

Written Testimony
of
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Policy

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Chairman Gardner, Ranking Member Cardin, and members of the Subcommittee, thank you for the opportunity to testify before you today.

1. History of America's Involvement in the Region. For much of its history, the U.S. armed forces have operated actively and freely in the South China Sea, as well as other areas in East Asia. Sometimes the actions have been independent and sometimes with friends and allies. The United States deployed its naval power into the South China Sea to defeat the Spanish fleet at Manila in 1898 and liberate the Philippines from Spain; later that year American maritime forces captured Guam. During World War II, the United States Navy operated throughout the Pacific Ocean, including the South China Sea, to defeat Imperial Japan through a combination of economic warfare against Japanese supplies and recapture of the territory that Japan had occupied in the Asia-Pacific region. The United States Navy operated throughout the South China Sea, the East China Sea, the Yellow Sea and the Sea of Japan during the 1950s Taiwan crises and the Korean War. In the 1960s and 1970s American armed forces operated freely sometime in conjunction with allies, throughout the South China Sea during the Vietnam War. Since the end of that war in 1975, US forces have operated freely and routinely throughout the region in support of treaty and partnership commitments and American interests, responding to crises such as the end of the Marcos regime in the Philippines in 1986, in the Yellow Sea in 1994 and 2010, and around Taiwan in 1996. There have been numerous US and allied military and civil deployments during this period in support of humanitarian objectives, from the evacuation of South Vietnamese refugees in 1975 through the response to the tsunami that devastated Aceh, Indonesia, in 2004, to the relief operations in the Philippines for super-typhoon Haiyan in 2013.

2. Traditional American Interests and Objectives. For more than one hundred years, the basic historical American objective in the Southeast Asia region has been to balance the influence of destabilizing countries and ideologies so that states in the region can develop independently and maintain good economic and political relations with the United States. Thus, the United States opposed attempts at regional aggression, both political and military, by Germany (1898-1919), Japan (1941-45), the Soviet Union (1963-75) and, more recently, China. Freedom of mobility and maneuver in oceans and international airspace has always been a core interest of the United States. The US Congress authorized the Gulf of Tonkin Resolution in 1964 after U.S. warships were attacked on the high seas, and President Ford ordered U.S. Marines to free US mariners on board SS Mayaguez in 1975, which was seized by Cambodia.

3. Current American Interests and Objectives.

a. In addition to the traditional American policy of balancing the influence of destabilizing countries and opposing attempts at regional aggression, the United States maintains the following specific interests in the South China Sea and in surrounding areas:

i. Defense treaty and legislative commitments with the Philippines, Thailand, Australia, Republic of

Korea, and Japan. Legislation, the Taiwan Relations Act, mandates US provision of “defense articles and services” in response to aggression against Taiwan.

ii. “Strategic Partnership” agreements with ASEAN, Singapore, India, and Vietnam.

iii. A core interest in freedom of navigation and the maintenance of naval mobility and maneuverability and access in the all of the world’s oceans, including the South China Sea. Freedom of navigation is principally a naval and military right, and includes innocent passage of warships in the territorial sea, and the right of military aircraft and ships to conduct archipelagic sea lanes passage through the archipelagic states of Indonesia and the Philippines, transit passage through straits used for international navigation, and to exercise high seas freedoms and overflight throughout the EEZ under article 58(2) and 87 of UNCLOS. Freedom of navigation and naval and military access is the basis for American continuous and transparent military exercises and other routine activities in support of its own interests and its alliance and partnership commitments, and for responses to crises in the region that affect its interests. When American ships and aircraft operate in the vicinity of those of other nations, they observe, and expect others to observe, the Collision Regulations and customary international law, which apply to state vessels and civil shipping, and the Chicago Convention on Civil Aviation and customary international law, which exempt military aircraft from foreign jurisdiction and provide the only mechanism for the lawful management of civil aircraft.

b. The United States supports all mechanisms for peaceful dispute settlement in East Asia, including disputes involving the Korean Peninsula, Taiwan, Japanese island and maritime claims and the South China Sea. The United States welcomed the 2002 Declaration of Conduct and the pledges that all ASEAN countries and China will negotiate all disputes in good faith, and to refrain from actions that would make negotiation more difficult. The United States favors all peaceful means of dispute resolution, including bilateral and multilateral negotiation, mediation, arbitration, and adjudication (litigation). The compulsory dispute resolution process in UNCLOS is an ideal mechanism for resolving maritime disputes, especially after bilateral negotiations have failed. The United States opposes military aggression or coercion as a means to settle sovereignty or maritime disputes. When disputes have involved allies (ROK, Japan), or former allies (Taiwan) the US has made military commitments to deter aggression. To this point, the United States has not invoked its treaty or partnership commitments to make military commitments in support of specific territorial positions in the South China Sea.

4. America’s Vision for the South China Sea.

a. The United States supports strong, free, sovereign, independent, and prosperous states in the region of the South China Sea, free of coercion from powerful states.

b. The United States supports the peaceful resolution of disputes and insists that all states, large and small, comply with their obligations under international law. Compliance with international law is a foundation for the peaceful, stable, and prosperous international system that benefits all states in Asia.

c. International law reflects universal values, and the same rule of law applies to every country similarly situated. The “rule of law” means that law must be followed by the strong as well as the weak.

d. The United States supports settlement of territorial disputes based upon adherence to the rule of law and application of accepted principles of international law and based upon transparent, documented and accepted historical facts. In areas with genuinely overlapping claims of equal

strength and validity, the United States encourages joint development of resources, such as in the Vietnam-China zone in the Gulf of Tonkin.

5. China's Claims and Activities in the South China Sea

For the past twenty years, China has steadily built up its air and maritime military forces in the vicinity of the South China Sea. It has consolidated its civil maritime forces into the State Ocean Administration, and has organized its fishing fleet in the South China Sea to act as a "maritime militia," an auxiliary of its government maritime forces. It has claimed that virtually the entire South China Sea belongs to China, although it has not specified exactly what that claim entails. It has established an administrative governing body for the entire South China sea, issuing regulations that China claims governs the action of all states. China has sent an oil rig from a state-owned oil company to drill in waters claimed by Vietnam, it has virtually blockaded two islands claimed by the Philippines, and it has attempted to enforce its own fishing regulations in the Natuna Sea, well within Indonesia's EEZ. It has in the past several years undertaken major improvements of seven islands it had previously occupied, greatly enlarging them, and building runways, harbors and logistic facilities.

6. China's Diplomacy in the South China Sea

- a. As it steadily built up its power and capability in the South China Sea, China's diplomatic approaches have alternated between moderate and reasonable contentions - publicly it favors peaceful negotiated solutions of differences with the other claimant states, however then issues truculent threats that it will make no concessions to the claims of others, and will use its power to enforce its claims. Under President Xi, its diplomacy has been relatively harsh and unyielding.
- b. China's hard line and aggressive action have been completely unsuccessful in gaining concessions from rival claimants in the South China Sea. On the contrary, the other claimants have all reached out to other countries for support, primarily to the United States. China has paid a heavy price for its aggressive activities in the hostility of the other claimant states and the strengthened American position in the region for the relatively minor gains it has made in island enlargement and naval coercion. Vietnam, the Philippines and Malaysia have all welcomed American military exercises using their bases. They have also strengthened their own military and maritime law enforcement organizations, although none of them is a match for China's, and they have been partially successful in forming a unified front against China in ASEAN.

7. Effectiveness of American Activities and Policies in the South China Sea.

- a. The United States has taken advantage of China's heavy-handed and aggressive actions in the South China Sea to strengthen its bilateral relations, including its defense cooperation, with the other claimant countries. It is cooperating closely with the Philippines in maritime exercises, it has removed its prior prohibitions on the sales of lethal military equipment to Vietnam, and it routinely deploys surveillance aircraft to Malaysian bases. Both the United States and Japan are pursuing assistance programs to the air and maritime forces of the other claimant countries. China believes that the United States is orchestrating a sophisticated South China Sea strategy using China's rival claimants to constrain China's growing power in the region.
- b. The United States has not prevented Chinese enlargement of seven of the Spratly islands it occupies, and has not disrupted the Chinese blockade of Scarborough and Second Thomas Shoals. However, it has used military deployments to violate Chinese territorial sea and EEZ claims, and it has demonstrated decisively that it will not be deterred from exercising full freedom of maneuver for its military forces under its interpretation of the UN Convention on the Law of the Sea.

8. Potential Improvements in American Activities and Policies.

a. The primary weakness in the American strategy in the South China Sea is that it takes no position on the conflicting claims, while urging restraint and negotiation on all parties. Its military maneuvers in the region accomplish the purpose of maintaining the U.S. position that it will operate its military forces throughout the South China Sea. They provide no restraint on Chinese aggression against the claims of other countries, even when the Chinese claims are extremely weak. For the sake of time, I'll truncate my testimony and just read through a list of Chinese claims that are inconsistent with UN articles and UNCLOS; however I am happy to go into further detail about why these claims are unlawful during questioning:

i. The unlawful invasion of the Paracel Islands in 1974, which was a violation of the proscription against "armed attack" against Vietnam, under article 2(4) of the Charter of the United Nations.

ii. Straight baselines along the coast of mainland China and in the Paracel

Islands. The straight baselines along the Chinese coast are unlawful because they do not connect a coastline that is deeply indented and cut into or a fringe of island, that follows the general direction of the coast. The straight baseline system in the Paracel Islands is unlawful because China is not an archipelagic state and may not use straight baselines to connect mid-ocean island groups (analogous to the United States using straight baselines around its mid-Pacific territories and the Hawaiian Islands). These claims violate the rules on straight baselines in UNCLOS articles 7, 13, and 47.

iii. Claims to historic waters that do not comport with the three-part test in international law as restated by the United Nations in 1962: (1) exercise of authority over the waters; (2) continuity of the exercise of authority; and (3) acquiescence or acceptance by neighboring states. China's "nine-dash line" claim does not pass this three-part test. Sovereignty over land features may be claimed under international law only in five circumstances: (1) accretion, that is a build-up through natural geologic processes, such as a volcanic eruption, (2) cession, or voluntary transfer via treaty, (3) conquest, but only before adoption of the UN Charter in 1945, (4) occupation of *terra nullius*, that is not mere inchoate discovery, but actual occupation, and (5) prescriptive exercise of authority that is public, peaceful and extending over a long period of time. The burden of proof is on the claimant state to present facts and law in support of the claim.

iv. China's apparent claim of a territorial sea and other sovereign rights and jurisdiction in the vicinity of its newly constructed artificial islands, in violation of article 60. All maritime claims derive from land territory: "the land dominates the sea." In accordance with UNCLOS and customary international law, coastal state sovereignty over oceans is limited to a 12-mile territorial sea, typically measured from normal baselines running along the low water mark of the coast of a rock, island or mainland. The United States rejects conditions on innocent passage in the territorial sea in violation of articles 19 and 21 of UNCLOS.

v. Sovereignty claims within its EEZ. No state may claim sovereignty over oceans or airspace beyond 12 miles of territory. The coastal State enjoys certain specified, limited and enumerated sovereign rights and jurisdiction in the EEZ under Part V of UNCLOS, including exclusive rights to exploit and develop natural resources, require consent for civilian marine scientific research, and for offshore and seabed installations related to those purposes. China illegally denies high seas freedoms and other internationally lawful uses of the sea associated with the operation of ships and aircraft in its exclusive economic zone (EEZ) in violation of articles 58(2) and 87. Coastal States may not claim any right to regulate the airspace above the EEZ, or the operation of warships, military activities, or military aircraft in the EEZ. China has hampered other states from enjoyment of the exclusive right and jurisdiction in their own EEZs in violation of UNCLOS article 56.

vi. Chinese claims to the continental shelf of Japan in the East China Sea and Vietnam and Malaysia in the South China Sea in violation of its duties under article 83. Overlapping EEZ and continental

shelf claims shall be resolved by beginning from an equidistant line between the two states and then making equitable adjustments based upon the length of contiguity of the opposing coastlines.

vii. Chinese disruption of the laying of foreign submarine cables and pipelines in its EEZ, in violation of articles 112 and 113 of UNCLOS and other legally binding instruments relating to submarine cables on the continental shelf.

b. The United States needs to decide which claims in the South China Sea it recognizes, and which it does not, so that it can use its superior military force to set limits on Chinese aggression, as it has done in Taiwan, and in the Senkaku Islands in the East China Sea. It would be ideal if there were a multilateral adjudication of the conflicting claims in the South China Sea, since there are many disputed claims beyond China's. Such a multilateral adjudication should ideally be undertaken by the claimant countries themselves, with or without China's participation. However, even without such a comprehensive settlement, the United States should oppose some of China's most extreme claims, if necessary, by the use of military force. One of those extreme claims is Scarborough Shoal. China has no claim to this feature except for its bogus Nine-Dash Line map; it is much closer to the Philippines than to China; the United States used it for a bombing range for many years, and even paid the Philippines for its use. The United States should support Philippine opposition to further Chinese aggression against Scarborough Shoal using military force if necessary.

c. The objective of American military opposition to China's aggressive actions in the South China Sea is not to contain China, but to encourage China to settle its claims with its neighbors in an equitable manner, rather than seeking always to expand its own local power through its superior local military and law enforcement forces. No matter which country owns which islands, China will be the greatest local power in the region, and will be able to operate its military forces freely throughout the region. However, it is in the American interest for China to negotiate a peaceful settlement of its conflicting claims with its neighbors and to observe that settlement.

9. Effect of the 12 July Decisions of the Permanent Court of Arbitration.

The decision of the Permanent Court of Arbitration on July 12 was a significant defeat for China. The Court asserted its jurisdiction in the matters it decided, reminded China that as a party to UNCLOS, it was bound by the decision, and completely rejected the Nine-Dash line as a basis for Chinese claims to any waters of the South China Sea. While carefully avoiding opinions on sovereignty disputes about the ownership of the features in the Spratly Islands, the Court made it clear that the Philippines has jurisdiction over the marine and seabed resources of most of the Spratly Islands. The decision declared illegal China's actions to interfere with the fishing activities of the Philippines and other countries, its failure to prevent harmful fishing by its own fleet, its interference with Philippine exploration of hydrocarbon deposits, and the environmental damage done by the dredging around the islands it expanded.

Most important will be China's considered reaction to the decisions of the Permanent Court of Arbitration. As a party to UNCLOS, China has no right to reject a ruling of the court. Should it do so, it will call into question China's adherence to any of the international treaties it has ratified. China will find it much more difficult to gain the trust of both its neighbors and other more distant countries with which it deals.