by necessary implication support the Soviet Union and undermine the United States.

Second, since 1950, the effective area under ROC control has been limited primarily to the Island of Taiwan at the same time that the ROC has become a significant maritime power. It has engaged in large-scale distant-water fishing, its fishing fleets operating from the Indian Ocean through the South Pacific and

<sup>57</sup> Information supplied by a reliable source.

<sup>58</sup> *Id.* On December 4, 1970, the ROC delegate to the First Committee of the United Nations General Assembly stated that "the Chinese delegation believes that the establishment of a 12-mile limit for the territorial sea to be embodied in a new treaty, as announced by President Nixon in his declaration on United States ocean policy on 23 May 1970, is consonant with customary international law as expounded by the International Law Commission in 1956." 25 GAOR First Comm., 1785th mtg., 8, U.N. Doc. A/C.1/PV.1785 (1970). In 1956, the International Law Commission stated "that international law does not permit an extension of the territorial sea beyond twelve miles." *Report of the International Law Commission Concerning the Work of Its Eighth Session, Articles Concerning the Law of the Sea*, art. 3, para. 2, 11 GAOR Supp. 9, U.N. Doc. A/3159 (1957); reprinted in 51 *Am. J. INT'L LAW* 161 (1957).

into the Atlantic. In 1973, its deep-sea fishing fleets caught about 369,726 metric tons of fish, about half of its total fisheries production.<sup>59</sup> As of the end of 1973, the ROC had a merchant fleet of 177 ships aggregating 2,148,238 dead weight tonnage (D.W.T.) and manned by 30,065 Chinese seamen.<sup>60</sup> Finally, the ROC's shipbuilding industry ranks 15th in the world—the Taiwan Shipbuilding Corporation, since 1971, has had an annual production capacity of up to 250,000 D.W.T. in shipbuilding, and up to 1,500,000 D.W.T. in ship repairing.<sup>61</sup> As a major medium-size maritime power, the ROC would not be benefited from an expanded territorial sea.

#### 4. The People's Republic of China and the Question of China's Territorial Sea

Before 1958, the PRC's position on the scope of the territorial sea was unclear. On July 17, 1952, the Soviet member of the United Nations International Law Commission, F.I. Kozhevnikov, observed that the PRC government "has so far made no ruling on the width of its territorial waters."<sup>62</sup> Similarly, in June 1957, a PRC writer, Wei Wen-han also observed: "The breadth of our territorial sea is not yet explicitly prescribed. However, at the 1930 Hague [Codification] Conference, the representative of old China [ROC] did approve the 3 nautical mile breadth of territorial sea."<sup>63</sup>

A textbook on criminal law prepared by the Central Political-Legal Cadres School in Peking and published in September 1957 generally observed that the territorial sea can be either 3 or 12 nautical miles, but it did not specify whether China adhered to the 3 or 12 nautical mile limit.<sup>64</sup> With respect to the method of delimiting the baseline of the territorial sea, the 1957 criminal law textbook noted generally that "the borderlines [outer limit] of the [territorial sea] are to be drawn at a given

<sup>59</sup> CHINA YEARBOOK 1974, at 191.

<sup>60</sup> *Id.* 227-228.

<sup>61</sup> CHINA YEARBOOK 1972-1973, at 15, 272.

<sup>62</sup> [1952] 1 Y.B. INT'L LAW COMM'N, *supra* note 46, at 153.

<sup>63</sup> Wei Wen-han, *Discussing the Question of the Width of the Territorial Sea*, 3 FA HSUEH (Science of Law) 25 (June 1, 1957).

<sup>64</sup> CHUNG-HUA JEN-MIN KUNG-HO-KUO HSING-FA TSUNG-TSE CHIANG-I (Lectures on the General Principles of Criminal Law of the People's Republic of China) 36 (Chung-yang cheng-fa kan-pu hsueh-hsiao hsing-fa chiao-yen-shih [Teaching and Research Office for Criminal Law of the Central Political-Legal Cadre's School] ed. 1957) [hereinafter cited as LECTURES], translated in 1 COHEN AND CHIU, PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 321 (1974). Only after the PRC had declared its intention to extend its territorial sea to twelve nautical miles on September 4, 1958 (see pp. 46-47 and note 75 *infra*) did a Chinese writer write: "Although the Kuomintang [Nationalist Party] government once formally announced by Executive Yuan order that the scope of territorial sea was three nautical miles, since the establishment of the People's Republic of China, it has never recognized the formerly prescribed three nautical mile limit. In fact, the organs concerned have acted on the principle of broader width on concrete matters." Chou Keng-sheng, *The Important Significance of Our Government's Declaration Concerning Territorial Sea*, 18 SHIH-CHIEH CHIH-SHIH 16 (Sept. 20, 1958).

distance from the low-water marks of the sea coast."<sup>65</sup> This is the so-called "normal baseline" method which was then used by most countries.

However, in 1957 and early 1958, Chinese writers began to question the wisdom of the traditional 3 nautical mile territorial sea and the use of the normal baseline method to delimit it. In Wei Wen-han's article, he observed: "How wide should the breadth of our territorial sea be? This question should be decided by jointly considering the concrete situation of our sea coast, national defense and security, and the welfare of the people. The author cannot give a definite figure, but under no circumstances should it be less than 12 nautical miles."<sup>66</sup> He also took note of the straight baseline method of delimiting territorial sea used by Norway and argued that the southern part of China's seacoast was sufficiently indented and dotted with islands to justify application of the straight baseline method in delimiting territorial sea.<sup>67</sup> Besides advocating an extended territorial sea and the use of straight baseline method for China, Wei went further by suggesting that:

Outside the scope of our territorial sea, if there are fishing resources which have been fished by our people, our country should, subject to freedom of navigation, claim rights or establish prohibited zones over these areas, or conclude agreements with the country or countries concerned to protect the right of our fishermen.<sup>68</sup>

On December 13, 1957, a declaration was issued by Indonesia on the territorial sea, containing three major points:

1. The territorial sea was to be extended from 3 to 12 miles.
2. It was to be measured from straight baselines drawn from the outermost points of the outermost islands of the archipelago.
3. Waters within the straight baselines would be internal waters, but open to innocent passage of foreign ships.<sup>69</sup>

The application of the declaration would have included as internal waters of Indonesia substantial areas between the islands of Indonesian Archipelago hitherto considered high seas. The Netherlands, United Kingdom, and other countries protested to

<sup>65</sup> LECTURES, *supra* note 64, at 231.

<sup>66</sup> Wei Wen-han, *supra* note 63, at 25.

<sup>67</sup> *Id.* 26.

<sup>68</sup> *Id.*

<sup>69</sup> *Pengumuman Pemerintah Mengenai Wilayah Perairan Nagara Republik Indonesia* (Government Announcement of the Territorial Water of the Republic of Indonesia), Dec. 23, 1957, 2 THE JAPANESE ANNUAL OF INTERNATIONAL LAW 218 (1958); the majority of the text is also reprinted in 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 284 (1965).

the Indonesian government. The PRC, however, rushed to its defense. An article in the December 28, 1957, authoritative *People's Daily*, by "commentator," the pseudonym for a Communist Chinese official, denounced the British and Dutch protests. It argued that Indonesia is a country comprising more than three thousand islands and for reasons of security and prevention of smuggling, it is necessary to include waters between islands as internal waters. It also referred to the British practice of extending its jurisdiction to 24 nautical miles from the coast of St. Helena Island when Napoleon was held there.<sup>70</sup>

Another article appeared in February, 1958, just a few weeks before the opening of the Geneva Conference on the Law of the Sea, categorically rejecting as "totally groundless" the alleged United States and British claim that the 3 nautical mile territorial sea is a "norm of international law." It observed that "the practice of the great majority of states shows that the breadth of territorial sea is freely decided by a state in accordance with its historical usage, economic interest, and [national] security." Although the article took note that there are different methods for measuring the baseline, it observed that "in practice, it is generally agreed that the baseline is the low-tide line."<sup>71</sup>

Although the PRC was not invited to attend the Geneva Conference on the Law of the Sea, held from February 24 to April 27, 1958, it appears that it watched closely the development of the Law of the Sea before and during the Conference.<sup>72</sup> Despite the fact that the Conference approved use of the straight baseline method in delimiting territorial sea<sup>73</sup> while failing to limit the breadth of territorial sea to 6 nautical miles as proposed by the United States,<sup>74</sup> the PRC waited until the fall of 1958 to articulate its claim of territorial sea.

On August 23, 1958, the PRC suddenly began a massive artillery bombardment of Quemoy, an ROC-held island off the mainland coast. Its air and naval forces soon joined the action. The

<sup>70</sup> Commentator, *Sovereignty Over Territorial Sea and "Freedom of the Sea,"* Jen-min jih-pao (People's Daily), Dec. 28, 1957, at 5.

<sup>71</sup> Ch'en Kang, "Territorial Waters" and "Internal Waters," 3 SHIH-CHIEH CHIH-SHIH (World Knowledge) 31 (Feb. 5, 1958).

<sup>72</sup> Draft Article of the Law of the Sea, Adopted by the United Nations International Law Commission, July, 1956 [1956] 2 Y.B. INT'L L. COMM'N 253 (1956), was translated into Chinese and published in KUO-CHI KUNG-FA TS'AN-K'AO WEN-CHIEN HSUAN-CHI (Compilation of the Reference Documents of International Law) 254 (high seas), 265 (territorial sea) (Wai-chiao hsueh-yuan [Institute of Diplomacy] ed. 1958). After the Conference, Communist Chinese writers frequently referred to the document of the Conference to support their arguments. E.g. Chou Keng-Sheng, *supra* note 64, at 16.

<sup>73</sup> Convention on the Territorial Sea and the Contiguous Zone, Sept. 15, 1958, art. 4, [1964], 15 U.S.T. 1606, 1608, T.I.A.S. 5639; 516 U.N.T.S. 205, 209.

<sup>74</sup> See p. 41 & note 56 *supra*. It should be noted that the Convention of the Territorial Sea and the Contiguous Zone provided that "[t]he contiguous zone may not extend beyond twelve [nautical] miles from the baseline from which the breadth of the territorial sea is measured." *Id.* art. 24, para. 2, at 15 U.S.T. 1606, 1612, 516 U.N.T.S. 205, 220. This provision seems to imply that the territorial sea may be extended beyond three miles, but not beyond twelve miles, leaving some room for a contiguous zone.

United States gave the ROC force some limited logistic support by escorting the ROC supply ships to the 3 mile limit off Quemoy. On September 4, the PRC issued the following declaration on China's territorial sea:

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 island, as well as 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 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 Strait, 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 permission of the Government of the People's Republic of China.

While navigating Chinese territorial seas, 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.<sup>75</sup>

The Declaration included all ROC-held offshore islands within PRC's territorial sea. The United States refused to recognize this extension, saying it was an "attempt to cloak aggressive purposes."<sup>76</sup> On September 7, the United States Navy continued to escort ROC supply ships to 3 nautical miles from Quemoy.<sup>77</sup> The PRC responded by issuing a serious warning on the same day, saying that "such an act, encroaching upon the sovereignty of our country, is dangerous."<sup>78</sup>

On October 6, 1958, the PRC Defense Minister Peng Tehhui issued a statement to the "Taiwan compatriots" that it would suspend the bombing of Quemoy for seven days, subject to the condition that the U.S. would no longer provide naval escort for supply ships to Quemoy.<sup>79</sup> On October 13, the suspension was extended for another two weeks. On October 20, on the eve of United States Secretary of State Dulles' visit to Taipei, PRC resumed its bombing of Quemoy on the ground that the "Taiwan authorities" allowed United States naval escort in the Quemoy "sea area."<sup>80</sup> A few days later, on October 25, 1958, PRC announced an "even-day" cease-fire.<sup>81</sup> This has been the military situation in the Taiwan Strait up to the present.

In PRC's legal circle, writers rushed to the defense of PRC's extension of territorial sea and the adoption of the straight baseline method. Their arguments are based primarily on two grounds. In the first place, they argued that it is within the sovereign right of a state to decide the breadth of its territorial sea. This does not mean that a state can arbitrarily make such a decision. Professor Chou Keng-sheng was of the opinion that a state "has the right to decide the breadth of its territorial sea [by taking into consideration its] national defense, economic interest, and geographical situation."<sup>82</sup> Two other authors took a more restrictive view. Kuo Chi wrote that a state has the "sovereign right" to declare "a reasonable breadth of its territorial sea."<sup>83</sup> Similarly, Fu Chu also wrote that "the breadth of the

<sup>75</sup> 1 PEKING REVIEW 21 (No. 28, Sept. 9, 1958).

<sup>76</sup> BARRACLOUGH, SURVEY OF INTERNATIONAL AFFAIRS, 1956-1958, at 568 (1962).

<sup>77</sup> *Id.* 569.

<sup>78</sup> 5 CHUNG-HUA JEN-MIN KUNG-HO-KUO TUI-WAI KUAN-HSI WEN-CHIEN-CHI. (Collection of Documents Relating to the Foreign Relations of the PRC) 169 (1959).

<sup>79</sup> *Id.* 175-176.

<sup>80</sup> *Id.* 181-182.

<sup>81</sup> *Id.* 182-183. During the "even-day" cease-fire, the PRC refrained from shelling Quemoy on even-numbered days.

<sup>82</sup> Chou keng-sheng, *supra* note 64, at 16.

<sup>83</sup> Kuo Chi, *Important Steps for Safeguarding the Sovereignty of the Country*, 5 CHENG-FA YEN-CHIU (Studies in Political Science and Law) 9 (Oct. 14, 1958).

territorial sea . . . should be decided, within reasonable scope, in accordance with the respective needs of [various] countries."<sup>84</sup>

In the second place, they argued that the "three nautical miles territorial sea" has never been a generally recognized principle of international law. They referred to the practice of states<sup>85</sup> and the discussions at the 1930 Hague Codification Conference,<sup>86</sup> the United Nations International Law Commission<sup>87</sup> and the 1958 Geneva Conference on the Law of the Sea.<sup>88</sup>

With respect to the use of straight baseline method in the PRC declaration, the PRC writers relied on the 1951 *Anglo-Norwegian Fisheries Case*, decided by the International Court of Justice,<sup>89</sup> the 1956 Draft Articles on the Law of the Sea, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, and the practice of various States,<sup>90</sup> to justify the use of this method in delimiting China's territorial sea. However, PRC writers failed to articulate why the Chinese coast would justify the use of this method.<sup>91</sup>

After the crisis over Quemoy had passed, the United States articulated its legal ground for challenging PRC's Declaration on China's Territorial Sea. In a speech delivered at the Washington Chapter of the Federal Bar Association on November 20, 1958, the Assistant Legal Adviser for Far Eastern Affairs of the State Department, Mr. Maurer, said:

<sup>84</sup> FU CHU, KUAN-YU WO-KUO TI LING-HAI WEN-T'I (Concerning the Question of Our Country's Territorial Sea) (1959), translated in 1 COHEN & CHU, *supra* note 64, at 472.

<sup>85</sup> *E.g.* Liu Tse-yung, *A Major Step to Protect China's Sovereign Rights*, 1 PEKING REVIEW 11 (No. 29, Sept. 16, 1958):

"According to data gathered by the Secretariat of the Geneva Conference on the Law of the Sea . . . 66 countries turned in reports on the present breadth of their territorial sea.

Twenty-one countries adhere to a breadth of three nautical miles . . . twelve have twelve nautical miles . . ." See also FU CHU, *supra* note 84, at 470; Chou Keng-sheng, *supra* note 64; Kuo Chi *supra* note 83, at 9.

<sup>86</sup> *E.g.* Liu Tse-yung, *supra* note 85, at 11:

"This question [of the breadth of territorial sea] was discussed at the First (Hague) Conference for the Codification of International Law in 1930. Owing to the insistence of Britain and the United States on the three mile limit the Conference failed to reach agreement."

<sup>87</sup> *E.g.*, *id.* at 12:

"The eighth session of the Commission (1956) declared in 'The Articles Concerning the Law of the Sea' it adopted that 'the Commission recognizes that the international practice is not uniform as regards the delimitation of the territorial sea' and 'considers that international law does not permit an extension of the territorial sea beyond twelve miles.' In other words, the Commission is of the opinion that a breadth of territorial sea not exceeding twelve nautical miles is legitimate."

<sup>88</sup> *E.g.*, Chou Keng-sheng, *supra* note 64:

"It is worth noting that at the Geneva Conference on the Law of the Sea convened in February this year [1958], in view of the majority of representatives of states opposed to the 3 nautical mile breadth, the conference could not but . . . make concessions by proposing a six nautical mile breadth. Eight states, including the Soviet Union and the United Arab Republic, proposed that each state has the right to decide the breadth of its territorial sea within twelve nautical miles. The proposal was supported by a majority of the [participating] states. However, none of the proposals at the Conference was adopted for failing to receive the required two-thirds majority and therefore, the law of the sea conference still could not reach a conclusion on the breadth of territorial sea."

<sup>89</sup> [1951] I.C.J.116.

<sup>90</sup> *E.g.*, FU CHU, *supra* note 84, at 480; Chou Keng-sheng, *supra* note 64, at 16; Kuo Chi *supra* note 83, at 10.

<sup>91</sup> *E.g.* Kuo Chi, *supra* note 83, at 10: "Our country's sea coast is indented and dotted with many islands. It is obviously reasonable and necessary to adopt the straight baseline method." Chou Keng-sheng, *supra* note 64, at 14, wrote that the geographical situation of China's sea coast "is suitable for using the straight baseline."

In addition, the United States considers that international law recognizes only a 3-mile limit, that it is not possible for a country, by unilateral action to take unto itself that which is the common property of all nations, and that this is, moreover, in violation of the universally accepted principle of the freedom of the high seas. The United States' position finds support in the report of the United Nations International Law Commission, wherein it is stated that 'international law does not require states to recognize a breadth [of territorial sea] beyond 3 miles.'

Further, a country is not free to choose whether its territorial sea will be measured from the low-water mark on the coast, which is the normal baseline, or whether it will use straight baselines connecting salient points or offshore islands. While Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone adopted by the recent Geneva Conference on Law of the Sea permits the establishment of straight baselines in localities where the coastline is deeply indented and cut into or if there is a fringe of islands along the coast in its immediate vicinity, it is clear that the Chinese coast along which the straight lines described in the statement of September 4 are drawn does not conform to the geographic conditions which are set forth in Article 4. There is even less legal basis for drawing straight baselines from outermost points on a group of islands and claiming waters thereby included as internal waters. Similar attempts by other countries to claim, as internal waters, large areas of high seas within group of islands or archipelagoes have been protested by many countries. The straight baselines described in the statement of September 4, 1958, are accordingly regarded by the United States as completely arbitrary and without any basis in recognized international law.<sup>92</sup>

Although the ROC has been allied with the United States since 1954<sup>93</sup> and welcomed the United States' naval escort for its supply ships to 3 nautical miles off the coast of Quemoy, it was

<sup>92</sup> *The Legal Considerations Affecting the Status of Taiwan and the Offshore Islands*, [1958] AMERICAN FOREIGN POLICY: CURRENT DOCUMENTS 1189, 1198. For a discussion of the PRC's Declaration on China's Territorial Sea, see Cheng Tao, *supra* note 6; Cheng Tao, *The Law of the Sea*, in LAW IN CHINESE FOREIGN POLICY: COMMUNIST CHINA AND SELECTED PROBLEMS OF INTERNATIONAL LAW 79, 82 (Shao-chuan Leng and Hungdah Chiu eds. 1972).

<sup>93</sup> Mutual defense Treaty with the Republic of China, Dec. 2, 1954, [1955] 6 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213.

silent on the legality of PRC's extension of the territorial sea and the use of straight baseline methods.<sup>94</sup> This attitude was understandable, as was discussed above, in that the ROC itself, on a number of occasions, was seriously considering extending its territorial sea beyond 3 nautical miles and approved the use of the straight baseline.

The post-1958 development on the Law of the Sea has been favorable to the PRC's position. Not only have more and more states extended their territorial sea beyond the 3 nautical mile limit and used the straight baseline method,<sup>95</sup> but the United States has also gradually come to recognize the legality of the 12 mile territorial sea.<sup>96</sup> In view of these recent developments, it is submitted that even if the PRC's claim of a 12 nautical mile territorial sea in 1958 was of questionable legality in international law, today the legality of such a claim appears beyond doubt.

With respect to the PRC's use of the straight baseline method in delimiting its territorial sea, the question does not concern the legality of using such a method, which was accepted in the 1958 Convention on the Territorial Sea, but rather whether PRC's application to the Chinese coast conforms to the requirements of that method. The answer to this question depends on a study of the actual straight baselines drawn by the PRC on the Chinese coast. Unfortunately, although the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provided in Article 4, paragraph 6, that "the coastal state must clearly indicate straight baselines on charts, to which due publicity must be given," the PRC is not a party to the Convention and so far has not made known how it drew straight baselines on the Chinese coast. The following descriptions of the PRC's baselines are primarily based on a study done by the Bureau of Intelligence and Research of the State Department<sup>97</sup> and several PRC publications.

Basically, it is observed by the State Department study that the PRC "appears to have taken a realistic and non-expansive attitude in drafting its straight baseline. Rather than stating that the lines join the outermost points of the outer islands, the

<sup>94</sup> The military spokesman of the ROC said at a press conference sponsored by the Government Information Office on Sept. 5: "China's mainland is a part of the territory of the Republic of China. All territorial sea [adjacent] to the mainland also belongs to the ROC." KAN HUANG, *supra* note 29, at 77.

<sup>95</sup> INT'L BOUNDARY STUDY, *supra* note 44.

<sup>96</sup> *International Law and the Ocean*, 62 DEP'T STATE BULL. 339 (No. 1603, Mar. 16, 1970) (Address by John R. Stevenson, the State Department Legal Advisor, to the Philadelphia World Affairs Council and the Philadelphia Bar Association, Philadelphia, Feb. 18, 1970); *United States Outlines Position on Limit of Territorial Sea*, *id.* at 343 (Press Release No. 64, Feb. 25, 1970). See p. 17 *supra*; p. 50 and note 172 *infra*; see generally, SWARZTRAUER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS 229-248 (1972).

<sup>97</sup> INT'L BOUNDARY STUDY, *supra* note 44, STRAIGHT BASELINES: PEOPLE'S REPUBLIC OF CHINA 2 (No. 12, July, 1972).

declaration notes [in paragraph 2] that mainland points intervene."<sup>98</sup> Therefore, the PRC's declaration "would act to shorten the length of straight baseline segments and hence to diminish the claim to internal waters and to territorial sea."<sup>99</sup>

With respect to specific areas of sea coast, the Declaration mentioned a number of areas where the straight baseline method is applicable. This question requires expansion.

*Gulfs or Bays.* The Declaration pointed out that the Gulf of Pohai (Pohai Bay or Gulf of Chili) is inside the baseline and is China's internal waters. Geographically, Pohai is totally enclosed by the Chinese provinces of Shangtung, Hopeh and Liaoning and its mouth has a width of 45 nautical miles. However, the mouth is fringed with islands which constitute eight entrances, and the largest entrance is the entrance between Liaotung Peninsula in the north and Pei Huang Chen Island (Lao Tieh Shan Waterway), which has a breadth of 22.50 nautical miles.<sup>100</sup> Article 7, paragraph 4, of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides: "If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 [nautical] miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters."<sup>101</sup> Therefore, it is beyond doubt that the PRC can claim the Gulf of Pohai as internal waters.<sup>102</sup>

Although the Declaration mentioned only the Gulf of Pohai, a PRC writer correctly pointed out that the reason for this is that it is the largest bay of China.<sup>103</sup> It does not mean that the PRC does not claim other bays as internal waters. It is impossible to describe all other bays of China in an article of this nature, so discussion will be limited to two other large and famous bays—Hanchow Bay and the Gulf of Ch'u [Pearl] River Mouth.

In the central part of the Chinese coast, Hangchow Bay is situated between the coast of Kiangsu and Chekiang provinces. Its mouth has a width of approximately 50 nautical miles but is fringed with the Chou-shan and the Sheng-szu Archipelagoes. None of the distances between the islands exceeds 24 nautical

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> FU CHU, *supra* note 84, at 484.

<sup>101</sup> Convention on the Territorial Sea and the Contiguous Zone, Sept. 15, 1958, art. 7, para. 4, [1964] 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205, 210; FU CHU, *supra* note 84, at 483.

<sup>102</sup> A PRC writer also claimed the Gulf of Pohai as an historical bay of China. FU CHU, *supra* note 84, at 484; *cf.* p. 12 *supra* (ROC's position of the Gulf of Pohai). The validity of this argument is now of purely academic interest; it will not be discussed here. Early in this century some Chinese writers advocated the view of claiming the Gulf of Pohai as China's territorial sea. *See, e.g., The Theory of Claiming the Entire Gulf of Pohai as China's Territorial Sea*, 1 TI-HSUEH TSA-CHIH (Geography Magazine) 43-44 (No. 5, June, 1910); *see also* references cited in KAN HUANG *supra* note 29, at 79-80.

<sup>103</sup> FU CHU, *supra* note 84, at 484.

miles. According to a State Department study, the PRC draws a baseline along the outermost islands of these two archipelagoes.<sup>104</sup>

Another important bay is the Gulf of Ch'u [Pearl] River Mouth in the southern part of the Chinese coast. Like the above stated two bays, the mouth of this bay is fringed with many islands, including the British-ruled Hong Kong and adjacent islands. According to an undated notice issued by the PRC in mid-1960, it is stated that "the waterway west of the Chiapeng and the Tankan islands at the mouth of the Pearl [Ch'u] River is part of China's inland [internal?] waters . . . foreign vessels are prohibited to sail in the waterways west of the Chiapeng Tankan islands."<sup>105</sup> It is reasonably assumed that PRC has drawn straight baselines connecting the outermost points of these islands. The lines would, however, enclose Macao as an enclave within PRC internal waters. The PRC might also have chosen to enclose Hong Kong by continuing the Tankan line eastward but apparently has specifically not taken this action.<sup>106</sup>

*Straits.* The Declaration points out in paragraph 2 that the Chungchow strait is part of China's internal waters.<sup>107</sup> The strait separates the Leichow (Luichow) Peninsula and Hainan Island and links the South China Sea with the Gulf of Tonkin. The distance between its natural entrance points is about 40 miles long, and the narrowest width is 9.8 nautical miles.<sup>108</sup> By claiming a 12 nautical mile territorial sea, the strait would be part of PRC's territorial sea. However, the PRC was not satisfied with such a claim and has gone further by claiming it as internal waters. Fu Chu justified the PRC's claim by saying: "When a coastal state adopts the straight baseline method to delimit the breadth of its territorial sea, if a strait is inside the baseline, then this strait should be the internal strait of the coastal state. Our Chungchow strait is this kind of strait because it is situated inside the baseline of our territorial sea."<sup>109</sup>

However, in view of the fact that the strait was being used by foreign vessels as an international waterway, the PRC made a

<sup>104</sup> See the map entitled "Taiwan to Korea" annexed to STRAIGHT BASELINES: THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 97.

<sup>105</sup> *Id.* 3.

<sup>106</sup> On April 21, 1968, two Americans, Mary Ann Harbert and Gerald Ross McLaughlin, were arrested on their yacht by the PRC at Tankan (Tamkon) Island for "illegally intruding into China's territorial waters." *China's Organs of Dictatorship Dispose of Cases of U.S. Culprits*, 14 PEKING REVIEW 23 (No. 51, Dec. 17, 1971). McLaughlin committed suicide on March 7, 1969, while under PRC confinement, and Harbert was released on Dec. 13, 1971. *Id.* For a detailed account, see HARBERT, CAPTIVITY, HOW I SURVIVED 44 MONTHS AS A PRISONER OF THE RED CHINESE (1973) (as told to Einstein).

<sup>107</sup> Declaration on China's Territorial Sea, pp. 46-47 and note 75 *supra*.

<sup>108</sup> Kennedy, *A Brief Geographical and Hydrographical Study of Straits which Constitute Routes for International Traffic*, U.N. Doc. A/CONF. 13/6 and Add. 1 (Oct. 23, 1957), in 1 U.N. CONFERENCE ON THE LAW OF THE SEA 114, 125 (text), 162 (map), U.N. Doc. A/CONF. 13/37 (1958). The Chungchow Strait is also known as the Hainan Strait.

<sup>109</sup> FU CHU, *supra* note 84, at 486.

concession by allowing foreign non-military vessels to continue to pass through the strait if they comply with the PRC's "Rules Regulating Passage of Foreign Nonmilitary Vessels Through the Chiungchow Strait," promulgated on June 5, 1964.<sup>110</sup> Article 3 of the Rules defines the strait water area as being bounded "provisionally" by a line joining Mu-lan-tao lightpost (about 20°9'37" north latitude and 110°41' east longitude) and Sheng-kou-hou-sha lightpost (about 20°26' north latitude and 110°30'22" east longitude) on the east and by a line joining Chiao-wei-chiao lightpost (about 20°13'30" north latitude and 109°55'30" east longitude) and the Lin-Kao-chiao lightpost (about 20°0'22" north latitude and 109°42'6" east longitude) on the west. Presumably, these two lines are the straight baselines for the strait.

Another important strait is the Taiwan Strait which separates the mainland province of Fukien and the island province of Taiwan. The widest distance of the strait is about 110 nautical miles, and the narrowest distance is about 70 nautical miles. The Penghu (Pescadores) Archipelago lies in the eastern side of the strait, and the nearest distance between this Archipelago and Taiwan is less than 24 nautical miles. From the language in the declaration, it appears very clear that a separate straight baseline system would be drawn about the two island groups of Taiwan and Penghu if they were placed under the control of the PRC. So far it appears that the PRC has not yet tried to draw a straight baseline for these ROC controlled islands, nor has it issued "serious warnings" when foreign warships enter the sea area between 3 and 12 nautical miles off the coast of these islands.

*South China Sea Islands.* Paragraph 4 of the Declaration provides that the straight baseline principle would be applied to the four Chinese archipelagoes<sup>111</sup> in the South China Sea: The Tungsha (Pratas), Hsisha (Paracel Islands), the Chungsha (Macclesfield Bank) and the Nansha (Spratly Islands). The Tungsha Islands under the control of the ROC is a small atoll and its coast is not deeply indented. There appears no justifiable legal ground to use the straight baseline principle here.<sup>112</sup>

The Chungsha Islands are submerged features which do not qualify as islands either geographically or legally. The question of its territorial sea certainly does not exist. Moreover, it is

<sup>110</sup> *Rules Regulating Passage of Foreign Nonmilitary Vessels through the Chiungchow Strait*, Jen-min jih-pao (People's Daily), June 28, 1964, at 2.

<sup>111</sup> Declaration on China's Territorial Sea, pp. 46-47 and note 75 *supra*.

<sup>112</sup> STRAIGHT BASELINES: THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 97, at 3.

questionable whether a state can claim ownership over a mid-ocean sea-bed area.

The Spratly Islands are generally under the control of the ROC, though it has been reported that the Philippines and South Vietnam also occupy a few islets of this island group.<sup>113</sup> The whole group, including at least 98 islands, islets or shoals, is widely spread between 11°30' and 4° north latitude and 109°30' and 117°50' east longitude. The distance between the largest island Taiping (Itu Aba) and the second largest island Nanwei (Spratly or Storm) is about 160 nautical miles, though many islets intervene. A State Department study is of the opinion that "because of their small size and wide dispersion [the Spratlies would] defy any logical system of straight baseline."<sup>114</sup> However, it is submitted that the question of applicability of straight baseline to the Spratlies would much depend on the distance between islets or shoals of this group and pending a thorough investigation of the matter, it is difficult to give a definite answer.

The Paracel Islands, though claimed by the Republic of Vietnam for some time, is now totally under the control of the PRC.<sup>115</sup> A State Department study based on warnings given by the PRC against intrusions into claimed PRC territorial sea of the Paracels indicated several straight baselines on the eastern side of the Paracels.<sup>116</sup> However, it is not clear how the PRC draws other straight baselines on the western side of the Paracels.

Although the PRC supported the Indonesian measures in 1957 to draw baselines from the outermost points of the outermost islands of the Indonesian archipelago, it does not appear that it attempts to apply this so-called archipelago principle to China's South China Sea islands.<sup>117</sup>

It is impossible to describe how the PRC draws straight baselines in other coastal areas of China. Therefore, a map based on all available information to this author was drawn to show the

<sup>113</sup> It was reported that the Philippines had occupied Nanshan, Thitu and Flat islands for some time. The ROC had occupied the largest island, Taiping (Itu Aba), since 1951, and the Republic of Vietnam has occupied the Nanwei Islands (Storm or Spratly) since early 1974. See Chiu and Park, *Legal Status of the Paracel and Spratly Islands*, in *OIL AND ASIAN RIVALS, Hearings before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs, 93rd Cong., 1st and 2nd Sess.*, at 422 (1974).

<sup>114</sup> STRAIGHT BASELINES: PEOPLE'S REPUBLIC OF CHINA, *supra* note 97, at 4.

<sup>115</sup> The Republic of Vietnam occupied Robert and Prattle islands of the Paracel Island group for some time, but, in January, 1974, the PRC drove out the Vietnamese occupation force. See Chiu and Park, *supra* note 113, at 422.

<sup>116</sup> See map entitled "People's Republic of China: Hypothetical Straight Baseline," annexed to STRAIGHT BASELINES: PEOPLE'S REPUBLIC OF CHINA, *supra* note 97.

<sup>117</sup> It should be pointed out that both the PRC and the ROC maps have usually drawn a boundary line outside the South China Sea Islands. This line is drawn for the purpose of identifying those islands as Chinese territory and does not mean that the sea areas within the boundary line are China's territorial or internal sea.

PRC's baselines of territorial sea for reference to readers. Whether these lines actually reflect the PRC's system of straight baseline remains to be studied.

The breadth at which the PRC delimits its territorial sea, of course, has a critical effect upon the existence of related legal rights such as the right of innocent passage by foreign vessels and the right of overflight above the territorial sea by foreign aircraft. It is interesting, therefore, to examine the position taken by the 1958 Declaration with respect to these issues. Paragraph 3 of the Declaration provides for innocent passage by non-military vessels, subject to observance of relevant laws and regulations.<sup>118</sup> While, in principle, this provision is similar to Article 17 of the 1958 Geneva Convention on the Territorial Sea,<sup>119</sup> whether in practice there is any discrepancy between the two would depend on the relevant laws and regulations of the PRC.<sup>120</sup> The Declaration also denies the passage of military vessels through the territorial sea and the overflight of foreign aircraft through the airspace above the territorial sea unless permission is granted by the PRC.

It is generally recognized that foreign aircraft do not enjoy the right of innocent passage through the airspace above the territorial sea.<sup>121</sup> However, whether foreign warships are entitled to enjoy the right of innocent passage through the territorial sea is controversial in international law. Article 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is unclear on this point. It provides: "If any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea."<sup>122</sup> Many Afro-Asian-Soviet bloc states have, on ratifying the Convention, made reservations asserting the coastal state's right to require warships to seek previous authorization before passing through the territorial sea.<sup>123</sup> The United States, while challenging the PRC's right to unilaterally extend its territorial sea to 12

<sup>118</sup> *Declaration on China's Territorial Sea*, p. 22 and note 75 *supra*.

<sup>119</sup> "Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal state in conformity with [articles 14 through 17 of the Convention] . . . ." Convention on the Territorial Sea and the Contiguous Zone, Sept. 15, 1958, art. 17, [1964] 15 U.S.T. 1606, 1611, T.I.A.S. 5639, 516 U.N.T.S. 205, 216.

<sup>120</sup> It is not clear whether the PRC has made known its pertinent laws and regulations, if any exist, to the outside world. The official CHUNG-YANG JEN-MIN CHENG-FU FA-LING HUI-PIEN (Collection of laws and decrees of the Central People's Government, 7 vols, 1950-1955) and CHUNG-HUA JEN-MIN KUNG-HO-KUO FA-KUEI HUI-PIEN (Collection of Laws and Regulations of the People's Republic of China, 13 vols., 1956-1965) do not contain such laws or regulations.

<sup>121</sup> *E.g.*, BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS* 427 (3rd ed. 1971).

<sup>122</sup> Convention on the Territorial Sea and the Contiguous Zone, Sept. 15, 1958, art. 23, [1964] 15 U.S.T. 1606, 1612, T.I.A.S. 5639, 516 U.N.T.S. 205, 220.

<sup>123</sup> FRIEDMANN, LISSITZYN, & PUGH, *CASES AND MATERIALS ON INTERNATIONAL LAW* 597 (1969).

nautical miles, did not seem to protest PRC's measure for entry of military vessels into its territorial sea.<sup>124</sup>

It must be pointed out that the right of foreign warships to enter Chinese ports and territorial seas was considered by the Chinese as an important item in the unequal treaties.<sup>125</sup> As President Chiang Kai-shek of the ROC observed:

The Treaties of Tientsin signed with Britain, the United States, France and Russia, permitted foreign war vessels to enter any harbor and anchor at all treaty ports.<sup>126</sup> Other nations came to enjoy the same privilege by virtue of the most-favored-nation clause. With territorial waters and inland rivers thus opened to foreign war vessels, China could well be called 'a house with gates wide open', and foreign powers were free to do whatever they liked. Inasmuch as the ports where foreign nationals concentrated were generally cities economically well developed, and politically and culturally rather advanced, foreign naval forces in the event of any incident could, by merely clearing their decks for action, readily intimidate the Chinese people and officials, the Central Government or the local authorities, into accepting whatever they demanded. Under pressure of this 'gun-boat policy' China could only do as she was bidden.<sup>127</sup>

On January 11, 1943, a *Treaty for the Relinquishment of Extraterritorial Rights in China and the Regulations of Related Matters* was signed between the United States and the ROC.<sup>128</sup> The accompanying exchange of notes No. 1 explicitly provided for the abrogation of special rights with regard to the entry of American naval vessels into Chinese waters.<sup>129</sup> From then on, warships of China and the United States, when exchanging visits, would be accorded reciprocal courtesies in accordance with international usage. Afterwards, similar rights enjoyed by warships of other countries were also abrogated. On October 19, 1946, the ROC government promulgated *Provisional Measures Governing the Entry of Foreign Warships into Chinese*

<sup>124</sup> P. 47 and note 76 *supra*.

<sup>125</sup> Hungdah Chiu, *Comparison of the Nationalist and Communist Chinese Views of Unequal Treaties*, in *CHINA'S PRACTICE OF INTERNATIONAL LAW: SOME CASE STUDIES* 239, 250-251, 260 (J. Cohen ed. 1972).

<sup>126</sup> *E.g.*, Article 52 of the Sino-British Treaty of Tientsin (June 26, 1858), 1 HERSTLER'S *CHINA TREATIES* 34 (3rd ed. 1908): "British ships of war coming for no hostile purpose, or being engaged in the pursuit of pirates, shall be at liberty to visit all ports within the dominions of the Emperor of China . . ."

<sup>127</sup> CHIANG KAI-SHEK, *CHINA'S DESTINY* 60 (Wang Chung-hui trans. 1947).

<sup>128</sup> Treaty with the Republic of China for the Relinquishment of Extraterritorial Rights in China and the Regulation of Related Matters, Jan. 11, 1943, 57 Stat. 767 (1943), T.S. No. 984.

<sup>129</sup> *Id.* 789.

*Territorial Seas and Ports*,<sup>130</sup> which provided that entry is subject to prior permission.

No country appears to have protested the legality of the measures.

#### 5. The PRC and the Recent Development of the Regime of the Territorial Sea, Economic Zone and Continental Shelf

After mid-1959, the PRC's interest in the question of the territorial sea appeared to be in decline. When the Second United Nations Conference on the Law of the Sea was held in the spring of 1960, the PRC seemed simply to ignore the Conference. It was neither reported in the authoritative *People's Daily* nor commented upon in the legal or international affairs journals such as *Chen-fa-yen-chiu* (Studies in political science and law), *Shih-chieh chih-shih* (World knowledge) or *Kuo-chi wen-ti yen-chiu* (Studies in international problems).

During the 1960's, the PRC's activities on the question of the territorial sea continued to be very limited. Except for promulgating the above-mentioned Rules concerning Chiungchow Strait,<sup>131</sup> its activities were limited primarily to giving "serious warnings" to "American imperialism" for violating the PRC's "territorial sea." Taking the year of 1963 for example, the PRC gave fifteen "serious warnings" to the United States for alleged intrusions into its territorial sea by its warships or military aircrafts. It also gave five "serious warnings" for alleged intrusions into its "sea areas" (hai-yu).<sup>132</sup>

Another significant action of the PRC was its strong protest against American proclamation of a "combat zone" off the Vietnamese coast in 1965. On April 24, 1965, President Johnson designated Vietnam and the waters adjacent to it as "an area in which armed forces of the United States are and have been engaged in combat."<sup>133</sup> This "combat zone" extended eastwardly to 111° east longitude, which is about 9 nautical miles off the coast of Triton (Chung-chien) Island of the Paracels (Hsisha).<sup>134</sup> The PRC responded by publishing an article by "Observer," a pseudonym for a senior Communist Chinese official, denouncing the act as "a menace to China's security and an encroachment on China's sovereignty," because the zone "extends to the very

<sup>130</sup> See the translation of selected articles in *LAW AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA* 867, U.N. Legislative Series, ST/LEG/SER. B/6, Dec. 1956.

<sup>131</sup> *Rules Regulating the Passage of Foreign Nonmilitary Vessels through the Chiungchow Strait*, *supra* note 110.

<sup>132</sup> See the listing of these serious warnings in I-CHIU LIU-SAN NIEN JEN-MIN JIH-PAO SO-YIN (Index of 1963 People's Daily), 288 (Jen-min jih-pao t'u-shu kuan ed. 1965). It is not clear whether the term "sea areas" refers to PRC's internal waters, or to areas contiguous to the territorial sea.

<sup>133</sup> Exec. Order No. 11,216, 30 Fed. Reg. 5817 (1965).

<sup>134</sup> *Id.*

door of China and even includes part of Chinese territorial waters in the vicinity of China's Hsisha Islands."<sup>135</sup>

Subsequently, the Republic of Vietnam (South Vietnam) declared a 3 nautical mile "defensive area" and a 12 nautical mile "supervisory belt" for the purpose of preventing "the infiltration by sea of (Vietcong) personnel and supplies." It would "inspect and search" ships passing through these areas. This was denounced by the PRC's Political Science and Law Association as a measure instigated by "American imperialism . . . , infringing on the PRC's territorial sovereignty and freedom of navigation on the seas."<sup>136</sup> It did not articulate why the Republic of Vietnam could not extend its jurisdiction beyond 3 nautical miles off its coast. Presumably, the PRC seemed to consider the Republic of Vietnam an American "puppet" and therefore had no legal right to take such measures on behalf of Vietnam.<sup>137</sup>

It was not until the early 1970's that the PRC gradually renewed its interest in the question of the territorial sea and other problems relating to the law of the sea. The focal point of the PRC's present interest, however, is not primarily on China's own territorial sea problem but on supporting developing countries' desire to expand their territorial sea right or maritime right up to 200 nautical miles.<sup>138</sup> The first significant PRC action was an editorial entitled "Support Latin American Countries' Struggle to Defend Their Territorial Sea Rights" appearing in the authoritative *People's Daily* on November 20, 1970.<sup>139</sup> In the editorial, the PRC committed itself to support the 200 nautical mile breadth of territorial sea right claimed by Latin American countries by saying:

The Chinese people<sup>140</sup> regard the struggle of the Latin American countries and people against U.S. imperialist aggression as their own struggle. They express firm support for the Latin American countries and people in their struggle against U.S. imperialist aggression and in defense of the rights of territorial seas.<sup>141</sup>

<sup>135</sup> Observer, *Johnson Administration's Act of Piracy*, Jen-min jih-pao (People's Daily) May 2, 1965, at 2; translated in 8 PEKING REVIEW 23 (No. 19, May 7, 1965).

<sup>136</sup> *Statement of Chinese Political Science and Law Association Condemning the Piratical Acts of the Johnson Administration's Combat Area Declaration*, 2 CHENG-FA YEN-CHIU (Studies in Political Science and Law) 6 (1965), translated in 2 COHEN AND CHIU, *supra* note 64, at 1499.

<sup>137</sup> On January 18, 1950, the Foreign Minister of the PRC notified the North Vietnamese Foreign Minister that the PRC "recognizes the Government of the Democratic Republic of Vietnam [North Vietnam] as the legal government representing the will of the Vietnamese people." 1 CHUNG-HUA JEN-MIN KUNG-HO KUO TUI-WAI KUAN-HSI WEN-CHIEN CHI, *supra* note 78, at 24 (1957).

<sup>138</sup> See note 1 *supra*, regarding the distinction between the use of the terms "territorial sea right" and "maritime right."

<sup>139</sup> Translated in 13 PEKING REVIEW 7-8 (No. 13, Nov. 27, 1970).

<sup>140</sup> In the terminology of the PRC, "the Chinese People" means the government of the PRC.

<sup>141</sup> *Support Latin American Countries' Struggle to Defend their Territorial Sea Rights*, *supra* note 139, at 8.

The PRC's support became increasingly official. For example, in mid-1971 when some Peruvian cabinet members visited the PRC, Premier Chou En-lai "reiterated the firm support of the government of the People's Republic of China for Peru and other Latin American countries in their struggle to persist in defending their rights over 200 nautical mile territorial waters and their maritime jurisdiction."<sup>142</sup> Subsequently, the PRC included such a commitment in the documents establishing diplomatic relations with several Latin American countries. Thus, in the joint communique announcing its establishment of diplomatic relations with Peru on November 2, 1971, the PRC stated that it recognized "the sovereignty of Peru over the maritime zone adjacent to its coast within the limit of 200 nautical miles."<sup>143</sup> The joint communique announcing establishment of diplomatic relations with Argentina on February 13, 1972, contained a similar declaration.<sup>144</sup> It should be noted that the term "territorial sea" was not used in these documents.

Despite the PRC's support for a 200 nautical mile territorial sea right or maritime zone off the coast, it did not articulate its legal grounds for supporting such a claim until it replaced the ROC delegation at the United Nations and was elected to the United Nations Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction (hereinafter referred to as Seabed Committee). In his first speech before the Seabed Committee on March 3, 1972, the PRC representative An Chih-yuan attacked the hegemonism of the superpowers in attempting to limit the breadth of the territorial sea, and based the legality of the 200 mile extension on state sovereignty:

The superpowers have tried hard to find pretexts in international law for their own defense. First, they asserted that 'the breadth of the territorial seas of states has been defined by international law to be three nautical miles.' Then, under the pressure of circumstances, they changed their tune and said that it should be 12 nautical miles. By this they attempt to attack the Latin American countries' proclamation of 200 nautical miles as 'violation of international law.' But this is of no avail. As everyone with some knowledge of international law is aware, there has never been in history a unified and internationally recognized breadth of territorial seas.

<sup>142</sup> *Peruvian Minister of Fisheries Visits China*, 14 PEKING REVIEW 4 (No. 26, June 25, 1971).

<sup>143</sup> *Joint Communique on Establishment of Diplomatic Relations between China and Peru*, 14 PEKING REVIEW 5 (No. 45, Nov. 5, 1971).

<sup>144</sup> *Diplomatic Relations Established between China and Argentina*, 15 PEKING REVIEW 26 (Nos. 7-8, Feb. 25, 1972).

The breadth of the territorial sea of each country in the world is determined by the country itself, and this is within its state sovereignty. With regard to the breadth of territorial seas of various countries in the world, there are at present more than ten different stipulations, ranging from 3 to 200 nautical miles. What is most ridiculous is that when a superpower says 3 nautical miles today, others must not say no; when tomorrow it, in collusion with the other superpower, says the breadth must not exceed 12 nautical miles, others have again to follow suit. By this logic, only the superpowers have the final say, while the other one hundred and scores of countries in the world can only submissively obey and let themselves be trampled upon at will. Can this be 'international law'? It is crude violation of the principle of state sovereignty. It is imperialist logic, pure and simple . . . .

We hold that it is within each country's sovereignty to decide the scope of its rights over territorial seas. All coastal countries are entitled to determine reasonably the limits of their territorial seas and jurisdiction according to their geographical conditions, taking into account the needs of their security and national economic interests and having regard for the requirement that countries situated on the same seas shall define the boundary between their territorial seas on the basis of equality and reciprocity.

We maintain that all coastal countries have the right of disposal of their natural resources in their coastal seas, sea-bed, and the subsoil thereof so as to promote the well-being of their people and the development of their national economic interests.<sup>145</sup>

The speech did not specify the exact limit of the breadth of a country's territorial sea and only said that a country "(is) entitled to determine reasonably the limits of (its) territorial sea. . . ." However, a month later the authoritative *People's Daily* defined the term "territorial sea" in its column on International Knowledge as follows:

The territorial sea is a part of the sea area extended to a designated width from the low-water line or the selected baseline (called baseline of the territorial sea)

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<sup>145</sup> Speech by An Chih-Yuan, Representative of the PRC, at the U.N. Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Mar. 3, 1972, 11 INT'L LEGAL MATERIALS 654, 657, 660 (1972).

along the entire coast of a coastal state and is under the sovereign jurisdiction of that state. At present, the width of the territorial sea of coastal states (also called littoral states) of the world is extremely inconsistent. Their width starts from 3 nautical miles and may be extended to 4, 6, 10, 12, 18, 25, 30, 130 and up to 200 nautical miles.<sup>146</sup>

The mentioning of 200 nautical miles in the above definition of territorial sea may imply that the PRC considers that this should be the limit of the breadth of territorial sea.

At the United Nations, the PRC actively supports the claim for 200 nautical mile maritime right,<sup>147</sup> which allows a state to create an exclusive economic zone beyond a country's territorial sea up to 200 nautical miles from the baseline of the territorial sea. On March 20, 1973, PRC Chief Representative Chung Yen spoke at the Subcommittee II of the Seabed Committee:

Owing to the fact that the breadth of the territorial sea varies with different countries, we consider that it is in the exercise of the sovereignty of a state to reasonably define, in accordance with their specific conditions and the need for the development of their natural economies, the scope of their jurisdiction over economic resources beyond their territorial seas, using the names of exclusive economic zone, continental shelf, patrimonial sea or fishing zone, etc. Neighbouring countries situated in a common sea area should equitably allot their limits of jurisdiction through consultations on the basis of equality and mutual respect.<sup>148</sup>

He explained the different legal status of the territorial sea and economic zone as follows:

Territorial sea is a part of the territory of a coastal state over which it exercises complete sovereignty. In the case of an exclusive economic zone, the coastal state mainly enjoys ownership over the economic resources therein, including living resources and sea-bed natural resources. . . . In order to protect, utilize, explore and exploit the resources therein it is necessary for the coastal state to exercise exclusive jurisdiction

<sup>146</sup> *Kuo-chi chih-shih* (International Knowledge), *Jen-min jih-pao* (People's Daily) Apr. 12, 1972, at 6, in 1 COHEN AND CHIU, *supra* note 64, at 491.

<sup>147</sup> *Supra* note 1.

<sup>148</sup> Speech by Chinese Chief Representative Chuang Yen at Subcommittee II, at 6 (People's Republic of China, Mission to the U.N., undated Press Release): summarized in *Chinese Delegate Chuang Yen Speaks at Subcommittee Meeting of U.N. Sea-bed Committee*, *HSINHUA WEEKLY* 5 (No. 13, Mar. 26, 1973).

over the area and the right to take necessary measures and promulgate appropriate laws and regulations to protect these resources against plunder, appropriation, destruction or pollution. . . . Other countries can engage in activities in the exclusive economic zone of a given country only when they have secured its consent by concluding necessary agreements with it through consultations on an equal footing and on the basis of respect for its sovereignty. Moreover, they should strictly observe its relevant regulations and measures. They enjoy the convenience of normal navigation and overflight through its exclusive economic zone provided they do not prejudice its security, or affect its fishing activities and its exploration and exploitation of seabed resources therein.<sup>149</sup>

With respect to the right of a land-locked country neighboring a coastal state, Chung Yen suggested that the latter "should, in principle, grant to its neighboring land-locked state common enjoyment in certain proportion of the rights of ownership and jurisdiction in its economic zone."<sup>150</sup>

It should be pointed out that the designation of a portion of high sea contiguous to its territorial sea as a special zone similar to economic zone is not new to the PRC. In late December 1950, the PRC issued regulations that prohibited all fishing by trawlers, whether Chinese or foreign, in a zone that seemed to extend from China's Korean border to Chekiang Province and that appeared to be broader even than the 12 nautical mile territorial sea later claimed by the PRC in 1958.<sup>151</sup> When on April 15, 1955, the Chinese Fisheries Association (CFA) and its Japanese counterpart, the Japan-China Fishing Council (JCFC) concluded an "unofficial agreement" on fishing in Yellow Sea and East China Sea, letters were exchanged between them in which the CFA notified the JCFC of this trawler-prohibited zone as including the sea area west of the line running from a point at 37°20' N and 123°03' E to a point at 36°49'10" N and 122°43' E, then to a point at 35°1' N and 120°38' E then to a point at 30°44' N and 123°23' E, and finally to a point at 29° N and 122°45' E. Moreover, the same letter also notified the Japanese side that the PRC had designated the sea area west of the line running from a point

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* 7.

<sup>151</sup> Tao Cheng, *The Law of the Sea*, in *LAW IN CHINESE FOREIGN POLICY: COMMUNIST CHINA AND SELECTED PROBLEMS OF INTERNATIONAL LAW* 93-94, 111 (1972), citing the Annex to the "Temporary Regulations Concerning Motorized Trawler Fishing in the East China Sea" issued by the Aquatic Products Control Board of the East China Military-Political Commission on December 16, 1950, 2 HUA-TUNG CH'U TS'AI-CHENG CHING-CHI FA-LING HUI-P'EN (Collection of laws and decrees of the East China area regarding financial and economic matters) 1333-1337 (PRC).

at 39°45'48" N and 124°10' E to a point at 37°20' N and 123°03' E as a military security zone. Japanese fishing boats "are not allowed to sail into this area without permission of the competent department of the Chinese government."<sup>152</sup> Both zones included a substantial portion of the high seas contiguous to China's territorial sea even assuming at that time the PRC had already claimed a 12 nautical mile territorial sea. The Japanese side accepted these measures on the understanding that they "are applicable to all boats irrespective of their nationality and are not merely intended for Japanese fishing boats."<sup>153</sup> On November 9, 1963, similar letters were again exchanged between the CFA and JCFC.<sup>154</sup>

Before the same Subcommittee, the PRC severely criticized the 1958 Geneva Conference on the Law of the Sea which adopted the four conventions on territorial sea, high sea, continental shelf and conservation of fishing resources. The PRC representative Shen Wei-liang told the Subcommittee II of the Seabed Committee on March 29, 1973:

It must be pointed out that, in 1958 when the First Conference on the Law of the Sea was held, many Asian and African countries had not yet won independence. Asian, African and Latin American countries made up only about half of the eighty-odd countries then participating in the Conference. And owing to manipulation by the imperialist powers, their many reasonable propositions were not adopted. Thus, the four Geneva Conventions have completely failed to reflect truly the reasonable demands of the numerous developing countries. In the decade and more since then, profound changes have taken place in the world situation. All countries, big or small, should be equal. International affairs should be settled by all countries through consultations on an equal footing. Opinions of the Third World should be fully respected. The representatives of many countries have now pointed out that the four Conventions do not meet the needs of our epoch and should be rewritten.<sup>155</sup>

With respect to the 1958 *Convention on the Territorial Sea and the Contiguous Zone*, Shen Wei-liang was particularly un-

<sup>152</sup> 4 CHUNG-HUA JEN-MIN KUNG-HO-KUO T'IAO-YUEH-CHI (Compilation of Treaties of the People's Republic of China) 280-281 (1958), trans. in 1 COHEN AND CHIU, *supra* 64, at 550.

<sup>153</sup> *Id.* 282; 550.

<sup>154</sup> For text, see 1 COHEN AND CHIU, *supra* note 64, at 549-551.

<sup>155</sup> Press Release, People's Republic of China Mission to the United Nations [no date], 1-2. Whole speech summarized in *Chinese Representative Speaks at Sub-committee of U.N. Seabed Committee*. HSHIN HUA WEEKLY 17-18 (No. 15, Apr. 9, 1973).

happy about three articles of the Convention. First, Article 24, paragraph 2, which set the limit of contiguous zone so as not to exceed "twelve (nautical) miles from the baseline from which the breadth of the territorial sea is measured," was considered by Shen as "a so-called legal basis" used by the superpowers (the United States and the Soviet Union) to oppose "the developing countries in their struggle to defend their territorial sea rights" (i.e., to expand their territorial sea or contiguous zone beyond 12 nautical miles.) Second, Shen said that Article 14 was drafted in such general terms that ships of all countries would enjoy the right of innocent passage through territorial seas, and therefore, it "may be interpreted that foreign military ships enjoy the same right." Finally, Shen said of Article 16 which stipulates that there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation, "this blatantly deprives coastal states with such straits of the right to exercise sovereignty over their own territorial seas," and allows "foreign warships and submarines (to) intrude unimpededly into the straits within the territorial sea limits of coastal states in disregard of their security."<sup>156</sup>

On July 16, 1973, the PRC consolidated its above stated view into a working paper and submitted it to Subcommittee II of the Seabed Committee.<sup>157</sup> The paper is divided into three parts: 1. Territorial sea, 2. Exclusive Economic Zone or Exclusive Fishery Zone, and 3. Continental Shelf.

The working paper provides that the territorial sea "as delimited by a coastal state by virtue of sovereignty," is "a specified area of sea adjacent to its coast or internal waters, including the airspace over the territorial sea and its bed and subsoil thereof, over which it exercises sovereignty."<sup>158</sup> With respect to the breadth of the territorial sea, it provides that a coastal state "is entitled to reasonably define the breadth . . . according to its geographical features and its needs of economic development and national security," and that it should pay "due regard to the legitimate interests of its neighboring countries and the convenience of international navigation, and shall give publicity thereto."<sup>159</sup> Although the PRC working paper does not put a limit on the breadth of territorial sea, the second part of the working paper on the economic zone provides that the "outer limit of the economic zone may not, in maximum, exceed 200 nautical miles measured from the baseline of the territorial sea."<sup>160</sup> Therefore,

<sup>156</sup> *Id.* 2-3.

<sup>157</sup> U.N. Doc. A/A.C. 138/Sc. II/L.34 (1973), reprinted in 12 INT'L LEGAL MATERIALS 1231-1234 (1975).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* 2.

it may be reasonably concluded that the PRC considers the maximum breadth of the territorial sea should be 200 nautical miles.<sup>161</sup>

The working paper is silent on the use of the straight baseline method to delimit the territorial sea. In view of the PRC's practice and the adoption of this method by the 1958 Convention on the Territorial Sea and Contiguous Zone, this omission should not be interpreted as a denial of the validity of the straight baseline method of delimitation. Although the PRC clearly accepts the notion that a country must publicize the delimitation of its territorial sea, what publication it considers adequate is unclear. If it considers that a state using the straight baseline should indicate the lines on charts and furnish them to other countries, it is clear the PRC's practice has not satisfied this condition. Although the PRC announced its territorial sea breadth and the use of the straight baseline method in 1958, it has never given due publicity of its straight baselines on charts.

The working paper provides with respect to islands that "in principle" a state's sovereign right to delimit its territorial sea applies as well to islands as to mainland areas. A special rule however, is applicable to archipelagoes: "an archipelago or an island chain consisting of islands close to each other may be taken as an integral whole in defining the territorial sea around it."<sup>162</sup>

The working paper denies the right of passage through straits lying within a state's territorial sea regardless of the prior or existing use of the strait for international navigation. Passage of foreign military vessels is subject to prior notification or approval at the discretion of the coastal state. Although no provision concerning the right of overflight above the territorial sea is included in the paper, as such a right is not recognized in customary international law, the omission cannot constitute PRC recognition.

Part II of the working paper concerns the "exclusive economic zone or fishery zone." It is provided that "a coastal state may reasonably define an exclusive economic zone beyond and adjacent to its territorial sea in accordance with its geographical and *geological conditions*, the state of its natural resources and its needs of national economic development."<sup>163</sup> The limit of the zone is set as up to 200 nautical miles from the baseline of the territorial sea within which the coastal state has ownership of all natural re-

<sup>161</sup> Cf. *supra* note 146 and accompanying text.

<sup>162</sup> *Supra* note 157.

<sup>163</sup> *Id.* 2.

sources, "including living and non-living resources of the whole water column, seabed and its subsoil."<sup>164</sup>

The inclusion of the factor of the *geological condition* is apparently closely related to the problem of the continental shelf. The PRC has defined the continental shelf as "the natural prolongation of the continental territory."<sup>165</sup> Unless the delimitation of the economic zone takes into consideration this geological element, China would be forced to share the continental shelf with Japan in the Yellow and East China Seas in conformity with the equidistance rule, even though the shelf is the natural prolongation of China's continental territory and not that of Japan.<sup>166</sup>

It should be noted that while the PRC working paper sets a limit upon the economic zone, no such limit was provided for the continental shelf. The working paper provides that "a coastal State may reasonably define, according to its specific geographical conditions, the limits of the continental shelf under its exclusive jurisdiction beyond *its territorial sea or economic zone*" (Emphasis added).<sup>167</sup> Therefore, a state's continental shelf may extend beyond 200 nautical miles from the baseline of the territorial sea if its geographical conditions warrant such an extension. However, the superjacent waters of the continental shelf beyond the territorial sea, the economic zone or the fishery zone "are not subject to the jurisdiction of the coastal State."<sup>168</sup> In other words, such water areas are high seas.

With respect to the right of passage through the economic zone, the working paper provides that "the normal navigation and overflight on the water surface of and in the airspace above the economic zone by ships and aircraft of all States shall not be prejudiced."<sup>169</sup> No provision was made for subjecting military vessels or military aircraft to a requirement of prior notice or permission. Presumably, their right of passage is the same as non-military ships or aircraft.

Other provisions in the working paper generally reflected the PRC position on the economic zone as stated by the PRC delegate at the Seabed Committee.<sup>170</sup> The above rules concerning

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* 3.

<sup>166</sup> The PRC has not yet articulated its claim on the continental shelf of the Yellow Sea and the East China Sea. However, the ROC deposited its instrument of ratification of the 1958 Convention on the Continental Shelf on Oct. 12, 1970 with the reservation to Article 6 "that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and/or opposite each other shall be determined in accordance with the principle of the natural prolongation of their land territories." 10 INT'L LEGAL MATERIALS 452 (1971). The seaward limit of the five "sea-bed reserve areas" promulgated by the ROC on October 15, 1970, is approximately coincident with the 200-meter contour line. *Chung-yang jih-pao* (Central Daily News), Oct. 16, 1970.

<sup>167</sup> *Supra* note 157, at 3.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* 4.

<sup>170</sup> See, *supra* note 148 and accompanying text.

economic zone will, *mutatis mutandis*, apply to the exclusive fishing zone.

A question closely related to the economic zone is the carrying out of scientific research in this area. The extension of the scope of the territorial sea or economic zone up to 200 nautical miles would necessarily include a large part of the ocean formerly considered a high seas area freely accessible for scientific research. According to the PRC these areas would no longer be accessible without restriction for scientific research under a 200 mile regime. The PRC supported the view of many developing countries that no freedom of scientific research in either territorial sea or economic zone exists. In a working paper on marine scientific research submitted to the Subcommittee III of the Seabed Committee on July 19, 1973, it is provided:

To conduct marine scientific research in the sea area within the national jurisdiction of a coastal State, prior consent of the coastal State concerned must be sought, and the relevant laws and regulations of the coastal State must be observed.

A coastal State is entitled to take part in the scientific research work conducted by other States in the sea area within its national jurisdiction and to receive data and results obtained in such work. The publication and transfer of such data and results are subject to the prior consent of the coastal State concerned.<sup>171</sup>

The above were the positions of the PRC before the opening of the Third United Nations Conference on the Law of the Sea.

#### 6. The PRC and the Third United Nations Conference on the Law of the Sea

The Third United Nations Conference on the Law of the Sea was held in Caracas, Venezuela, between June 20 and August 29, 1974. The position of the PRC on the territorial sea and economic zone was essentially the same as that stated above. The PRC was strongly opposed to the position of the United States and the Soviet Union on the breadth of territorial sea, the rights and duties of the coastal state over the economic zone, and the question of passage through straits for international navigation.

At the conference, the United States, the principal supporter of the principle of a "package" settlement, was willing to accept "a maximum outer limit of 12 nautical miles for the terri-

<sup>171</sup> U.N. Doc. A/Ac. 138/Sc. III/L.42 (1973). See also Shen Wei-liang's speech at Subcommittee III of the Seabed Committee held on April 2, 1973 in Press Release, People's Republic of China Mission to the United Nations (no date).

torial sea and of 200 miles for the economic zone . . . conditional on a satisfactory overall treaty package, and, more specifically, on provisions for unimpeded transit of international straits and a balance between coastal state rights and duties within the economic zone."<sup>172</sup> As regards the rights of other states in a coastal state's economic zone, the United States held the view that no "unjustifiable interference" with navigation and overflight by the coastal state is permitted and that insofar as a coastal state does not fully utilize its fishery resources, it must "permit foreign fishing."<sup>173</sup> With respect to the question of scientific research in the economic zone, the United States supported a proposal to obligate the state conducting the research to notify the coastal state, provide for its participation, and to insure sharing of the data and assistance in interpreting such data.<sup>174</sup> The Soviet position on the above questions was essentially the same as that of the United States.<sup>175</sup>

The PRC's position on the delimitation of the territorial sea and the exclusive jurisdiction of the coastal state over its economic zone flatly contradicted that of the United States and the Soviet Union.<sup>176</sup> In particular, with respect to coastal state control over fisheries and scientific research in the economic zone, PRC delegate Ling Ching said the following at the Conference's Second Committee meeting on August 1, 1974:

We are of the opinion that a coastal state may, in accordance with its wishes and needs, allow foreign fishermen to fish in the sea areas under its jurisdiction by bilateral or regional agreements, since it is a matter of the exercise of sovereignty by the coastal state and should be decided by the coastal state itself. But it must not be provided beforehand that the coastal state have the 'obligation' to grant foreign states any such rights . . . .

<sup>172</sup> Statement by Ambassador Stevenson to the Third United Nations Conference on the Law of the Sea at Caracas, July 11, 1974, in DEPT. OF STATE, LAW OF THE SEA: THIRD UNITED NATIONS CONFERENCE 9. See also, Statement by J. N. Moore before the Subcommittee on Immigration, Citizenship, and International Law of the House Committee on the Judiciary, March 14, 1974. *Id.* 3.

<sup>173</sup> See, U.S. Draft Articles on Economic Zone and Continental Shelf, arts. 8, 13, U.N. Doc. A/CONF. 62/C.2/L.47 (1974); reprinted in DEPT. OF STATE, *supra* note 172, at 26-30.

<sup>174</sup> Statement by Ambassador Stevenson, Committee III, July 19, 1974, in DEPT. OF STATE, *supra* note 172, at 18-21.

<sup>175</sup> For the Soviet position, see generally, Kovalyov, *Territorial Waters and International Law*, 1974 J. INT'L AFFAIRS No. 36, at 41-46; Igorev, *The Law of the Sea Conference*, 1974 NEW TIMES No. 36, at 10-11.

<sup>176</sup> Concerning the width of the territorial sea, the PRC took the position that the "coastal states are entitled to reasonably define their territorial sea of an appropriate breadth" and that its "maximum limit" should be "decided upon by all countries jointly on an equal footing." Speech by Chai Su-fan, Leader of the PRC delegation, before Plenary Session, in *At the Conference on the Law of the Sea, Chinese Delegation Leader Chai Su-fan's Speech*, 17 PEKING REVIEW 13 (No. 28, 1974).

The superpowers do not recognize the exclusive jurisdiction of the coastal state over the entire economic zone. Both of them proposed that coastal state jurisdiction should be subject to 'international standards,' should be 'in conformity with the recommendations of the competent international organization,' and should even be 'in compliance with any internationally agreed rules.' Recently, a superpower, after listing a series of coastal state 'duties' in respect of the economic zone, went so far as to openly indicate that the coastal state may not regulate scientific research and prevention of vessel-based pollution in the economic zone.<sup>177</sup>

A natural consequence of increasing the maximum width of territorial sea to 12 nautical miles is to make many straits used for international navigation the territorial sea of the coastal state or states. A study prepared by the United States Department of State indicates that more than 100 world straits are affected by a 12 mile territorial sea.<sup>178</sup> While many maritime powers, including the United States and the Soviet Union, were willing to agree to increase the maximum limit of the territorial sea to 12 nautical miles, they insisted on a guarantee of the freedom of navigation through straits used for international navigation but lying within the newly extended limits of the territorial sea.<sup>179</sup>

At the plenary meetings of the Conference's Second Committee held on July 22 and 23, 1974, the Sultanate of Oman submitted a proposal entitled "Navigation Through the Territorial Sea, Including Straits Used for International Navigation."<sup>180</sup> According to this proposal a strait, though lying within the limit of the territorial sea and used for international navigation, retains its legal status as territorial sea. The right of passage of foreign merchant ships is generally guaranteed, but with respect to the passage of military ships, the proposal provided that in view of the fundamental rights of a sovereign state "the coastal state may require prior notification to or authorization by its competent authorities for passage of foreign warships through its territorial sea, in conformity with regulations in force in such a state."<sup>181</sup> At the same time, the Soviet Union also

<sup>177</sup> At the U.N. Conference on the Law of the Sea, China Supports 200-mile Sea Limit and Exclusive Economic Zone, 17 PEKING REVIEW 6 (No. 33, AUG. 16, 1974).

<sup>178</sup> OFFICE OF THE GEOGRAPHER, DEPT. OF STATE, WORLD STRAITS AFFECTED BY A TWELVE MILE TERRITORIAL SEA

<sup>179</sup> E.g., Statement by J. N. Moore, Committee II, July 22, 1974, in DEPT. OF STATE, *supra* note 172, at 21-24.

<sup>180</sup> See U.N. Doc. A/CONF.62/C.2/L.16, in THIRD U.N. CONF. ON THE LAW OF THE SEA, OFF. REC. 192 (1975).

<sup>181</sup> *Id.* at 194.

submitted a proposal entitled "Draft Articles on Straits Used for International Navigation" to the Second Committee, which provided, *inter alia*, for the "enjoyment of the equal freedom of navigation (as that of the case on the high seas) for the purpose of transit passage through such straits" by all ships.<sup>182</sup>

On July 23, 1974, Deputy Leader of the Chinese Delegation Ling Ching commented on the above two proposals at the Second Committee. He said:

The Chinese Delegation has consistently held that, on the premise that the sovereignty of the strait state is fully respected, the needs of international navigation must be taken into consideration and all necessary and reasonable measures adopted so as to safeguard international transport and trade against impediment. . . .

The passage of foreign military vessels is, however, entirely different in nature from that of foreign merchant vessels, and should be strictly distinguished from the latter.

The superpowers, however, have always tried their best to obliterate this distinction under the smokescreen of 'all ships' and have fabricated all sorts of pretexts in an attempt to impose on other states their proposition of free passage through straits by warships. . . .<sup>183</sup>

With respect to the so-called package settlement—that is, some states suggested that their acceptance of some aspects of the law of the sea such as economic zone is contingent upon the other states' acceptance of free passage through straits by all ships, including warships—Ling Ching said that the interrelations between various aspects of the law of the sea must never be accommodated at the expense of the sovereignty of the states concerned and the interests of international peace and security. He said:

Any attempt to give 'recognition' to the legitimate demands of the developing countries, such as the economic zone, etc., in exchange for 'free passage through straits' by military ships will definitely not be tolerated.<sup>184</sup>

When the Conference ended on August 29, it had not adopted a new convention on the law of the sea. Therefore, the Con-

<sup>182</sup> U.N. Doc. A/CONF.62/C.2/L.11, *supra* note 180, at 189.

<sup>183</sup> U.N. Conference on Law of the Sea, *Debats on the Question of Straits for International Navigation*, 17 PEKING REVIEW 10 (No. 31, Aug. 2, 1974).

<sup>184</sup> *Id.*

ference recommended to the General Assembly of the United Nations that another session of up to eight weeks be held at Geneva from March 17 to May 3 or 10, 1975, and it agreed that its final session—for which it did not specify a date—should be held in Caracas to sign the documents which would emerge.<sup>185</sup> In view of this development, at the time of this writing in December 1974, it is impossible to make a thorough coverage of the PRC's participation at the unfinished Third United Nations Conference on the Law of the Sea.

### 7. Concluding Observations

Although China became acquainted with the regime of territorial sea in the mid-nineteenth century, it did not articulate its position on the breadth of the territorial sea until the early 1930s. China's practice prior to that time indicated that it did in fact respect a three nautical mile territorial sea. As a country with a negligible naval force and backward fishing industry, China could not fully protect its national interests and security by accepting the three mile limit, however. Both before and after its removal to Taiwan, the ROC government has never been satisfied with this limit. Due to the fact that China consistently relied upon support from the United States and Great Britain in the face of constant Japanese aggression, China was reluctant to challenge the then prevailing practice, supported by the United States, Great Britain, and many other maritime powers, of a three nautical mile limit. In addition, the ROC, consistently claiming to be the only legal government of China, could not disregard the interest of China as a whole, and it is too obvious that before the mainland becomes a significant maritime power, an extended territorial sea would better serve its interests. Since 1950, however, the ROC itself has become a medium size maritime power and would no longer benefit from an extended territorial sea.

When the PRC government gained control of mainland China in late 1949, it apparently faced a similar dilemma. To protect its national interests and security it was certainly desirable for the PRC to extend its territorial sea beyond the three nautical mile limit, but it was necessary to take into serious consideration the possible reaction of maritime powers, especially the United States and the United Kingdom, if such a measure were taken. Consequently, the PRC was very cautious in approaching this

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<sup>185</sup> See 11 U.N. MONTHLY CHRONICLE 110-111 (No. 8, Aug.-Sept. 1974). This session has subsequently concluded without agreement and another session will be held in New York in early 1976.

objective. It was not until September, 1958, that the PRC finally extended its territorial sea to twelve nautical miles. By that time, the traditional three-nautical mile rule had already been seriously challenged at the 1958 First United Nations Conference on the Law of the Sea, and by the practice of some states. When the PRC took action to extend its territorial sea, it also mobilized its legal scholars to defend its position and as a result, the question of territorial sea became, with the exception of the legal status of Taiwan, the most widely discussed topic in the PRC's literature of international law.

In recent years, the PRC has approached the question of the territorial sea and its related problems not primarily from the consideration of China's national interests, but rather as a means of supporting the opposition of Third World countries to the "hegemony" of the two superpowers, the United States and the Soviet Union. However, there are many Third World countries and their views and interests are not necessarily the same on all major issues of the territorial sea. The PRC's position on each issue seems to reflect a degree of consensus among the Third World countries. If the great majority of these countries takes a similar position toward a particular issue, the PRC also takes that position regardless of the fact that in the long run it may have a detrimental effect on its increasingly developed naval power and maritime merchant fleet. Its position on passage through a strait used for international navigation lying within the territorial sea of a coastal state is an example. The PRC supported the proposal that a coastal state may subject the passage of military vessels to prior notification or consent.<sup>136</sup>

With respect to issues which are controversial among the Third World countries, the PRC is taking a flexible and general position. Thus, on the question of the breadth of territorial sea, the PRC takes the position that a coastal state may define a reasonable limit of territorial sea and the maximum limit should be decided by all countries concerned. The PRC has not yet disclosed its position on the exact limit of the "maximum limit,"

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<sup>136</sup> See note 123 *supra*, and accompanying text. In August 1967, the United States coast guard icebreakers informed the Soviet Union that they intended to pass the Vil'kitskii straits which are entirely within the Soviet 12 mile territorial sea, but between two parts of the high seas used for international navigation. The Soviet Ministry of the Maritime Fleet immediately sent a radio message to United States ships which said:

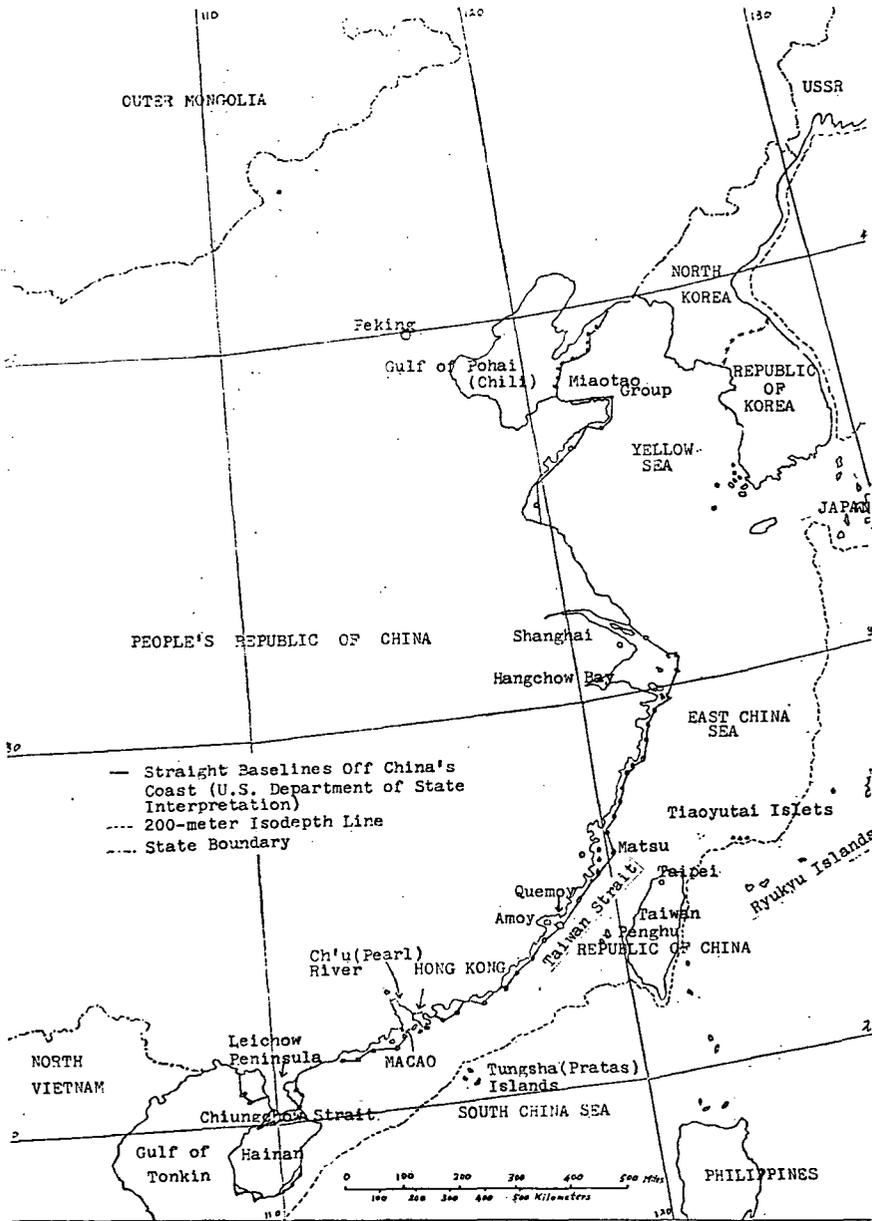
Vil'kitskii straits are within USSR territorial waters. Therefore sailing of any foreign navy ships in the straits is subject to regulations of safety of USSR frontiers. For passing the straits according to the above regulations military ships must obtain preliminary permission of the USSR Government through diplomatic channels one month before expected date of passage.

In view of the Soviet objection to free passage, the United States found it necessary to cancel the proposed passage. See W. E. BUTLER, *THE SOVIET UNION AND THE LAW OF THE SEA* 66-70 (1971).

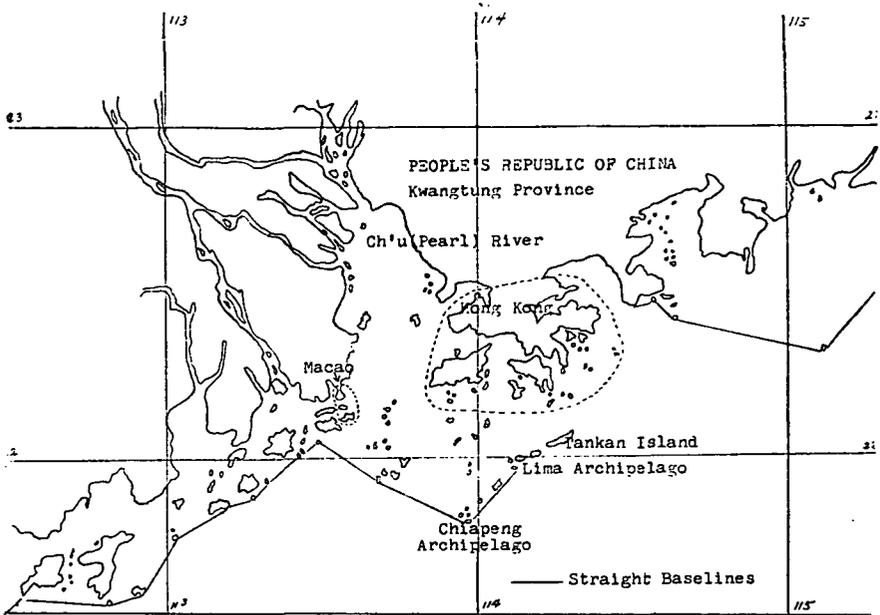
thus avoiding having to take sides with either those Third World countries favoring a twelve mile limit or those which oppose such a limit. With respect to the question of the interest of land-locked countries in an extended territorial sea or economic zone of neighboring coastal countries, the PRC took a similar position by saying that they should "enjoy reasonable rights and interests in the economic zones of neighboring coastal states and have the right of transit through the territory and territorial seas of the latter and other sea areas."<sup>187</sup>

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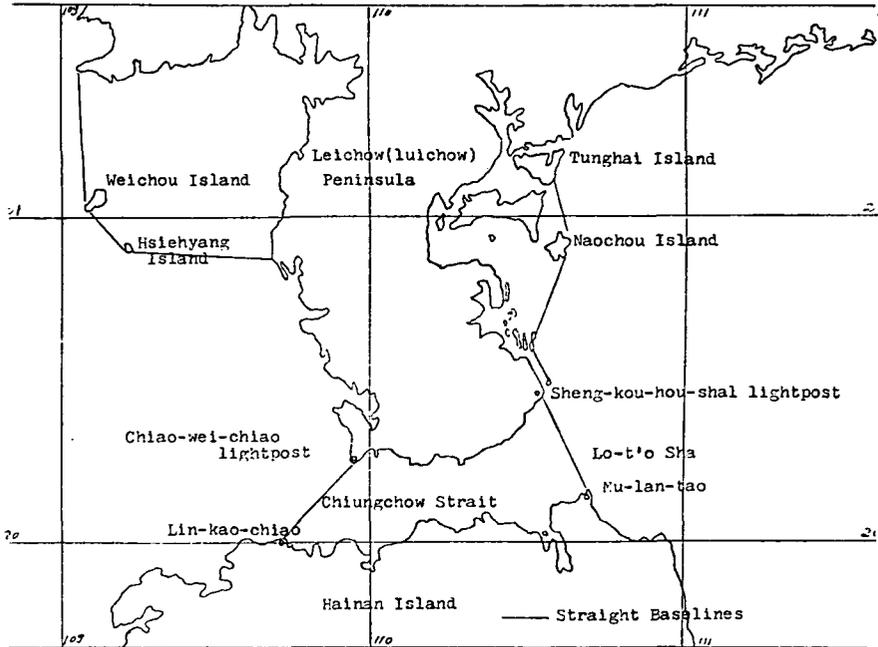
<sup>187</sup> See, *Chinese Delegation Leader Chai Shu-fan's Speech*, *supra* note 176.



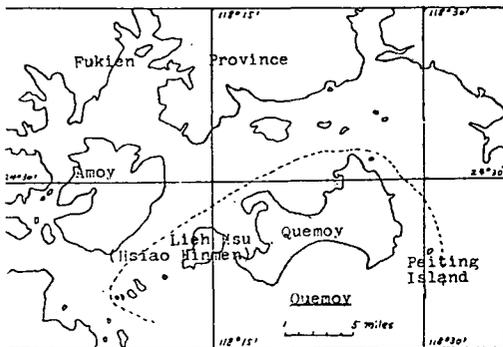
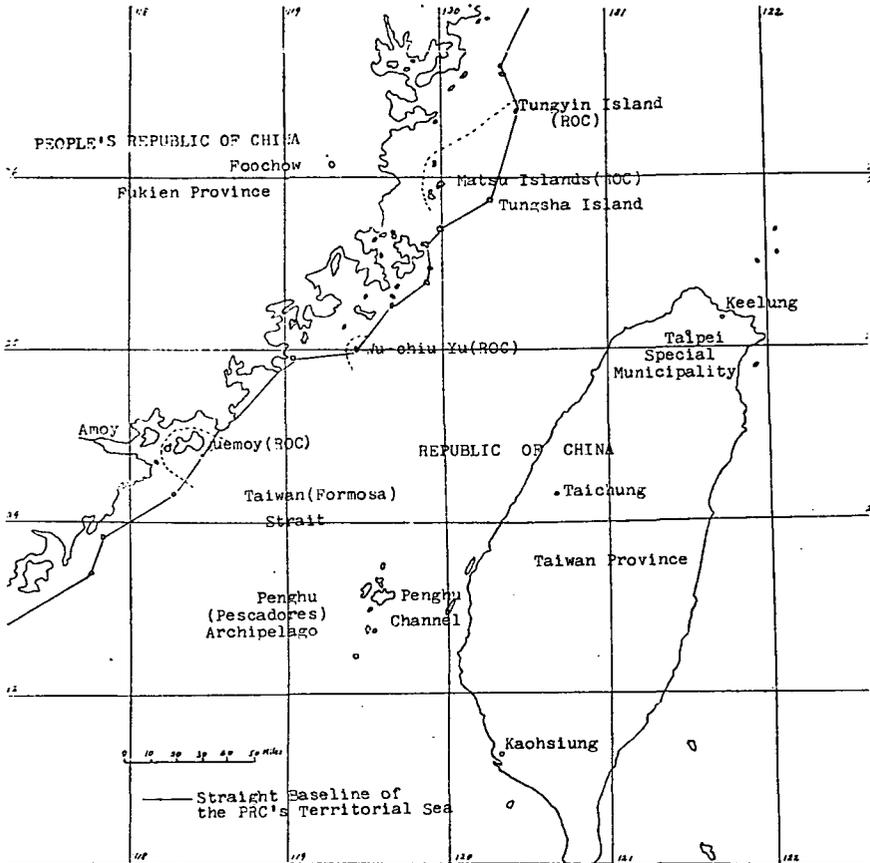
M A P (1) THE COAST OF CHINA



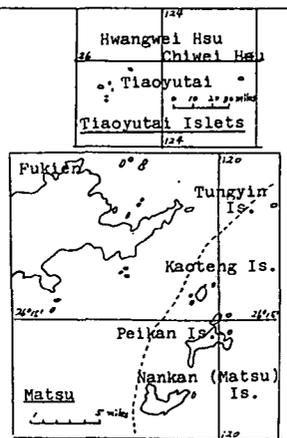
M A P (2) HONG KONG, MACAO, AND CH'U (PEARL) RIVER

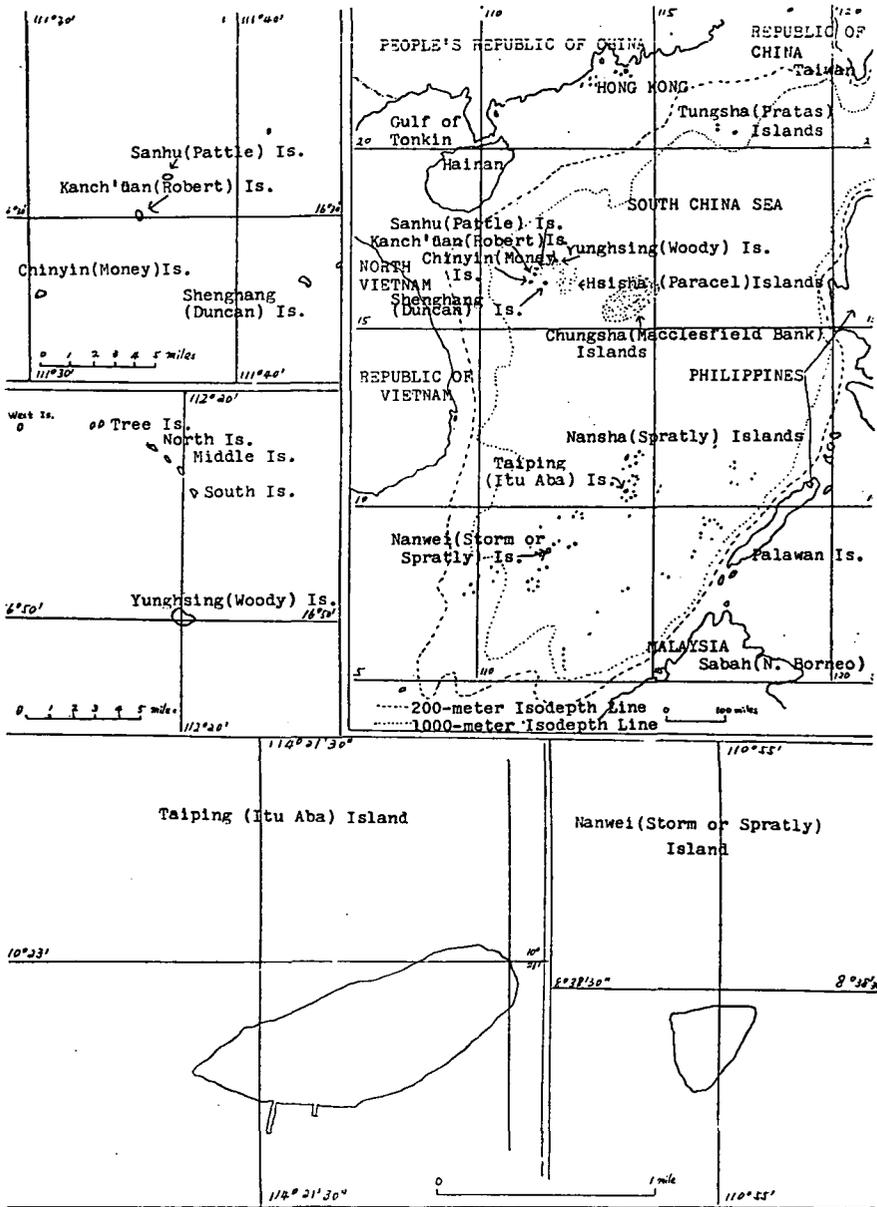


M A P (3) CHIUNGCHOW STRAIT



M A P (4) TAIWAN AND OFF-SHORE ISLANDS





M A P (5) CHINA'S SOUTH CHINA SEA ISLANDS

