

Chapter 4

The United Nations Convention on the Law of the Sea (UNCLOS III) and China's Assertion of the U-shaped Line

Abstract China's strategy for claiming sovereignty in the South China Sea, based on UNCLOS which it has signed and ratified, is to be seen as an evolving process of interaction. Periodic adjustments to various situational logics are apparent: the material conditions on the mainland; the tenor of international relations shaped by China's rise; China's relationship with ASEAN as a regional organization and with its individual members. China's understanding of 'maritime borders' tends to conflate the notion of a 'nation' with that of a Confucian 'family'. The application of this to foreign diplomacy is baulked by a form of nationalism derived from a neo-Confucian interpretation of culture and identity. The framing of territorial sovereignty in terms of a lineage to support its claim to exclusive rights and authority over this maritime area faces the litmus test of successful institutional building with "Chinese characteristics" over a culturally hybrid sea space in order to achieve peaceful coexistence.

Keywords UNCLOS · ASEAN Way · Cultural hybridity · Nation/family conflation · Chinese characteristics · Peaceful coexistence

Honoured by being referred to as the 'Constitution of the Oceans', UNCLOS III is premised on three main moral principles guiding maritime delimitation: (1) equity regarding fairness for coastal states and user states; (2) proportionality (in the limits to be determined) for ensuring equitable access (to resources and sea space); and (3) historical (the historicity of) claims. Regarding marine resources, UNCLOS emphasizes cooperation as a requirement for the optimal use of resources and their adequate protection, especially with respect to enclosed and semi-enclosed seas.¹ Within ASEAN as a regional community, a consensus has been reached among claimant states on cooperation and resolution of overlapping claims in accordance with both UNCLOS and the Treaty of Amity and Cooperation in Southeast Asia.

The maritime claims made by the People's Republic of China (PRC) in the South China Sea, based on the U-shaped line first introduced in 1947 and the

¹UN; at: http://www.un.org/depts/los/convention_agreements/texts/unclos/part9.htm (6 September 2014).

evidence used to justify the claims, have raised anxiety among competing claimant states in Southeast Asia as well as among other states within and outside the region. The underlying concerns are related to issues of proportionality, modes of cooperation and the meaning(s) of the word ‘historical’ as variously used in statements of claim. In the twenty-first century, the South China Sea has gained strategic significance for the economies of the East and Southeast Asian regions, and has been aptly described as the ‘throat’ of the western Pacific Ocean and the Indian Ocean—a channel of passage made of connective economic tissues where global sea routes coalesce (Kaplan 2014). The normal and earnest expectation of China’s neighbours is cooperation through both bilateral and multilateral channels to resolve overlapping claims in line with UNCLOS’s norms and rules. The principle of peaceful coexistence underlying the Treaty of Amity and Cooperation—to which China is also a party—is an additional point for consideration.

The process of resolving differences with reference to UNCLOS in this region has revealed characteristics that correspond to what Lo (2012) has observed as cycles of maritime activities in China’s history. Maritime trade and expansion, initiated by coastal provinces, peaked when China was unified and declined when the country became absorbed either in internal affairs or the defence of the northern and western frontiers. These cycles may be considered as a structural tendency, although in contemporary times the pattern of securing political legitimacy at the maritime frontier has become more complicated. Today, nation states in dispute are, in principle, equal actors under international law. At the same time, some tend to position themselves as members of a ‘family’ (in figurative terms) as regards China. Understanding China as a land-based empire, whose divergence into the position of anti-imperialism and pragmatism were merely moments of retreat and adjustment, is helpful for grasping its emerging features as a modern state, and its manner of self-projection as a maritime power. Shaped by a Sinocentric perspective on ‘sovereignty’ since the campaign concerning a “Century of Humiliation”, the will to project ‘Chinese characteristics’ on to the maritime world to counter the dominance of Western values remains a dormant force which may awaken when favourable conditions permit.

4.1 The U-shaped Line in China’s Maritime Claims and UNCLOS

One of China’s leading experts on the Law of the Sea confirms that, being a land-based empire, China’s awareness of the significance of maritime borders and the need for strong measures to protect them only arose with the formation of the modern state (Gao 2009: 267). A key concern for its neighbours is the form of modern state that China is constructing along with the values that underpin it. Although China’s posture on the U-shaped line remains consistent, it has gone through different principal conceptual lines of reasoning: (1) Mao Tse-tung’s anti-imperialism and ideas of world revolution, which were eventually watered

down to the principles of the *Non-Aligned Movement* (NAM) in support of nations and factions emerging from the process of decolonization, including the Democratic Republic of Vietnam and the Provisional Revolutionary Government of South Vietnam; (2) Deng Xiaoping's pragmatism both towards internal affairs (building 'socialism with Chinese characteristics') and foreign relations ('hide our capacities and bide our time ... never claim leadership');² and (3) Xi Jinping's 'China's Dream'—discursively extended to the 'Asian Dream'—which pledges to continue along the same lines but adds a new layer of Chinese characteristics to socialism plus the notion of leadership. This means the rejuvenation of Chinese ancient civilization and cultural values as its international mission to promote a more benevolent form of international relations than the Westphalian system. The latter is considered inferior owing to its mercantilism, colonization and development built into a global system of capitalism. Each line of reasoning carries a distinct approach to the maritime frontier.

Although the PRC did not participate in the Geneva Convention on the High Seas in 1958, which was dominated by the Atlantic maritime powers, it praised and supported the Latin American demand for an *Exclusive Economic Zone* (EEZ) based on fishery rights. In joining the opposition against the US position on freedom of the high seas, China, as previously mentioned, declared the boundary of its territorial waters at twelve nautical miles, as delimited by the Chiang Kai-shek government in 1947 (Gao 2009). In the national liberation context following the Second World War, the complexity of state-building in Southeast Asia was such that the Sinocentric tendency to spread its cultural revolution and support for insurgency in the region eventually created the reverse effect: anxiety and ambivalence, if not straightforward hostility, towards communist China (Jie 1994; Acharya 2009). Deng Xiaoping thawed relations in the 1990s by proposing to shelve maritime disputes and focus on joint development, thus switching the position from confrontation to what was referred to as 'joint cooperation' and 'peaceful rise'. Economic opportunism came at a moment of convergence between different events. First, East Asian (Japan, South Korea, Hong Kong, Taiwan) export-oriented industrialization policy since the 1970s—having specific features regarding the role of the state combined with a culture of management—had yielded what came to be known as a 'miraculous transformation' (Amsden 1989). Second, cooperation within ASEAN has turned Southeast Asian economies into the second generation of this type of model, although some major weaknesses in governing markets had begun to reveal themselves by the late 1990s (Wade 2003). China's rapprochement with ASEAN became decisive when China stepped in to alleviate the plight of some Southeast Asian countries that had been badly hit by the 1998 financial crisis (Storey 2013: 57). Subsequent to the recovery of these economies, China became a party to the TAC in 2003.

²The full motto is: "Observe calmly; secure our position; cope with affairs calmly; hide our capacities and bide our time; be good at maintaining a low profile; never claim leadership."

From a geopolitical perspective, the significance today of China's eastern seaboard of roughly 1,200 miles—stretching northward from the three southern provinces (Guang Dong, Fujian and Hainan) which were initially opened for the establishment of *Special Economic Zones* (SEZs), to fourteen coastal cities in eight other provinces—is owed to Deng's four modernizations. The liberalization of international trade, including various investment flows into the seaboard area for more than two decades, has transformed the whole coastal area and accentuated its driving role. This has brought the significant relationship between China's maritime border and its economic growth to the fore (Brandt/Rawski 2008: 624–626), and also corresponds with the specific pattern of China's historical maritime projection driven by the coastal provinces (Lo 2012).

Regarding the *Law of the Sea* (LOS), Gao (2009: 275–278) points out two key features of China's position during the deliberations at UNCLOS III between 1973 and 1982. First, China's proposals very often boiled down to broad policy outlines or general principles rather than specific regulations; in other words, China's position was one of 'wait and see'. Second, China insisted on its maritime territorial claims and maintained reservations concerning a number of articles in the UNCLOS: innocent passage; definition of continental shelf; the delimitation of an EEZ and continental shelf; the international seabed regime. These were considered "imperfect", even "having serious drawbacks for China".

To redress these imperfect features, the PRC promulgated 'The Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone', which was adopted in 1992. In the South China Sea, this law is consistent with the country's 1958 Declaration on the Territorial Sea, which maintained a boundary at twelve nautical miles. In 1996, the law was supplemented by the 'Declaration on the Baselines of the Territorial Sea' and the 1998 'Exclusive Economic Zone and Continental Shelf Act'. The principles articulated in these pieces of legislation indicate a problem of 'excess' regarding the notions of equity, proportionality and historical usage.

In its 1996 Declaration, China specifies twenty-eight base points and connects them to enclose the Parcel group of islands, a dozen small islands and reefs scattered over an area approximately 120 miles by 100 miles. The largest islands are Woody Island (a little over half a square mile) and Pattle Island (one-fifth of a square mile), which were seized from Vietnam in 1974. The rest are even smaller islets, rocks and reefs. This enabled China to declare sovereignty over the surrounding waters, as well as their bed and subsoil plus the resources contained in these. The use of 'straight baselines'³ is, in principle, applicable to an 'archipelagic state' (meaning an independent political entity composed of archipelagos) and does not apply to archipelagos belonging to a continental state.⁴ Article 8 of its 1998

³Straight baselines may only be drawn 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 (Article 5, UNCLOS).

⁴Two Chinese professors, Zhao Lihai and Yuan Gujie, strongly opposed the application of the concept of the 'archipelagic state' to the clusters of islands in the South China Sea because this would not be in line with UNCLOS (Hong et al. 2013: 221).

Exclusive Economic Zone and Continental Shelf Act declares the PRC's exclusive rights to establish, authorize, and regulate the establishment, operation and use of artificial islands, installations and structures. Article 14 declares that the "provision of this Act shall not affect the historical rights of the People's Republic of China" (Gao 2009).

Application of the norms pertaining to an archipelagic state to a group of islands such as the Paracel Islands does make possible the use of 'straight baselines' to define the sea surrounding these islands as territorial water, and subsequently the limits of China's contiguous zone, exclusive economic zone and continental shelf in this area. Claim to sovereignty over the airspace above has recently been threatened.⁵ If internationally acknowledged, this would give China the right to treat the area enclosed within the U-shaped line as an integral whole (Schaeffer 2011). Furthermore, it would allow China, as per Article 52, part IV of UNCLOS, to "suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published". So far, China has made no public announcement in this regard (except by individual officials). Incidences of confrontation since 2001 involving US marine research and military vessels as well as the US Air Force in China's EEZs is an indication that China is using this UNCLOS article to undermine or block US naval power in the area.

Despite the protests of its neighbours, China is proceeding with a recently initiated construction on the semi-submerged Johnson Reef (in the Spratly Islands)—defined as "[land] reclamation"—to be used as a base for military (plus fishing, fish farming and tourism) purposes,⁶ and more recently on Fiery Reef Cross. This is in addition to the Chinese-built airport on Woody Island in the Paracel group, where a military garrison was stationed in 2012.⁷ China seems determined to physically alter these features to establish grounded facts in order to fulfil the normative conditions of continuous occupation, economic exploitation and effective administration as evidence of its 'historical rights'. The term 'historical rights' which features in the 1998 Exclusive Economic Zone and Continental Shelf Act is clearly intended to strengthen claim to the water surrounding these two groups of islands as being not just China's 'internal waters' but also its 'historical waters'. If acknowledged, this would give China the right to claim all water area(s) inside the U-shaped line as her inland waters.

⁵In February 2014, Senior Colonel Li Jie—a researcher-cum-PLA officer—made a statement purporting to extend sovereignty over the air space above the claimed water. The Diplomat; at: <http://thediplomat.com/2014/02/pla-officer-china-must-establish-south-china-sea-adiz/> (30 March 2014).

⁶China Daily Mail; at: <http://chinadaily.com/2014/08/30/china-speeds-up-building-artificial-island-on-johnson-south-reef-in-defiance-of-philippines-protests/> (19 September 2014).

⁷This airport built in 1990 has been considerably revamped. Its runway has been extended to 8,200 ft and can handle landings by any of the third-generation combat fighters currently in service in the People's Liberation Army air force, including the Sukhoi Su-30MKK (Mastro 2012).

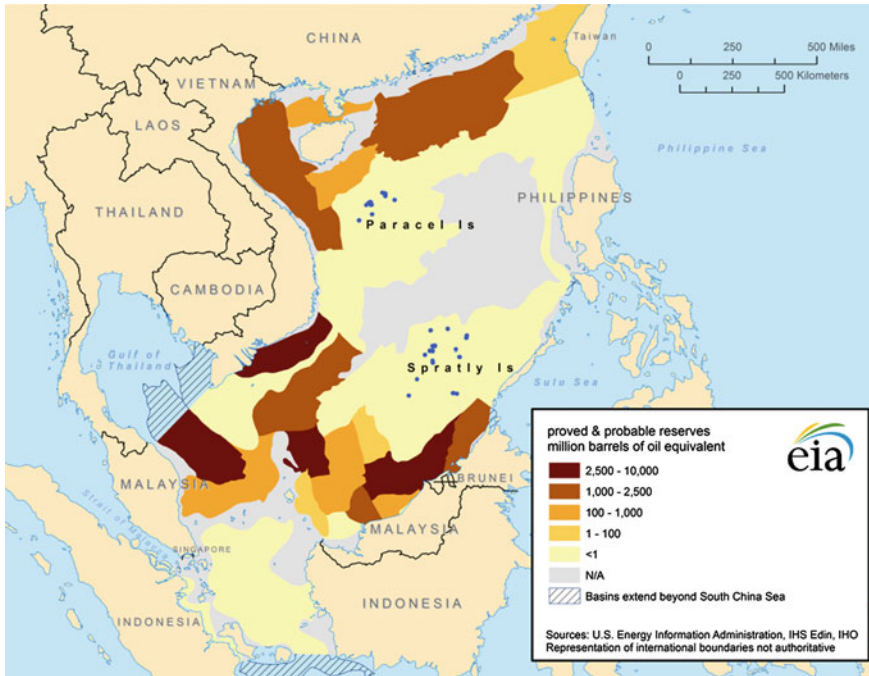


Fig. 4.1 South China Sea oil and natural gas proved and probable reserves. *Source* EIA; at: <http://www.eia.gov/todayinenergy/detail.cfm?id=10651> (19 November 2014). This figure is in the public domain

These pieces of legislation may be considered as major institutional mechanisms in China's legal warfare to advance its maritime claims in order to balance its objective of sovereignty with economic interest and security. All these legal moves, which seemingly adhere to the norms and regulations of UNCLOS, are worded in ways that ensure the protection of the meaning of China's 'sovereignty' in the South China Sea. The term 'historical rights' adds three aspects of meaning to its maritime territorial claims in the South China Sea: an heirloom; a 'historical sea' (a definition deriving from the term of 'historical bay' used in UNCLOS); and a defining of limits (the U-shaped line) drawn up well before UNCLOS came into being (Schaeffer 2011).

Article 8 of the 1998 Exclusive Economic Zone and Continental Shelf Act, which allows use of artificial islands, installations and structures, has raised anxiety about the 'words and deeds' of China's peaceful rise, given that new constructions on islands in areas with overlapping claims may be an administrative strategy to show de facto human habitation and economic life and thus support the claim to an exclusive economic zone in addition to the continental shelf below and between



Fig. 4.2 Disputed claims in the South China Sea. *Source* This map was created by Goran Tek-En and is in the public domain; at: https://en.wikipedia.org/wiki/File:South_China_Sea_vector.svg (9 August 2015) the graphic version by Lindsey Burrows can be found at: <http://www.maritimeprofessional.com/news/doesnt-chinas-pitch-south-china-270509>

islands and rocks previously uninhabited.⁸ A subsequent rush among other claimants to react similarly has prompted nationalist sentiments from all sides, creating a climate of ‘diplomatic discomfort’ and suspicion that is undermining the belief in Deng’s pledge of ‘joint development’ as a manifestation of China’s peaceful rise.

Joint development in areas with overlapping claims is generally unattractive to international companies, leaving competing claimants a sole choice of Chinese companies. According to the US *Energy Information Administration* (EIA), a reserve of oil and natural gas deposits is close to land in Vietnam’s case. The largest proven deposits are located at the southern tip of the U-shaped line—an area involving multiple claimants (See Figs. 4.1 and 4.2).

⁸A BBC report by Rupert Wingfield-Hayes dated 10 September 2014 shows that China is busy constructing new habitable structures on five different atolls. The spokesperson for China’s Ministry of Foreign Affairs answered a query on the legitimacy of this act as follows: “China asserts indisputable sovereignty over the Nansha Islands and the adjacent waters, and China’s activities on relevant islands and reefs of the Nansha Islands fall entirely within China’s sovereignty and are totally justifiable”. BBC; at: <http://www.bbc.com/news/world-asia-china-29139125> (11 September 2014).

The struggle of sovereignty in the endeavours of joint development often boils down to the principle of ‘equity’ when addressing overlapping claims to EEZs or the choice of partner(s) in resource extraction and development. Given the years of unsatisfactory negotiation with China, claimant countries continue to invite non-Chinese international companies for joint ventures in offshore exploration and development in their EEZs.

4.2 Testing China’s Legal Claims: Resilience or Subordination

Among the South China Sea claimants, Vietnam is probably in the most difficult and tense position, given its geopolitical position and complex historical–cultural relationship with China. On the politico-cultural front, the relationship between the two communist states is such that the notion of bilateral relationship is one that defies common understanding in modern international relations. Vietnam’s continued cooperation with non-Chinese companies in oil exploration ventures has led to a gradual and multilayered response by China through which the specific character of ‘bilateralism’ between the two countries has become apparent.

In 2011, two Chinese fishing boats cut the cables of a Vietnamese seismic oil exploration vessel while it was working within Vietnam’s internationally recognized EEZ. Chinese officials denied any wrongdoing in the incident, and instead accused Vietnam of “seriously infringing” China’s sovereignty and maritime interests.⁹

Subsequent to this incident, Vietnam promulgated its Law of the Sea on 21 June 2012. A few days later, *China National Offshore Oil Corporation* (CNOOC) responded by releasing a map declaring nine offshore areas in the South China Sea available for exploration through cooperation with foreign companies. The declared area is within Vietnam’s EEZ (Figs. 4.3 and 4.4).

The Chinese Foreign Ministry spokesperson asserted that announcing the areas to be up for public bidding “is a normal business activity in line with relevant Chinese laws and international practices”, and advised his Vietnamese counterpart to remember the bilateral agreement made with China and not to make any move which would complicate matters.¹⁰ The bilateral agreement that the spokesperson mentioned was not specified either by date, time, venue, substance, or key officials involved. In May 2014, the *China National Offshore Oil Company* (CNOOC) moved drilling rig HD–981 into a sea area near the Paracel Islands, and well within

⁹See more at: *The Wall Street Journal*; at: <http://online.wsj.com/news/articles/SB10001424127887323717004578157033857113510> (11 September 2014).

¹⁰In: *The Diplomat*; at: <http://thediplomat.com/2014/05/vietnam-mulling-new-strategies-to-deter-china/> (15 June 2014).

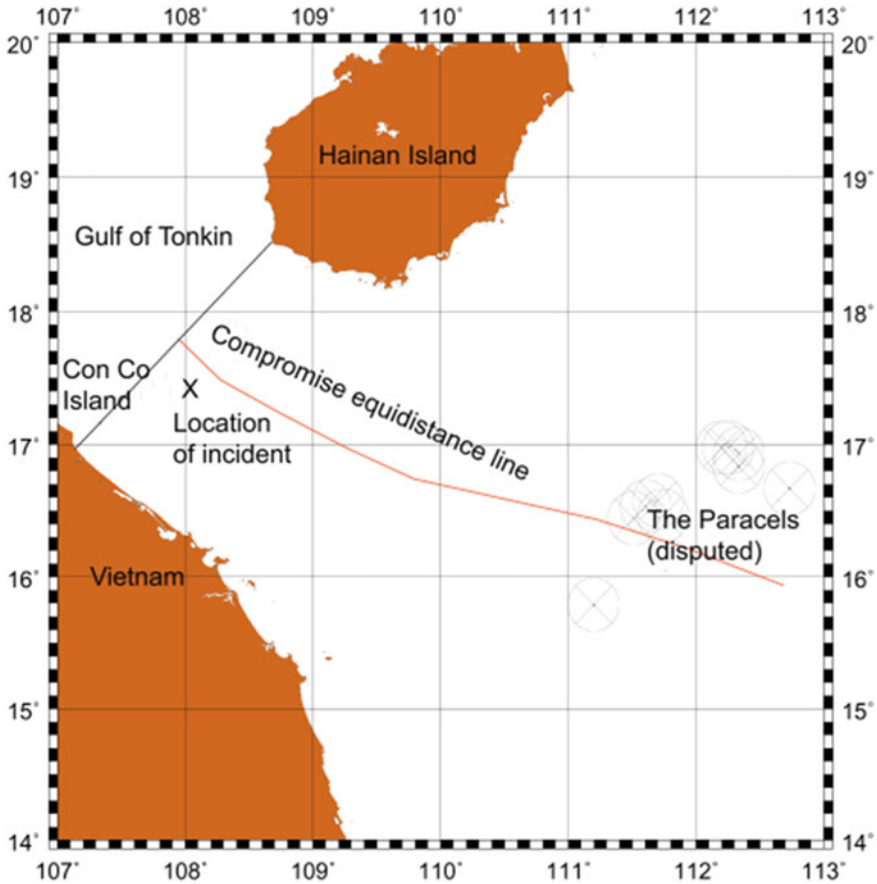


Fig. 4.3 Location of the cable of Petro Vietnam’s ship cut by Chinese fishermen while conducting a seismic survey within the country’s EEZ. The author of this map, Duong Danh Huy, has given permission for reprint. *Source* Center for Strategic and International Studies, Asia Program; at: <http://cogitasia.com/trouble-outside-the-gulf-of-tonkin/> (21 July 2015)

Vietnam’s EEZ. The rig was transported in a large convoy of ships of the People’s Liberation Army’s Navy and China’s Maritime Surveillance (Fig. 4.5).¹¹

The placement of this special deep-water drilling rig triggered an exceptional level of protest throughout Vietnam. Some officials among the Vietnamese leadership stressed the need to seek resolution through international arbitration; others were in favour of a bilateral diplomatic solution. Although many diplomatic overtures towards China were made during the following months in an attempt to ease tension—including party-to-party talks and a proposed visit to China by the

¹¹In: *The Diplomat*; at: <http://thediplomat.com/2014/05/why-did-china-set-up-an-oil-rig-within-vietnamese-waters/> (15 June 2014).



Fig. 4.4 The location of the nine blocks of oil and gas fields in disputed areas announced in June 2012 by *China National Offshore Oil Corporation* (CNOOC). **a** <http://csis.org/publication/cnooc-pulls-back-curtain> (December 16, 2015), **b** http://www.china.org.cn/business/2012-07/18/content_25942312.htm (December 16, 2015)

secretary general of Vietnam’s ruling Communist Party—China instead sent its State Councillor, Yang Jiechi, to Hanoi to bring the bilateral relationship back on track. Yang Jiechi warned Vietnam that China would take all necessary measures to protect national sovereignty and maritime rights, as well as to ensure the safe and smooth running of its oil exploration activities. The two sides should avoid amplifying, complicating and ‘internationalizing’ the current maritime issue. He urged Vietnam to stop disturbing the Chinese operations at sea, inflating differences, and creating new disputes, stressing that Vietnam’s leaders should properly handle the aftermath of the serious violence, vandalism and arson in mid-May 2014 (referring to riots which targeted Chinese-owned businesses) and accord appropriate compensation.¹²

Four basic points came through during this meeting: (1) Do not underestimate China’s determination and power; (2) Do not take the case to the International Court of Justice; (3) Do not draw world powers into a ‘bilateral’ conflict; and (4) Do not put the relationship between China and Vietnam at risk. Alongside this, Chinese media portrayed Yang’s visit as a gift from China, offering Vietnam yet another

¹²In: *The Diplomat*; at: <http://thediplomat.com/2014/06/yangs-visit-underlines-china-vietnam-standoff/> (19 June 2014).

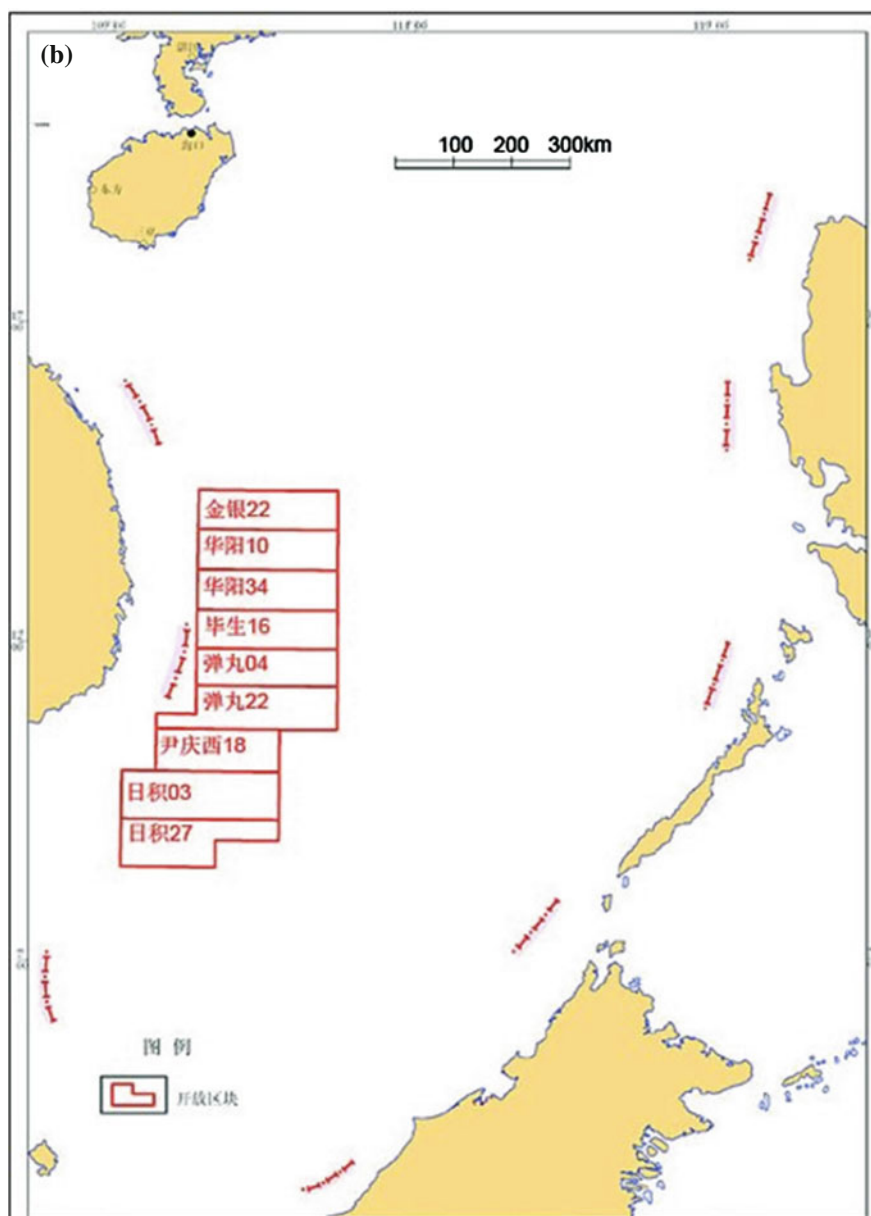


Fig. 4.4 (continued)

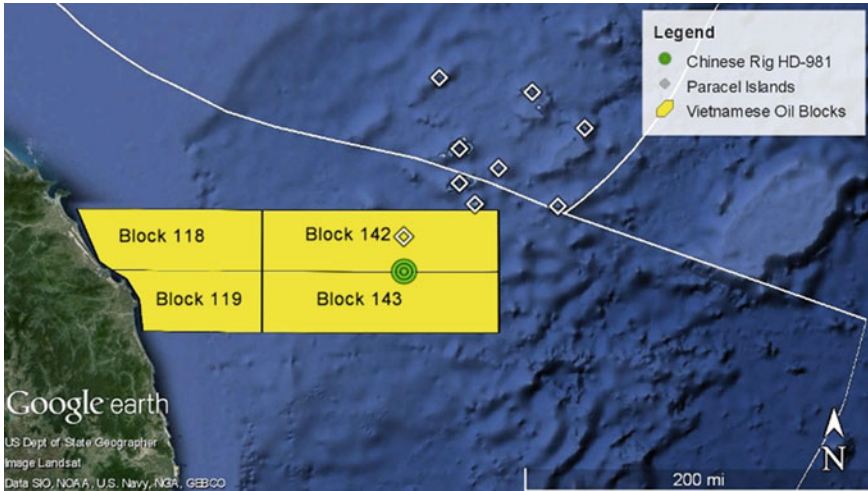


Fig. 4.5 The Position of China’s oilrig HD-981 in Vietnam’s EEZ in May, 2014. The author of this map, Greg Poling, has given permission for reprint. *Source* Center for Strategic and International Studies, Asia Program; at: <http://cogitasia.com/haiyang-981-from-water-cannons-to-court/> (21 July 2014)

chance to “rein itself in before it’s too late”, and suggested that China “is urging the “prodigal son” to return home”.¹³

Any attempt to deconstruct the meanings of ‘bilateralism’ behind this public discourse is riddled with difficulty simply because of the secrecy of the ‘agreement’, which remains so far publicly unspecified. A cloud of suspicion hung over the subtlety of the content of the 1990 secret meeting to normalize relations between the two countries after the land border war in 1979. Some sources claim that, at the 1990 meeting, the Chinese leader of the delegation presented a poem to his Vietnamese counterpart. Allegedly, two versions exist; a less-known version conveys a profound meaning on the nature of neighbourhood, as follows:¹⁴ “Our mountains and rivers are linked, as we share the same ideology and culture, our destiny is also shared.” The public version diffused by Vietnam’s propaganda machine conveys a similar message but is couched in terms of principles of cooperation between the two countries in the new millennium: “Long-term security, future orientation, friendly neighbour relations, comprehensive cooperation.”

The statement made by General Phùng Quang Thanh, Vietnam’s minister of national defence, at the Shangri-La Dialogue in May 2014 during the Third Plenary

¹³In: *The Diplomat*; at: <http://thediplomat.com/2014/06/chinese-media-in-vietnam-yang-calls-prodigal-son-to-return-home/> (11 September 2014). In: *Foreign Affairs*; at: <http://www.foreignaffairs.com/articles/141970/david-brown/vietnams-pivot> (11 September 2014).

¹⁴Gócnhìn Alan; at: <http://www.gocnhinalan.com/blog-cua-alan-va-bca/dinh-menh-da-an-bai.html> (18 September 2014).

Session described the HD-981 oil rig incident in terms of “contradictions and differences” at intra-family level.¹⁵ This was unexpected by many observers. Yet it may also indicate the possible existence of a bilateral agreement between the two countries thus far unannounced publicly. The framing of an event that could be legally defended by Vietnam as a violation of a nation's sovereignty in terms of intra-family differences expresses the role of cultural and ideological proximity between the two countries in handling conflict. The ideational corpus on sovereignty also contains elements of emotional ties within a figurative family.

The use of family-related terms in a figurative language conveys the Confucian message of sanctioning social hierarchy within what is taken to be an ‘organic’ unity. This naturalizes acts of symbolic and even physical violence as part of the socializing process, bringing subordinates (surrogate children and siblings) into compliance. As for deeper levels in current diplomatic relations between Vietnam and China, the HD-981 drilling rig incident did reveal the ‘self/other’ relationship in a hierarchical arrangement, and its endurance and reproduction. Identity formation with Confucian characteristics in combination with the social construct of a modern nation state appears to have conflated many different meanings under the term of ‘nation’: a sovereign territory; a sense of belonging to that territory; a state apparatus; a political party as an authority embodying all these elements. China's tendency in territorial claiming throughout the history of China-Vietnam relations over two thousand years seems to have also been apparent. Anderson/Whitmore (2012) note that the historical manoeuvre consists of actions initiated first by local and state agents in southern China to shift a border. Subsequently this territory became reshaped and claimed as Chinese. Previously applied on land, the manoeuvre now seems to be moving on to the sea frontier.

4.3 The ‘ASEAN Way’: Between Self-reflexive Understanding and Multilateral Diplomacy with Chinese Characteristics

In modern time, bilateralism between China and individual states has to contend not just with the normative framework of rights and responsibility between nation states as equals, but also with ASEAN as a community and its diplomatic modality. The unfolding disputes in the South China Sea are revealing a historically-based discord regarding maritime order and security. Three templates of international relations seem to be in play: (1) the Sinocentric hierarchical vision of the regional order's drawing on its past to project its future; (2) the Hindu-inspired image of the mandala which allows order to be conceived of in terms of flexible circles of influence, interests and ambitions as practised in the ‘ASEAN Way’; and (3) the Westphalian

¹⁵China withdrew the oil rig in July 2014. In: *The Diplomat*, at: <http://thediplomat.com/2014/08/vietnam-china-and-the-oil-rig-crisis-who-blinked/> (14 June 2015).

framework of sovereignty which treats the nation state as a unit in international relations, and associations of states as ‘blocs’ of common interests and values. Formed by contextual practices and different legacies of domination and colonization, these templates are now becoming conjoined. Careful reflection on the processes that have shaped, and are shaping, this community helps bring to the fore aspects not only of cooperation but also of potential fracture.

The founding members of ASEAN (Indonesia, Malaysia, Philippines, Singapore, and Thailand) viewed the ‘ASEAN Way’ as a cultural and institutional mechanism of diplomacy—a characteristic of the community. The actual origin of the ‘ASEAN Way’ continues to be debated. Some attribute its initiation to President Suharto of Indonesia, after the 1963–1966 ‘*Konfrontasi* policy’ (the confrontation with Malaysia) was ended, and subsequently ASEAN was created as a community in 1967. Its philosophy of non-alignment and neutrality aimed at a gradual phasing out of foreign bases and non-acceptance of any defence pact with outside powers. This led eventually to the disestablishment of the collective defence treaty—the *Southeast Asia Treaty Organisation* (SEATO)—in 1977. Others consider the ‘ASEAN Way’ as representing the continuity of an indigenous concept of state, sovereignty, statecraft and inter-state order, which takes into consideration that Westphalian legal-political concepts such as sovereign equality, non-interference and non-use of force are relatively new to postcolonial Southeast Asia. Practices of informal persuasion among and between leaders of states are seen as an important way of ensuring a common position. Yet diplomatic skills gained from the ‘ASEAN Way’, despite being recognized as valuable in some dimensions, were not necessarily translated into effective action as regards the integration of a regional community.¹⁶

Regardless of the authenticity of its origins, the ‘ASEAN Way’ came to be known as a cultural approach that helped members engage in dialogue and build mutual confidence in order to find a peaceful resolution to conflict, thereby building unity within a community. To bring about the desired results, this modality of negotiation is driven less by treaty norms than by practice in diplomatic conduct. For example, the 1972 Treaty of Amity and Cooperation had no ‘road map’, but the ASEAN Regional Forum created in 1994 was expressly intended for constructive dialogue and consultation on political and security issues of common interest and concern, in order to build confidence from which effective ‘preventive diplomacy’ could address particular types of tension in the Asia–Pacific region. Despite the lack of institutional mechanisms within this region—mechanisms that are able to serve as a normative fulcrum in balancing the interests of regional stakeholders—ASEAN remains an important institutional hub to date (Acharya/Layug 2013).

The practices of the ‘ASEAN Way’ may be seen as being derived from the Indian or Javanese political philosophy of circles of governance. In precolonial times, each circle contained several loosely-knit, tributary-like polities; some could repudiate their tributary status when the opportunity arose, and then try to build

¹⁶For a comprehensive discussion, see Haacke (2013).

alternative networks in order to safeguard the security of the ruler's own realm (Wolters 1999: 28). Although this form of governance no longer corresponds to present-day sovereign states, the mandala as an instrument for contemplation is still relevant for reflection on the distinctive experiences of conducting international relations in parts of this region where the influence of the Confucian hierarchical tributary relationships was not so influential.

Lund (2003) uses the mandala as a tool to gauge the effectiveness of the contemporary circles of influence built by ASEAN in response to four events that posed a particular challenge: (1) the 1997 Asian financial crisis; (2) the 1997–1998 Indonesian smoke/haze environmental problem; (3) the admission of new members; and (4) globalization (in terms of the surge of information technology). These events caused member states to reflect on their own positions and that of neighbouring countries in order to respond effectively to these issues. Two further events may be added to the sequence of major issues of diplomacy that have affected the relationship between ASEAN and China: the 1988 seizure by China of six Spratly islands then under the control of Vietnam (not an ASEAN member at that time); and the violent repression of the 1989 Tiananmen Square protests. Although ASEAN members were silent about these two events, the normalization of relations between China and Indonesia, Brunei and Singapore during 1990–1991 may be seen as the initial bilateral steps that set the stage for ASEAN to engage with China. The normalization constituted a shift in the amity/enmity relations: from China's being perceived as a threat to its being a possible co-participant in the ASEAN market economies, which would open the way for subsequent cooperation between China and ASEAN.

The 1997–1998 Asian financial crisis originating in Thailand revealed aspects of market- and society-induced regionalization within which there was no institutional mechanism for cooperation at intergovernmental level. Such problems went beyond the existing precepts of 'regional identity' and required responses that could spread mutual confidence among affected countries. The financial crisis first erupted as a localized Thai currency crisis (the Baht) but as it unfolded and spread to Malaysia, Indonesia, the Philippines, and later to South Korea, it revealed the weakness of the regional financial architecture. Although international institutions such as the World Bank, the International Monetary Fund and the United Nations Development Programme have stepped in to support individual countries, ASEAN turned to Malaysia's Prime Minister Mahathir—known for his 'Look East' approach—and inaugurated the 'ASEAN+3' Summit in 1997. Convened annually, this Summit brings together the finance ministers of the ten members of ASEAN plus those of China, South Korea and Japan to discuss problems, find means of cooperation, and put together arrangements that may help protect their currencies from banking crises caused by attacks from financial speculation (Sharma 2003: 351). The protection arrangement(s) thus went beyond ASEAN as a community without the intervention of UN-related institutions. This was considered a success in the bid for trans-border financial security. Since then, ASEAN+3 activities have been broadened and deepened to cover other trans-border social issues.

A parallel event, the smoke haze that originated in Indonesia in 1997 and was caused by localized practices of land use, revealed another trans-border problem. The seriousness of the haze showed how air pollution extends through the atmosphere across all abstract borders of sovereignty, and led to ASEAN environmental officials' raising questions about Indonesia's forestry and land use policies—issues which would normally be considered only within the purview of a nation's sovereignty.¹⁷ ASEAN has increasingly become open to proceedings with international institutions, and even to non-governmental organizations, regarding environmental concerns and their implications for regional security in Southeast Asia. The emergence of a civil society has brought about recognition of the importance of society-driven associations based on common interests. Regarding trans-border issues affecting citizens' daily lives and their social protection (such as migration, pollution and transnational crime) more voice in policy forums becomes a necessity for effective cross-border cooperation.

The admission of ASEAN's four newest members—Vietnam in 1995, Laos and Myanmar in 1997, Cambodia in 1999—can be seen in effect as an enlargement of the circle of influence over countries considered to be 'outliers' in matters of market economies and political ideology. It reflects a regional ambition to make geographical proximity more compatible with cultural proximity and a shared 'community identity'. This aspiration is now challenged by the territorial disputes in the South China Sea, with implications for trans-border activity such as fisheries, SLOCs, and the marine environment.

As a dialogue partner, China is 'the elephant in the room' with its power, its vested interests in trade, marine and seabed resources, and its ambiguous position on "innocent passage". The last has further implications for the Sea Lines of Communication—a concern also shared by non-claimants within and beyond the region. The protection of vessels from the growing problem of maritime piracy (attacks, theft or demands for ransom) requires multilateral cooperation to coordinate logistics and share burdens. Given that responsibility for maritime surveillance has remained with the US Navy by others' default since the end of the Cold War, the US cannot be kept out of the South China Sea as matters now stand. These are big issues that cannot be addressed by quiet diplomacy; they require full public debates on the political and economic costs and benefits among the range of available options.

Concerning the South China Sea, the 'ASEAN Way' has been operating with a 'dual track' approach to cooperation, launched in 1990 on the initiative of Indonesia with the support of Canada. 'Track I' is a channel for intergovernmental negotiation and 'Track II' is an informal channel for both non-governmental experts and officials in their personal capacity. By bringing these together to discuss the regional

¹⁷The 2004 tsunami in the Eastern Indian Ocean that struck the littoral countries made apparent not only the lack of preparedness among the populations but also the absence of a shared early warning system in the region.

dimensions of competing claims, this track aims at a rapprochement of diverging views to benefit formal diplomacy.

In the 'ASEAN Way', Track I has long been practised as a set of procedures for decision-making in conflict management and resolution. Rather than pursuing a purely legalistic approach to problem-solving, the 'ASEAN Way' rests on a diplomatic 'etiquette' followed by government leaders, that stresses consensus as a goal and harmony in conduct in reaching it. It is assumed that through frequent though informal meetings, leaders can become familiar with each other's outlook and thereby build ties which help reconcile differences in perception. This can help shape the position and posture of each party so as to reach a common position for the group (Dajal 2001). Negotiations along such lines have brought together the ASEAN states with overlapping claims in the Spratly group—Vietnam, Malaysia, Brunei, and the Philippines—to agree on reconciling their different views and to bring their claims in line with UNCLOS rules.

Through Track II, the Workshop Process on Managing Potential Conflicts in the South China Sea¹⁸ has encouraged mutual confidence for cooperation in addressing trans-border issues. The emphasis is on practices of implementing the cooperative agreements reached, and based on this mutual confidence is expected to develop (Dajal 2001). Although some cooperation has resulted from this workshop process (such as cooperation on marine pollution control) there has been no progress on matters concerning under-seabed resources, except a *Joint Marine Seismic Undertaking* (JMSU) between China, the Philippines and Vietnam lasting from 2005 to 2008.¹⁹

The signing of the ASEAN Charter in November 2007,²⁰ which came into force in 2009, marked a turn in ASEAN history, notably the formalization of its status as a regional community with three pillars referred to as 'communities': the economic community, the politico-security community and the sociocultural community. A separate council governs each 'community'. The goal is to create a form of regional integration inspired by the model of the European Union (without a common currency) by 2015.²¹ This expresses a move towards the formal practices of rule-based regional integration.

¹⁸This process was supported by Canada for more than ten years, and is now fully under the leadership of Indonesia.

¹⁹This initiative—involving a tripartite exploration within the 200-mile Exclusive Economic Zone boundaries of the Philippines around Palawan—was “allowed to expire” due to questions raised in the Philippines about its constitutionality (Baviera 2012).

²⁰It is important to note that, in November 2007, China declared Sansha city on Hainan Island to be the administrative centre of the maritime space it had laid claim to in the South China Sea.

²¹The ASEAN Summit comprising the heads of state is the supreme decision-making body, the power of which is balanced by the strengthened power of the ASEAN Secretary General in monitoring member states' compliance with ASEAN decisions (ASEAN Charter 2008: 25). The ASEAN Charter for ASEAN Peoples (concerning roughly 570 million people) is symbolically represented by a new flag, which depicts a bundle of ten rice stalks—symbol of strength and unity—and the motto “One Vision, One Identity, One Community”.

Although the South China Sea has been on the agenda of the annual ASEAN Summits since 2007, only at the 2015 Summit—chaired by Malaysia—did its leaders managed to find sufficient unity to issue a joint statement. The statement criticized land reclamation activities as having the potential to “undermine peace, security, and stability in the South China Sea”, reaffirmed the “importance of maintaining peace, stability, security and freedom of navigation in, and overflight over the South China Sea”, and urged “the speedy conclusion of a Code of Conduct”.²²

One special aspect to be noted is the fact that ASEAN as a regional organization neither has a mutual defence agreement with external powers, nor engages in any collective engagement other than with the United Nations. Individual member states have adopted their own security policies, resulting in a diversity of security alliances. Members of ASEAN are unlikely to go to war against one another but they have a great need for self-defence against forces from outside the region, especially since the 1991 withdrawal of the US from Subic Bay to the west of Manila Bay in the Bataan peninsula (Acharya 2013). During the Cold War, Indonesia was one of the leaders of the Non-Aligned Movement. The Philippines, Singapore and Thailand separately drew up bilateral defence agreements with the US during the 1950s and 1960s. The so-called Five Powers Defence Arrangement of 1971 formalized the collective defence links between Malaysia, Singapore, Australia, New Zealand and the United Kingdom. Bilateral security ties also exist between Brunei and the UK (Emmers 2010). None of the new members—Vietnam, Myanmar, Laos, and Cambodia—have any similar security ties.

Despite this fragmentation, ASEAN as a multilateral regional institution subscribed to the principle of ‘comprehensive security’ in its Roadmap for 2009–2015. Beyond the requirements of traditional security, this principle takes into account non-traditional security aspects that are now vital to regional and national resilience—including the economic, sociocultural and environmental dimensions of development, which also cover the maritime domain. In international relations literature, this arrangement is called a “regional security complex” (Buzan/Waever 2003), a term which acknowledges the notion of ‘security’ to be historically, politically and socially produced and therefore subject to regional dynamics rather than purely driven by international norms.

Although overlapping claims of maritime boundaries originally concerned only four and now five (with Indonesia) of the ten ASEAN members, all members benefit from the safety of SLOCs. Matters of maritime transport of goods and services through the South China Sea extend beyond ASEAN; they require norm-based functional institutions and multilateral forms of cooperation. A broader view of the sea space to include users, both in the region and beyond, would seem more appropriate but has been slow in coming forward.

²²In: *The Diplomat*; at: <http://thediplomat.com/2015/04/china-gravelly-concerned-by-asean-statement-on-south-china-sea/> (30 April 2015).

As a claimant state, China's position has remained unchanged. Despite being a dialogue partner in the annual ASEAN Regional Forum, China has consistently maintained its position on the two issues: (1) resolution of overlapping territorial claims through bilateral channels; and (2) use of a restrictive interpretation of UNCLOS on freedom of navigation in order to keep controls on US deployment of aircraft and naval vessels in China's EEZ, including areas with competing territorial claims. The deployment has so far been kept within the bounds of Hainan Island, but if the U-shaped line is accepted, this could mean that the presence of the US Navy will be unwelcome in the entire zone enclosed by this line.²³ Commercial aircraft's right to overflight is potentially implicated. Maritime interconnectivity and safe navigation to ensure secure and efficient supply chain management are vital to global value chains built on the Japanese lean mode of production known as 'Just-in-Time' or JIT. They have been essential to the success of economic integration in Southeast and East Asia, although matters of social redistribution of benefits and marine pollution remain key concerns. Amity/enmity perceptions have led to various expressions of maritime nationalism by social groups within the littoral states of the South China Sea. Yet a militarized approach to protection of the claimed maritime borders could well result in trade and industrial investment being diverted elsewhere.

Security in the maritime domain is a strategic issue for most ASEAN member states but particularly for those with a significant role in regional and global supply chains. Contemporary arrangements for the security of Asian SLOCs are still under the control of the US Navy; ad hoc multilateral arrangements operate in the Indian Ocean but are less effective. Obstacles to a multinational approach to maritime security include differing interests within the region; differences of perception regarding the 'threat'; concerns over state sovereignty; negative attitudes toward externally-led initiatives; and differing levels of capability to make an effective contribution (Henry et al. 2012). Although China does not have the means as yet to ensure the safe transport either of its own oil supply or exported goods, it does not want to compromise its grand naval strategy in which the South China Sea is enclosed by a line of maritime defence referred to by the People's Liberation Army as the "First Island Chain of China's maritime defensive perimeter" (see Fig. 4.6).

China's involvement in multilateralism is consequently highly selective, as it looks to strengthen its status as a regional and world power, and to enlarge the space of its own influence rather than build its role as a responsible stakeholder (Buszynski 2010). Wu and Lansdowne referred to this phenomenon as the difference between international multilateralism and multilateralism with Chinese characteristics—the latter being designed to shape a "China-led de-Americanization of regional affairs" (2008: 8). In the East and Southeast Asian region, this means reshaping relations in the region to expand its influence and limit the hegemony of

²³In: *The Diplomat*; at: <http://thediplomat.com/2015/05/china-issues-8-warnings-to-us-surveillance-plane-in-south-china-sea/> (7 July 2015).



Fig. 4.6 China’s maritime defence perimeter. *Source* University of Texas; at: http://www.lib.utexas.edu/maps/middle_east_and_asia/china_first_and_second_island_chains_2009.jpg (7 September 2014). This figure is in the public domain

the US. In terms of the protection of SLOCs, China reluctantly adapted to the regionalization of maritime security issues in the South China Sea as being inevitable, but stated a preference for preserving the autonomy of its forces from foreign command structures, and opposed an integrated command in a multilateral team. In other words, China seeks to ensure that its sovereignty will not be jeopardized in the process of multilateral negotiations under the terms of the ASEAN Regional Forum (Wu/Lansdowne 2008). ASEAN declined any direct involvement of China’s military but proposed an approach similar to that which it had adopted with Japan as a user state—consisting basically of financial and technical support given to littoral states. Although some ASEAN countries have proceeded to set up limited cooperation with China on a number of maritime issues, ASEAN as an entity has not reached any consensus on such cooperation (Wu/Lansdowne 2008: 137).

The changing dynamics in North Africa and the Middle East affecting supply lines of energy have clearly added impetus to China’s strategy in respect to the South China Sea, where it is now openly adopting a much more assertive posture. Its attempts to secure access to energy resources in different parts of the world are a result of its rapid and sustained industrialization over the last three decades, which have caused rising demands structurally linked to the transformation of its

economy; these are expected to translate into a massive need for hydrocarbon resources.²⁴ The impact of a convergence of the structural tendency within China's domestic economy and the dynamics of inter-regional politics has influenced the nature of its interactions with other stakeholders.

Without a vision for future policy coordination, the 'ASEAN Way' seems unprepared to engage with China as a rising power. Apart from the carefully-planned development of its navy (Cole 2010), China's maritime rise in the last two decades has also been fostered by its expanding place in world fisheries and trade in aquatic products; it is now the world's largest producer, consumer and exporter of seafood, with an annual catch far exceeding that of Japan, the United States and other major Pacific maritime powers (Hanson et al. 2011).

For effective negotiation of different interests, the meanings of ASEAN's three pillars (economic, political, sociocultural) would need to be complemented with a crosscutting understanding of the maritime space built on people's experience at multiple levels, thus making visible the diversity of local and trans-border relations of power, how they operate, and their impact on maritime social groups, aspects so far neglected by macro-studies centred on states. Specifically, within the ASEAN sociocultural pillar, a recently initiated 'Track III' is intended to nurture dialogue between civil society organizations, but has not yet taken up issues on the South China Sea.

At this juncture, ASEAN is facing the hard choice between (a) continuation of the 'ASEAN Way', and (b) the development of governance frameworks based on international maritime rules which put a limit on a nation's (increasing) assertiveness and/or willingness to use force in maintaining its claims. The 'ASEAN Way' might have been effective in some specific forms of building confidence, but existing asymmetrical relations are such that the need for a firm normative base of (renovated) legal and extra-legal instruments now appears imperative for ensuring fair resolution of disputes and promoting appropriate measures for peaceful co-development. Understanding the features that are specific to the formation of security arrangements in this region may benefit from analytical attention to possible tension between a 'culture' of security based on submission to a higher authority, compared with one that is based on a broad alliance allowing a certain degree of autonomy—the formation and (re-)arrangement of which depends to a great extent on the tenor of international relations at the particular time.

A perspective on a regional security complex in Southeast Asia must pay attention to the historical continuity of two different modes of international relations: (1) the Sinocentric model of *Tian Xia*, and (2) the Hindu-inspired mandala circles of influence in the formation of polities in Southeast Asia, where different polities could be held together without necessarily undergoing a process of

²⁴China's oil consumption increased by 100 % between 1990 and 2001—a period during which the country had attracted huge foreign investment. In 2010, China became the third largest consumer of oil after the US and the European Union, substantially ahead of Japan and India; 30 % of its oil comes from the national supply, and the rest is imported. Understanding China's Energy Landscape; at: <http://www.understandchinaenergy.org/oil-and-gas/> (2 October 2014).

administrative integration. Both these models have interacted with the Westphalian model of liberal democracy only since the end of the Second World War. The human rights framework is relatively new, and must therefore build on people's experiences with lack of rights to find means to actualize them.

Most research endeavours into maritime governance in the South China Sea are rooted in the Classical Realist paradigm, addressing 'interests' as a key category in natural resources, sovereignty and national security. What is lacking is knowledge about the long-term transformation in the structure–agency relationships that foster 'interests' in the maritime domain and stimulate the emergence of new patterns of conflict and cooperation. China's maritime claims follow this paradigm along with a discursive strategy used to re-interpret UNCLOS norms to China's own advantage where necessary, showing a skilful way of actualizing its interests. The attempt to attach its national outlook as closely as possible to a legal characterization of its Exclusive Economic Zone by using UNCLOS terminology is clearly related to the imperative it feels to balance its sovereignty with economic and security interests. In so doing, China's national law seems to have remoulded the three key principles of UNCLOS (equity, proportionality, and historical usage).

The choice of relying on bilateral negotiations rather than translating the Declaration of the Code of Conduct into binding rules has turned the process of norm setting into a constant political haggling between actors at many levels. The transaction costs remain so far unaccounted for, especially regarding the trust and confidence all the ASEAN claimant states placed in the Declaration of the Code of Conduct more than a decade ago. Trust and confidence-building is now facing a new challenge regarding the Chinese way of exercising power in diplomatic relations through the language of the 'family'. Previously applied to Vietnam's case, this exercise is now being taken to another level. In a self-defence move that responds to international criticism over its ongoing land reclamation activities—especially the transmogrification of islets in the Spratly group in 2015 with damaging consequences for the marine environment—China's foreign minister Wang Yi placed his country in the position of the 'victim' and appealed to a sense of shame that conflates the notions of a 'nation' and a 'family' in two ways: (a) a change of China's position on its claims over the South China Sea would shame its ancestors; (b) not facing up to gradual "infringements" on Chinese sovereignty and encroachment of its interests here would shame its children.²⁵ By stressing its unique Confucian culture and identity built around the notion of the 'family' and placing this in the country's foreign policy,²⁶ Wang Yi has turned the 'ASEAN Way' upside down. Whereas the 'ASEAN Way' conveys the message of respect for each disputant's culture and identity as a means of confidence-building and facilitating diplomatic negotiations in conflict resolution, the Chinese Way uses the

²⁵Reuters; at: <http://www.reuters.com/article/2015/06/27/us-southchinasea-china-idUSKBN0P708U20150627> (28 June, 2015).

²⁶The Diplomat; at: <http://thediplomat.com/2015/07/who-owns-what-in-the-south-china-sea/> (8 July 2015).

figurative language of the family derived from its Confucian culture and identity to assert its will to defend its recently declared “core interest” as a matter of justice as fairness for its ancestors and descendants.

A new analytical approach is needed, capable of integrating all these concerns, in order to explain variations in the process of the diffusion of UNCLOS norms, the role of ideational corpora and contentions between agents, and the likely consequence of the absence of a compromise.