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Joint Hearing on “Maritime Security in the Indo-Pacific and the UN Convention on the Law of the Sea”

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Introduction

Chairman Bera, Chairman Courtney, Members of the Asia, the Pacific, Central Asia, and Nonproliferation, and the Sea Power Subcommittees, thank you for the opportunity to testify today on the critically important issue of Maritime Security in the Indo-Pacific and the UN Convention on the Law of the Sea (UNCLOS).

Let me start by laying the essential context.

U.S. Interests

The United States is a Pacific nation and is inextricably bound to the Indo-Pacific region by virtue of our geography, history, alliances, economic and security interests, and by the connections between our people. These enduring interests have only grown stronger as technology and travel have made the world more interconnected.

The Indo-Pacific is a young and uniquely dynamic region, which today accounts for more than half of the world’s GDP and nearly half of its trade, is a key driver of innovation, and houses some of the fastest growing economies in the world. The region is both a major manufacturing center and a huge market with a rapidly increasing middle-class and corporate community who buy U.S. products and visit and invest in the United States. While the region holds vast opportunity, it also poses formidable risks to America’s interests, if certain challenges are not effectively addressed in a timely manner.

One of the top challenges is to maintain freedom of navigation and overflight. The Indo-Pacific ranges from the Indian Ocean, through the South and East China Seas, and to the Pacific Ocean – a vast maritime space. These waters include highly valuable fish stocks and large hydrocarbon resources, particularly under the East and South China Seas.

These waters also contain numerous important Sea Lanes of Communication (SLOC) for global commerce that are vital to the U.S. economy. Most of the world’s busiest container ports are in this region, and a huge portion of global maritime trade transits these waters, much of it bound for the United States. This requires us to place a premium on maintaining maritime peace, security, and unimpeded lawful access for all.

In this region, freedom of the seas is particularly crucial to American interests, as well as to those of our allies, partners, and friends. This not only means that we must prioritize safeguarding the freedom of commercial and military vessels to transit international waterways, but also ensuring they can exercise all of the rights and uses of the sea and airspace recognized under international law. More broadly, it means unimpeded lawful commerce, respect for international law, and the peaceful management of disputes. The United States has important interests at stake in these seas.

Maritime Disputes

But both the East and the South China Seas are plagued by significant territorial and maritime disputes. Brunei, China, Indonesia, Malaysia, the Philippines, Taiwan, and Vietnam each claim sovereignty over parts of the South China Sea, including its land features. Japan, the Republic of Korea, and China each have overlapping claims in the East China Sea.

While these disputes have existed for decades, tensions have increased significantly as China has deployed massive military, paramilitary, and civilian assets, has further militarized outposts in the South China Sea, has interfered with commercial surveys, shipping, and fishing – and in a few cases U.S. naval operations – and has applied coercive pressure against rival claimants.

The Indian Ocean region has, comparatively speaking, been less afflicted by tensions over maritime disputes in recent years. The unresolved maritime disputes in the region are relatively stable. Perhaps for this reason, and despite the Modi government’s “Act East” policy, India has been reticent to engage in East Asian maritime issues beyond its statements at ASEAN-led East Asia Summit meetings.

Countries all around the globe have competing territorial claims with their neighbors and the United States does not take sides on disputes where it is not a claimant. But China's attempts to assert and enforce its claims in the South China and East China Seas through threatening behavior, including against U.S. treaty allies, are raising tensions and pose serious economic and security challenges for the United States. Not only could a serious incident provoke a dangerous crisis, but the region's efforts to maintain a stable, rules-based order are undermined by such coercive behavior.

Dispute Handling

What are the options for dealing with maritime disputes in a rules-based order?

The two main peaceful paths are negotiations and arbitration. Various countries in the Indo-Pacific have resolved maritime disputes cooperatively through direct negotiations or third-party dispute settlement mechanisms.

History shows us that diplomacy can be a viable tool for sovereignty dispute resolution. The Philippines and Indonesia used diplomatic negotiations to resolve their exclusive economic zone (EEZ) boundary issues and there are numerous other examples of successful bilateral negotiations over borders and maritime rights. China itself has resolved disputes via negotiations with Vietnam and South Korea.

Where claims can't be reconciled, diplomacy still offers options for maintaining stability and peace. Competing assertions of sovereignty and jurisdiction in the South China Sea led to violent conflicts in 1974 and 1988. Claimants moved to occupy land features in that contested space over the years in an effort to create "facts on the water." But that is something that all the claimants – including China – agreed to stop doing when they signed a Declaration of Conduct in 2002.

That diplomatic agreement explicitly committed them all to refrain from occupying uninhabited features, to handle differences constructively, and to flesh out the terms of the agreement in a Code of Conduct. And while this agreement and the ensuing negotiations helped lower the temperature somewhat, diplomacy cannot be said to have triumphed. Unfortunately, nearly twenty years later, there is no such Code and China has created and occupied seven new artificial "islands."

Alternatively, claimants can bring disputes to arbitration. One option is to obtain a determination at the International Court of Justice – as Cambodia and Thailand

have done. Another is to seek rulings from the Tribunal of the International Law of the Sea – as Bangladesh and Myanmar did. India and Bangladesh took their dispute over the Bay of Bengal to arbitration and when the ruling awarded extensive oil and gas rights to Bangladesh, New Delhi publicly accepted the result.

At the opposite end of the spectrum is China’s refusal to accept the “final and legally binding” 2016 ruling by the Law of the Sea Tribunal in the case brought by the Philippines. Not only did the Tribunal reject China’s jurisdictional argument and its claim to a so-called “Nine-Dash Line” in the South China Sea, but the final ruling effectively established that the vast majority of the waters fall within the EEZ of the Philippines and other ASEAN claimants. The subsequent change of government in Manila allowed Beijing to disregard the ruling with impunity, dealing a blow to the rules-based order.

There is, in fact, a third peaceful option for dealing with irreconcilable maritime jurisdictional claims – essentially to defer ultimate resolution and look for practical interim arrangements. In 1978, Deng Xiaoping told the Japanese Prime Minister that he chose to “shelve” the dispute over the Senkaku Islands in the hope that “the next generation would likely be wiser than us and will probably be able to find some resolution to the issue.” And indeed, Japan and China in 2008 were able to reach an agreement to jointly develop a nearby undersea field Chunxiao/Shirabaka gas field, although this agreement proved short-lived. Since then, the situation has rapidly deteriorated. In 2020, China conducted over 300 incursions by its vessels into Japanese-administered waters around the Senkakus and over twice that number of sorties by fighter aircraft.

In sum, the record shows China’s failure to adhere to a negotiated agreement in the case of the Declaration of Conduct, to a legal determination in the case of the UNCLOS Tribunal ruling, or even to Deng Xiaoping’s wise injunction to “shelve” the dispute with Japan over islands in the East China Sea. This points to the fact that China’s leaders seem to be out to get as much as they can take, and that where possible, they will use the strength of their coercive power to compensate for the weakness of their claims.

Role of the United States

I dealt extensively with all the East and South China Sea claimant governments – including China – between 2009 and 2017 when I was responsible for Asian affairs on the NSC and then as Assistant Secretary of State for East Asian and Pacific Affairs. Even at the height of the Obama “Rebalance to Asia” with frequent

Summit meetings, expanding U.S. military operations, and enhanced diplomatic and economic engagement in the region, Asian partners were hungry for an even more robust American presence. They considered the U.S. an essential stabilizer and security guarantor, as well as a bulwark against Chinese bullying and hegemony. While they stressed they did not want to be forced into choosing between the U.S. and China, they made clear that they wanted to have options and certainly did not want to be left at China's mercy.

More recently, however, the perception grew among a number of governments in the region that the United States was no longer willing or perhaps even capable of playing its traditional role as the guarantor of a rules-based order. Fears that Washington was so focused on reaching a trade deal with Beijing that it would overlook behavior that threatened Asian partners later gave way to fears that they would be dragged into a conflict as the U.S.-China rivalry worsened. Numerous polls show that trust and confidence in the U.S. fell precipitously among Indo-Pacific nations. And during that period, China made significant advances in gaining leverage and advantage throughout the region. China's Belt and Road Initiative (BRI) has been a principal vehicle through which it has conducted a remarkable full-spectrum push for primacy in economic, financial, diplomatic, technological, and increasingly in military domains.

The Belt and Road

China's Belt and Road initiative is far more than a series of infrastructure projects, and Beijing's repeated insistence that it is purely a peaceful and "win-win" development program has not proven convincing to its neighbors who recall similar pledges about land reclamation in the South China Sea. But the relevance of the BRI to maritime security in the Indo-Pacific is four-fold:

- China is gaining significant leverage over governments in the region, including through debt obligations and elite cooption, that it can parlay into greater tolerance for China's maritime agenda, as a shield against criticism, and potentially use to curtail access by U.S. or other third-country vessels.
- The BRI includes a large number of port projects which, under Chinese civilian-military fusion laws, must conform to Chinese defense specifications and whose Chinese port operators are obligated to support Chinese naval operations when so requested.

- Under China’s “strategic strongpoints” concept, certain ports are developed with dual-use functionality in close proximity to maritime chokepoints and critical SLOCs. Cambodia’s Koh Kong port, Sri Lanka’s Hambantota Port, and Pakistan’s Gwadar Port are all examples of overseas ports that expand the Chinese navy’s logistics network and its ability to conduct overseas operations.
- BRI’s Digital Silk Road expands China’s reach through its Beidou Satellite network, digital networks, fiber-optic cable projects, data centers, and various surveillance and monitoring systems – all of which create opportunities for China to collect immense quantities of data and intelligence that can be used to disadvantage the U.S. and other naval and commercial operations.

Response Options for the United States

The need to maintain a robust and highly capable military presence and to further enhance and modernize U.S. alliances and partnerships in the Indo-Pacific is an absolute given, and I will not elaborate on this point.

But equally important is taking steps that will rebuild regional confidence in American economic, diplomatic, and technological leadership, combined with confidence in a sustained U.S. commitment to the region and to international laws and norms.

The willingness of smaller nations to defend their own interests and push back against coercion by a powerful neighbor is directly affected by their confidence that the United States is present, capable, and willing to defend the rights of the weaker party under international law.

And the willingness of the countries in the region to stand together with the United States in upholding rules and norms vastly increases the prospects of improving Chinese behavior in the maritime domain.

Practical steps that the United States could take towards reestablishing U.S. leadership and building consensus around an effort to safeguard international law and norms in the Indo-Pacific include:

1. Programs building maritime capacity and U.S. interoperability with partners to better enable them to handle their own territories and support maritime security across the region. These programs ideally would include training and facilities for enhanced domain awareness and EEZ protection.

2. Fully staffing U.S. diplomatic posts and resuming the previous high tempo of high-level dialogues and bilateral and multilateral interaction between officials (including visits when normal travel again becomes possible).
3. Active, senior-level U.S. participation in regional multilateral institutions such as the East Asia Summit, the ASEAN Regional Forum and Defense Ministers-Plus meetings, the Pacific Island Forum, etc.
4. Follow-through and an expansion of the agenda set at the March Quad Summit. This Quad meeting was favorably viewed in the region because it broadened the Quad's focus beyond security and towards providing practical and concrete benefits to Indo-Pacific countries in areas such as Covid vaccines, public health, emerging technologies, and climate resistance. This seems to have opened the door to Quad-plus partnerships with ASEAN countries, South Korea, Taiwan, and other potential partners. The Quad is the optimal format for promoting greater and more meaningful Indian engagement in East Asia and obtaining Indian buy-in for U.S. engagement in South Asia.
5. Restart the painstaking diplomatic work with individual South China Sea claimants to discuss the current situation, examine options to reduce risk and tensions, and explore potential pathways toward compromise. Nothing positive will come about without judicious U.S. diplomatic involvement, but something negative is certain to come about without it.
6. Build on the strategic convergence with India's "Act East" policy in developing the U.S. reengagement agenda by reinforcing India's capabilities as an advocate for and a provider of maritime security, not only in the Indian Ocean region but beyond into the Pacific. Maintaining a shared vision on maritime security issues will enhance our combined diplomatic influence and make possible other forms of collaboration, such as building regional partner capacity and maritime domain awareness.
7. Ratify the 1982 Law of the Sea Convention, which requires that maritime claims are derived from land features, as the first step in a push for all claimants to clarify territorial and maritime claims in accordance with international law. Although the United States in operational practice abides by the key provisions of UNCLOS, non-party status has significantly reduced Washington's credibility when it attempts to invoke or enforce the convention's rules when others violate them. In isolation, ratifying UNCLOS may do little beyond

removing a talking point from the Chinese script. But as part of a strategy that includes some of the other elements listed above, ratification would have a powerful galvanizing effect that lends substantial credibility to a U.S. reassertion of leadership in support of a rules-based order.

Conclusion

With regret I have omitted recommendations that, while hugely important to the effort to reclaim U.S. influence in the Indo-Pacific and find lasting solutions to maritime disputes, do not appear political feasible at this moment – such as rejoining the Trans-Pacific Partnership trade deal. The absence of a robust trade agenda is a major gap in the U.S. approach. At a minimum, assisting countries with economic diversification should be an element of an Indo-Pacific strategy.

I have also chosen not to address the need for, or the challenges in, direct discussions with China regarding maritime security issues. Sustained, multi-level strategic dialogue with China is one of the few tools available for setting limits, deterring challenges, dispelling misconceptions, and reducing risk. That is not a tool we can afford to discard.

Ultimately, the key to a more secure maritime environment in the Indo-Pacific is to reinforce international law and norms in ways that pressure China (as well as other actors) to conform. It will be persuasive power, not simply naval power, that will lead to a stable, prosperous, and secure Indo-Pacific.

Bolstering America's persuasive power begins with persuading our partners that we are capable, resolute, engaged, and invested in the region and its institutions for the long haul. It means persuading them of our resolve to support and defend the rule of law. Ratification of UNCLOS is a necessary, albeit not sufficient condition for that mission.

Lastly, to persuade China will require that the United States is joined by active partners throughout the Indo-Pacific who have or are developing both the will and the wherewithal to resist China's paramilitary and non-military coercive pressure. This will require a sustained and major U.S. effort across a wide spectrum of diplomatic, economic, military, legal, and information domains.

Thank you.