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**Hearing on**  
**China's Maritime Disputes in the East and South China Seas**

This testimony reflects the personal views of the author and not the official views of the U.S. Navy or any other entity of the U.S. Government.

**Questions presented:** What are the origins of China's territorial claims in the East and South China Seas. Upon what historical, geographic, or other bases does China justify them? What is China's strategy for promoting its "9-dash line" claim? How does China address skepticism to this claim and how sustainable is this strategy? What impact will the Philippines' initiation of South China Sea boundary arbitration proceedings have on the outlook for the resolution of other maritime boundary disputes in the region? What is the impact of China's decision not to participate in the proceedings? How will the maritime boundary dispute in East Asia be resolved, if at all? What avenues have the greatest promise to yield an enduring solution? Discuss possible roles for international institutions, such as the United Nations (UN), and regional institutions, such as the Association of Southeast Asian Nations (ASEAN). What should be the role of the US in achieving resolution and ensuring the resolution endures?

**The Origin of China's Maritime Claims in the East and South China Seas.** China's maritime claims in the East and South China Seas flow from several overarching interests and objectives.<sup>1</sup> These include enhancing China's sense of national security, acquiring control over the region's living and non-living maritime resources, and restoring China's place of pre-eminence in the East Asian regional order. Thus, China's maritime claims serve important security, economic, and external political objectives. Additionally, consolidating Chinese state power over the offshore islands and regional seas serves the Communist Party's interest in maintaining internal political credibility by delivering to the Chinese people what they believe is rightfully their own.

Perhaps China's pre-eminent objective is expansion of its national security perimeter. There is evidence that as early as the 1930's Chinese leaders were already looking forward to a period of restored Chinese sovereignty and power and many of today's specific claims stem from this period.<sup>2</sup> Emphasizing this continuity of strategic thinking about how China thinks about security, regardless of the polity that provides governance there, a spokesman for China's Ministry of Foreign Affairs scolded Japanese Prime Minister Noda as the Senkaku-Diaoyu Islands dispute heated up in late August 2012, and added that the disputed islands "have been an inherent territory of China since ancient times ... [and were] within China's *maritime defense sphere* since the Ming Dynasty."<sup>3</sup> What is interesting about this statement—and fully representative of Chinese views—is the weaving of history, security, and territorial claims with attempts to correct the behavior and attitudes of leaders of neighboring states. Additionally, while the statement by

the spokesman for the Ministry of Foreign Affairs appears to be the first and only public use of that specific term, the concept behind it is not at all new. A 2007 article in *China Military Science*, for instance, calls these waters “the overlay area of China’s national sovereignty, an important strategic protective screen, and an energy source base.”<sup>4</sup> Similarly, People’s Liberation Army Major General Peng Guangqian stated “China’s sea area is the initial strategic barrier for homeland security ... a channel and strategic pivot for the country to move outward ... [and] a treasure trove of the strategic resources necessary for the country’s survival and development.”<sup>5</sup> Thus, there are close connections between China’s claim to sovereignty over the islands in the East and South China Seas, Beijing’s expansive jurisdictional assertions over the region’s water space, and China’s sense of national security, resource security, and regional credibility.

Concerning the Senkaku-Diaoyu dispute, there is a direct correlation between China’s heated rhetoric surrounding the September 2012 purchase by the Japanese government of some of the islands from their private owner and China’s most intense period of internal politics in many years. China’s escalation of the incident throughout the autumn of 2012 certainly served to externalize the internal political instability and thereby created space for the Chinese Communist Party (CCP) leaders to resolve the political struggle with less internal or external political pressure. In my view, however, it would be wrong to conclude that since Xi Jinping has now consolidated his political position the purpose of escalation has been achieved and the dispute will return to some form of status quo stability. That line of reasoning overlooks the fundamental point, that in addition to the temporary political objectives of escalation, China has fundamental and long term vital objectives regarding national defense and resource security that will not fade. Additionally, influential Chinese thought-leaders believe that regional power dynamics currently favor China, but they are anxious that ten years from now that may no longer be the case. Thus, it is my view that any easing of tensions over the Senkaku-Diaoyu dispute will be temporary and for the next several years at least China will retain most of the strategic initiative to dial up or dial back the tensions as it deems the circumstances require.

**China’s Strategy for Promoting its “9-Dashed Line” Claim.** It will be easier to understand China’s strategy and to assess the United States’ best response to it if we lay out the framework of five basic approaches to international dispute resolution. The spectrum begins with three diplomatic or institutional options. The first of these is direct, *bilateral negotiations* between the disputing parties. The second is *multilateral negotiations*, either through an appropriate institution, such as ASEAN or the UN, or undertaken on an ad hoc basis among the various disputing parties. The third is to submit the dispute to arbitration or litigation through an appropriate *international legal institution*. The fourth and fifth approaches are power based—*non-militarized coercion* and *armed conflict*. Of these five approaches, China prefers bilateral negotiations to resolve the conflict, but these negotiations have gone nowhere over the past two decades because China demands more than its negotiating partners are willing to give up. China has participated in multilateral negotiations in the past—the period between 1995 and 2008 in particular—and this led to some successes, including the Declaration on the Conduct of Parties in the South China Sea. When ASEAN was unified against China, as it was in the aftermath of the 1995 Mischief Reef Incident, this pressure gave China incentive to work productively with ASEAN, but by 2008 the Chinese had concluded that only they were negotiating in good faith and that the other disputing parties were taking advantage of Chinese restraint to seize control of

valuable hydrocarbon resources. The Chinese thereafter actively sought to divide ASEAN to forestall any meaningful collective pressure from that direction. Likewise, the Chinese have so far refused to submit to international arbitration or litigation because, although they sincerely believe their claims are just and appropriate, they know that international law does not support many of their assertions, especially their more expansive claims—such as jurisdiction over the waters of the South China Sea based on the 9-dashed line and their East China Sea continental shelf claim. Finally, China has been deterred over the past few decades from using armed conflict to resolve the disputes—an approach it had used successfully in 1974 in the Paracel Islands and in 1988 at Fiery Cross Reef. Thus, since 2008 China’s strategic emphasis has settled into the gap between armed conflict—from which it has been deterred—and institutional approaches, which it found ineffective to advance its interests. In the gap between these strategies lies the power-based approach of non-militarized coercion.

A good example of how China employs non-militarized coercion to consolidate its near seas claims can be seen in the 2012 Scarborough Reef Incident and the interactions between the Chinese and Philippine governments in the weeks before it. On February 27, 2012, the Philippine Secretary of Energy announced plans to develop hydrocarbon 15 blocks in the Reed Bank area, which forms part of the continental shelf of the Philippine’s Palawan Island. This area is, however, also within China’s 9-dashed line, which has resulted in agitation between the two countries for years. A couple of days after the announcement, the Chinese warned the Philippines

Any exploration and development projects in these areas without China’s consent cannot be successful. China is firmly determined to safeguard its sovereignty, and will take *all possible measures* to solve such problems when necessary.<sup>6</sup>

The next incident occurred about a month later when, in the same disputed waters, the Philippine Navy seized a Chinese fishing vessel and 35 wooden, motorized dinghies it was towing under a law that authorizes the Philippine Navy to seize foreign vessels engaged in illegal fishing in Philippine waters. The Chinese Ministry of Foreign Affairs responded that these waters have been China’s “traditional fishing grounds for generations” and reiterated that “China has indisputable sovereignty” over these islands and waters.<sup>7</sup> Thus, even before the Scarborough Reef Incident began, China and the Philippines were actively sparring over resource rights in the waters near the coast of the Philippines and the situation was poised to escalate.

Scarborough Reef is a coral feature sitting atop a shallow shoal in the eastern part of the South China Sea. It is not part of the Spratly Islands. The feature is, however, disputed between China and the Philippines, but had been actively used and occasionally patrolled by both parties for decades. When a single Philippine Navy frigate on a fisheries law enforcement patrol showed up at Scarborough Reef on April 8, 2012 to stop Chinese fishermen from harvesting endangered species there, the Chinese quickly deployed civilian law enforcement vessels from China’s Maritime Surveillance Service.<sup>8</sup> They were joined by a small armada of Chinese fishing vessels and together this flotilla of Chinese government and civilian craft overwhelmed the Philippine presence. A standoff on the water began, supported by the nearby presence of Chinese Navy vessels serving to remind the Philippines that any temptation to escalate the situation could and

would be met by highly capable naval power. Bilateral diplomacy took over, resulting in what appeared to be an agreement for both sides to withdraw and for the situation to return to the status quo ante. The Philippines complied, removing their few government and civilian vessels from the reef. The Chinese did not. In fact, after the Philippine ships departed the Chinese placed a physical barrier across the reef's narrow entrance and posted a Chinese law enforcement vessel to prevent any Philippine attempts to return. The Philippines was outmaneuvered at Scarborough Reef and lost access to the resources in its sheltered harbor and lost the ability to protect the reef's fragile ecosystem.

These incidents demonstrate some of the key attributes of China's comprehensive coercive strategy for advancing its interests within the 9-dash line. First, and perhaps most obvious, is China's tremendous investment and *expansion of its various civilian maritime agencies*. As China's white-hulled capacity grew, so did China's now continuous presence in the disputed waters. These vessels outnumber even the collective capacity of other disputants and provide an intimidating presence and de facto control over much of the disputed water space. The second attribute is *integration of the enormous civilian maritime capacity* China has developed over the past two decades in a new sort of people's war. China's fishing fleet reportedly receives financial incentives and logistical support to operate in the southern waters of the South China Sea and can help flood a hot spot in support of government action in a way that overwhelms the law enforcement capacity of China's rivals—especially in the South China Sea. Third, the Chinese also *leverage superior economic power* through targeted commercial engagement by state-owned enterprises, infrastructure projects, and official gifts, grants, and favorable loans. These can be extended or withheld to affect national policy—an example of which can be seen in the stoppage of rare earth shipments to Japan during the 2010 crisis and the cancellation of banana imports from the Philippines in 2012. Fourth, China has developed *domestic laws and institutions* to rationalize and manage the spaces it is increasingly controlling. These laws serve to organize and direct the efforts of China's considerable domestic agencies, but they also serve to raise the stakes for their opponents. As China incorporates more closely islands and waters in the South China Sea, it simultaneously deters action against it by treating these gains as new triggers for action in national self-defense. Likewise, Beijing applies *public and psychological pressure* on its neighbors by stirring up Chinese nationalist fervor surrounding the disputes and also through media campaigns, such as its very well publicized deployment in early 2012 of a deep-water drilling capacity. Fifth, although its role remains indirect, the PLA still has an important component of this strategy. Just as they were during the Scarborough Reef Incident, PLA Navy vessels are never far from the site of any dispute and these *Chinese naval forces serve as a deterrent* reminder that China could manage any escalatory action its opponents might be tempted to try. This combination of economic leverage, civilian maritime power, and military deterrence power has enabled a Chinese strategy in which there are *little or no consequences for the employment of escalation*, short of militarized armed conflict. Thus, operationalization of the strategy includes the use of low-level force—such as cutting the cables of Vietnamese survey vessels, arresting or firing upon Vietnamese fishermen, and intimidating Philippine exploration vessels. It has indeed proved to be a low risk, high reward strategy. That was, at least, until the Philippines decided to open up a new front in the conflict.

**Impact of the Philippine Arbitration in the South China Sea.** For the past several years, China's coercive strategy for consolidating its hold over the islands and water space within the 9-dash line has left other claimants grappling to find effective ways to respond with the more—sometimes much more—limited means at their disposal. On January 22, 2013, however, *the Philippines seized the initiative*, shifted the battleground, and shook up decades of stagnation in discussions with China over their maritime disputes in the South China Sea – known as the West Philippine Sea in Manila – by initiating an international arbitration process under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>9</sup> So far, China has rejected participation in the process, even though arbitration will continue without them. This is because arbitration of disputes over the interpretation of UNCLOS is mandatory for states party, except for four key issues touching on the vital sovereign interests of any state: sovereignty over disputed territory, maritime jurisdictional boundaries, military activities at sea, and historic title over water space. The normal process for assembling the five-member arbitral panel is for each party to choose an arbitrator of its own and then through negotiation and agreement the parties choose three more arbitrators together. When a party refuses to participate in the process, the rules require the Chief Judge of the International Tribunal for the Law of the Sea to independently appoint the remaining four arbitrators. In this case, they will be appointed by Japanese Judge Shunji Yanai.

This process, therefore, presents China with several challenges. First, China's continuing failure to reach a negotiated settlement with any of its neighbors has exposed China to the risk of international litigation of the issues. If the Philippines is successful, other states will either join in the process or initiate arbitration of their own. Thus, one impact of the arbitration is that Beijing has, at least temporarily, *lost the strategic initiative* it so painstakingly developed through the combined strategy of diplomatic stalling and non-militarized coercion at sea. Second, if the arbitration goes forward—and this is a significant “if” that I will explain further below—Beijing will be at a serious disadvantage because it is doubtful that several Chinese assertions about their South China Sea rights will survive the scrutiny of international law. Thus, another impact is that *Beijing could lose even the mere fig leaf of credibility* for some of its important maritime claims. Thus, a very important outcome of this case could be that China is faced with the embarrassment of the formal international rejection of its claims and a clear reinforcement of the rules and norms concerning rights and obligations at sea that UNCLOS establishes. It should be noted that on at least one occasion in the past—in the period from 1995 to 2008, Beijing was influenced to pursue non-coercive measures by unified international opinion against its behavior.

Failure by China to participate in the process or, worse, a decision to ignore unfavorable results, would be a signal from Beijing that no amount of international disapproval will sway it. Thus, a third impact could be to encourage others in the region and beyond to enhance coercive capacity and *engage in accelerated balancing activities* in order to reinforce their claim strength and their overall security in the face of a more powerful China. A fourth impact could be that China's leaders may have to face *domestic political concerns*, since the avid Chinese nationalism that Beijing sometimes uses as a weapon against its neighbors could in this case be turned against the leadership. Indeed, there is likely to be especial sensitivity to the perception that China's government lost control of a high profile issue to a small Southeast Asian state and a Japanese judge. At a time when a new Chinese leadership is in the process of establishing its authority,

asserting its policy preferences, and developing its credibility as defender of China's interests, nationalist outcries could easily become an unwelcome and complicating distraction.

There is one big hurdle yet to cross before China has to fear any of these consequences. The arbitral panel must be formed and it must decide whether it has jurisdiction over the case. This much, at least, will proceed even without Chinese participation. The issue of jurisdiction is not a simple one. The Philippine *Notification and Statement of Claims* asks the Arbitral Panel to determine that China's nine-dashed line claim in the South China Sea is contrary to UNCLOS and therefore invalid. While the Chinese government has never openly stated its policy on the meaning of this line, there is some evidence in the public domain in that China officially submitted a picture of the 9-dashed line to the UN in 2009 in opposing a joint claim by Vietnam and Malaysia to continental shelf rights in the South China Sea. However, since UNCLOS specifically allows countries to exclude claims to historic title from compulsory arbitration—and China is on record as asserting its right to exclude such cases—the tribunal may choose the path of least risk and decide it has no authority to review Beijing's claim over or activities within the 9-dashed line. This is why the question of jurisdiction is really at the heart of the matter. If the tribunal decides it has jurisdiction, it is because it found that China's 9-dashed line claim is indefensible as a zone of historic title. This would be a severe blow to China, one that it may be unwilling to risk. Accordingly, perhaps the single biggest impact of the Philippine arbitration is that it *incentivizes China to re-open the avenue of bilateral negotiations* on terms that are more realistically acceptable to the Philippines.

**Avenues for Resolving Maritime Disputes in East Asia.** Even as bilateral negotiations will likely be reinvigorated in light of the arbitral process, Beijing will undoubtedly continue to engage in at least some of its coercive activities to ensure its maximum leverage at the bargaining table. Since the Philippines has few tools with which to coerce China in return, Manila will pursue maximum leverage by continuing to press the legal claims, since they are aimed precisely at China's greatest weakness. In addition, if other claimant states were also to initiate compulsory dispute resolution under UNCLOS, it would be possible for the Southeast Asian claimants to achieve a measure of multilateralism even without ASEAN unity. In this way, *all three non-coercive dispute resolution mechanisms could be simultaneously employed* to bring Beijing into a meaningful bargaining process. It must be acknowledged, however, that Vietnam, Malaysia, and Brunei have some incentive to wait for the current arbitral panel to decide whether it has jurisdiction. If they initiate arbitration now, they would undoubtedly have to face stepped up coercive pressure from Beijing. On the other hand, it is perhaps now—before a decision on jurisdiction is rendered—that multilateral pressure would have its most effect. The risk to Beijing of an unfavorable decision may be enough to change China's current calculus about engaging in real negotiations across the region.

Thus, it cannot be emphasized how critical the decision on jurisdiction will be for maintaining the availability of peaceful mechanisms to resolve the disputes. Without the ability to bring China into compulsory arbitration, the smaller claimant states will have no source of leverage to settle on terms other than those dictated by Beijing. They are overpowered in bilateral negotiation, undercut in multilateral negotiation, ineffective at withstanding coercion, and unable to match Beijing's military power.

### **The Role of the United States in Supporting Resolution of East Asian Maritime Disputes.**

To date, the United States has carved out two roles for itself in supporting peaceful resolution of East Asian maritime disputes. First and most importantly, American alliances, security partnerships, and security guarantees, in combination with the maintenance of strong American military power resident in East Asia, have so far taken military conflict—the fifth approach discussed in the framework above—off the table as a method of dispute resolution. Since 1988, Beijing has not used military force to improve its position in the East and South China Seas. Second, the US uses its persuasive power, the reinforcement of international law norms, and diplomatic efforts to encourage the disputing parties to resolve their conflicts through peaceful means—that is, the first three approaches discussed in the framework above. This appears to have been especially helpful in supporting Beijing’s approach between 1995 and 2008, sometimes called the period of China’s “charm offensive.” But the US has played a very limited role in affecting Beijing’s calculations about the fourth framework option, that of pursuing a non-military coercive strategy. American tools in the region are almost entirely military, meant for prevention or winning of war. We have no similar regional “white hulls” and to use the US Navy to counter action by China’s civilian law enforcement vessels would be escalatory. Thus, in a very real sense, the existing American strategy has incentivized China to take non-military coercive measures.

What might be a stronger American posture? The single most important role for the United States in East Asia is to keep conflict as a means of dispute resolution off the table. To the extent that American deterrent power has eroded, that needs to be reversed with concrete, visible steps. No other measure will ensure that framework option five—armed conflict—remains off the dispute resolution table. This is the single biggest contribution America, and America alone, can make. If we do nothing else, we must focus on achieving this. Additionally, by focusing on military deterrence, we may be able to allow regional states to focus scarce resources on developing coast guard and other capabilities necessary to withstand Chinese coercive pressure at sea.

The US also needs to continue to bring its diplomatic power to bear to persuade and encourage parties to pursue non-coercive measures. American persuasive power would be strengthened by a reassertion of the American leadership role over the development of international law of the sea. Since UNCLOS is the basis of modern international law of the sea, the U.S. should ratify the Convention in order to more effectively exercise this leadership from within the ranks, not just from outside them. It is my view that the American policy of neutrality on the outcome of sovereignty disputes is a good one, as long as the dispute is resolved without coercion of any kind. However, the US should not be neutral about disputes over how to divide water space and the resources in them. The US, indeed all countries, have a vital interest in the strength of the methods of UNCLOS for allocating coastal state rights to resource zones. Not history, not power, but international law must be the guide.

Finally, the US should consider ways to support the ability of regional states to withstand China’s non-military coercive pressure. Perhaps focused aid to develop coast guard capacity

would be appropriate. Assisting states in achieving economic diversification is another path that should be considered. Only through such cooperative efforts *across* the spectrum of international dispute resolution mechanisms will the East Asian playing field be leveled sufficiently to guarantee a just and lasting solution to East Asia's maritime disputes.

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<sup>1</sup> For more on this issue, please see, Dutton, Peter, "Three Disputes and Three Objectives: China and the South China Sea," *Naval War College Review*, Volume 64, No. 4, Autumn 2011, p. 42.

<sup>2</sup> See, Dutton, Peter A., "Through a Chinese Lens," *USNI Proceedings*, April 2010, p. 24.

<sup>3</sup> Chen Jie, "China Strongly Displeased at Japan's Remark on Diaoyu Islands," *Xinhua*, August 25, 2012

<sup>4</sup> Wang Shumei, Shi Jiazhu, and Xu Mingshun, "Carry Out the Historic Mission of the Army and Establish the Scientific Concept of Sea Rights," *China Military Science*, February 1, 2007, pp.

<sup>5</sup> Peng Guangqian, "China's Maritime Rights and Interests," in Dutton, Peter (ed.), *Military Activities in the EEZ: A U.S-China Dialogue on Security and International Law in the Maritime Commons*, China Maritime Studies Number 7, Naval War College December 2010, p. 15.

<sup>6</sup> "Philippines Must Learn Self-Restraint in South China Sea Disputes," *People's Daily*, March 1, 2012. Emphasis added.

<sup>7</sup> Ina Reformina, "DOJ Against Release of Chinese Fishing Vessels," *ABS-CBN News*, April 4, 2012.

<sup>8</sup> "Second Philippine Ship Sent in China Standoff," *Agence France-Presse*, Thursday, April 12, 2012.

<sup>9</sup> Much of the material in this section is taken from Dutton, Peter A., "The Sino-Philippine Maritime Row: International Arbitration and the South China Sea," *East and South China Seas Bulletin #10*, Center for a New American Security, March 15, 2013.