



**INTERNATIONAL TERRITORIAL  
DISPUTES AND CONFRONTATIONS IN  
THE SOUTH CHINA SEA FROM A  
LEGAL PERSPECTIVE**

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# INTRODUCTION (1)

- Q: What is the Rights and Duties of States in an Disputed Maritime Area in the South China Sea?
  1. Overview of the Maritime Disputes in the South China Sea
  2. The Rights and Duties of States in an Disputed Maritime Area under International Law
  3. The Implication of the Philippines v China Arbitration Award on Jurisdiction and Admissibility, October 29, 2015.



# INTRODUCTION (2) ZONAL APPROACH OF UNCLOS

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## INTRODUCTION (3) DISPUTED AREA

1. Undelimited maritime area (= overlapping EEZ or Continental Shelf)
  - Article 74 and 83 of UNCLOS apply.
2. Territorial sea or jurisdictional water surrounding an island, of which territorial title is disputed ; or territorial sea surrounding a rock, of which territorial title is disputed.
  - No specific provision in UNCLOS but general provisions as well as general international law principles apply.



# INTRODUCTION (4) ISLAND, ROCK, LOW-TIDE ELEVATION (LTE)

- **Island** – entitled to Territorial Sea (TS), Exclusive Economic Zone (EEZ) and Continental Shelf (CS). (Article 121(1))
- **Rock** – entitled to TS only. (Article 121(3))
- **LTE** – When within the TS, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.; if it is not within the TS, no legal effect. (Article 13)





# MARITIME DISPUTES IN THE SOUTH CHINA SEA

# GEOGRAPHICAL SITUATION OF THE SOUTH CHINA SEA: AN OVERVIEW (1)



Figure 1: Sovereignty Claims in the South China Sea.

# GEOGRAPHICAL SITUATION OF THE SOUTH CHINA SEA: AN OVERVIEW (2)

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# CHINA'S NINE-DASH LINE (1)



- Attached to China's note verbale (May 7, 2009) opposing to the extension of the continental shelves of Vietnam and Malaysia.
- In 2013, it added a line at the east of Taiwan.
- No official explanation as to the meaning of the lines.



## CHINA'S NINE-DASH LINE (2)

- Note verbale: “The People’s Republic of China has its indisputable sovereignty over the islands in the South China Sea and surrounding waters, and enjoys **sovereignty and jurisdiction rights** over related waters as well as the seabed and subsoil of those waters.”
- Chinese scholars’ view on the waters surrounded by the Nine-dash line:
  - “Historical water”;
  - “Jurisdictional water”;
  - “Boundaries of the continental shelf”.



# CHINA'S UNILATERAL ACTIONS IN THE SOUTH CHINA SEA (1)

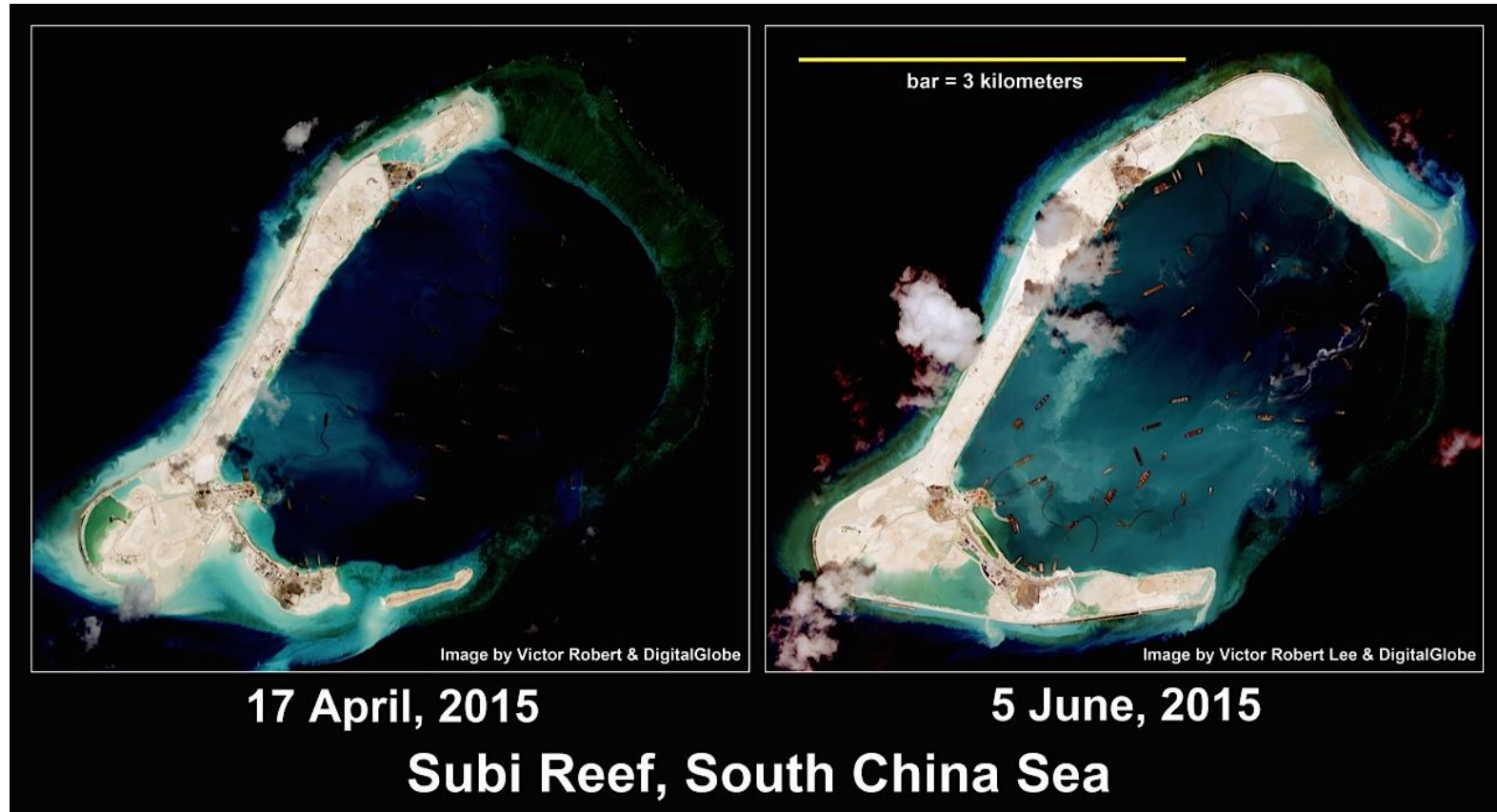
- China's harassment against Vietnamese or Filipino fishing vessels in the overlapping EEZs.
- China's development of the continental shelf which is within the 200 nm from Vietnamese coast line.
- China National Offshore Oil Corporation's Oil Rig 981



Source:  
<http://www.xinhuanet.com/energy/huiyi/hy5.htm>



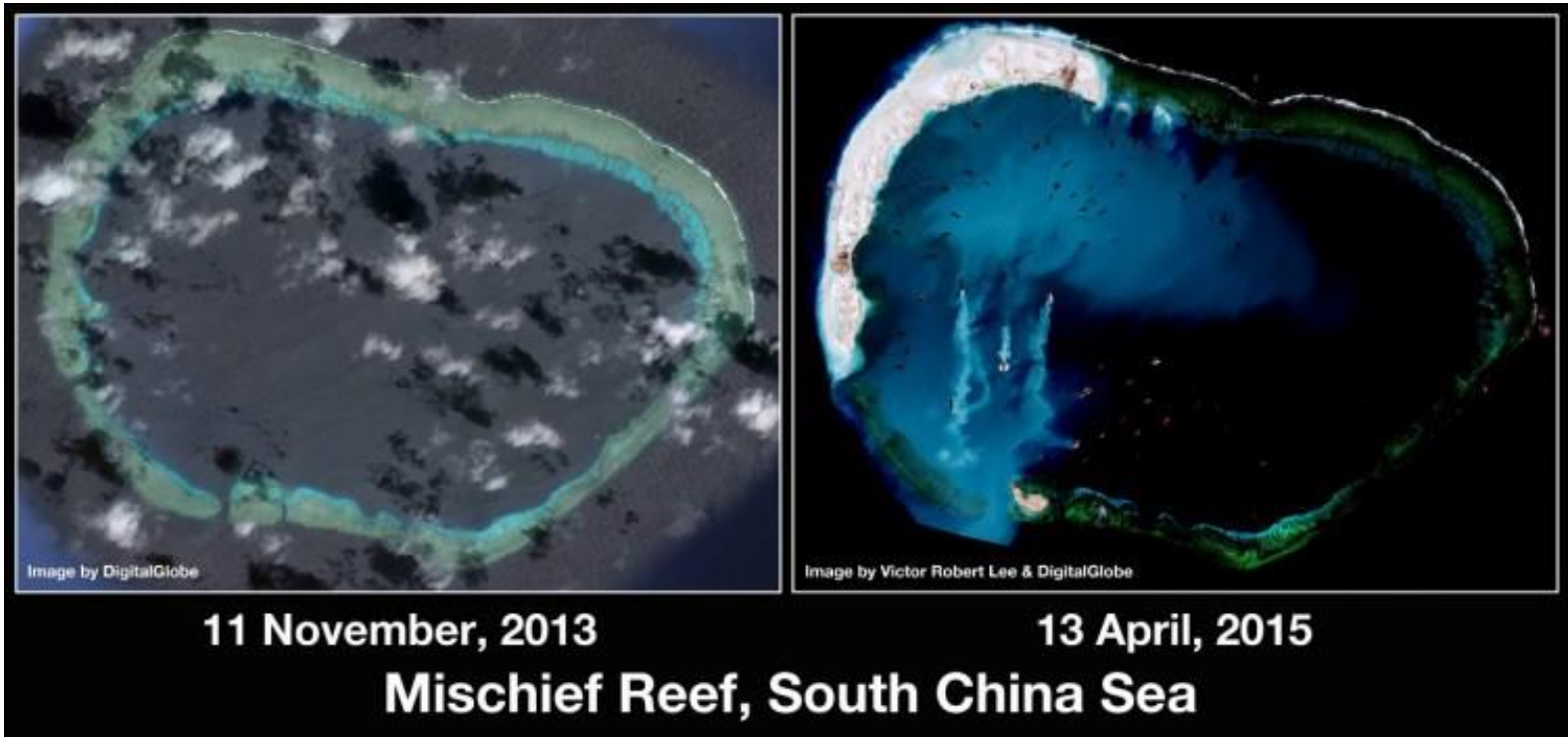
# CHINA'S UNILATERAL ACTIONS OF THE SOUTH CHINA SEA (2)



Source: <http://thediplomat.com/2015/06/south-china-sea-satellite-images-show-pace-of-chinas-subi-reef-reclamation/>



# CHINA'S UNILATERAL ACTIONS OF THE SOUTH CHINA SEA (3)



Source: <http://thediplomat.com/2015/06/south-china-sea-satellite-images-show-pace-of-chinas-subi-reef-reclamation/>





# CHINA'S UNILATERAL ACTIONS OF THE SOUTH CHINA SEA (4)



Image via DigitalGlobe

**2 April, 2014**



Image via Victor Robert Lee & DigitalGlobe

**17 March, 2015**

**Duncan Island, Paracel Islands, South China Sea**

Source: <http://thediplomat.com/2015/06/south-china-sea-satellite-images-show-pace-of-chinas-subi-reef-reclamation/>





**THE RIGHTS AND DUTIES OF  
STATES IN THE DISPUTED  
MARITIME AREAS**

# RIGHTS AND DUTIES OF STATES IN THE UNDELIMITED MARITIME AREA (1)

- UNCLOS, Article 74(1) and 83(1)

The delimitation shall be effected **by agreement** on the basis of international law.

- UNCLOS, Article 74(3) and 83(3)

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into **provisional arrangements** of a practical nature and, during this transitional period, **not to jeopardize or hamper the reaching of the final agreement**. Such arrangements shall be without prejudice to the final delimitation.





# RIGHTS AND DUTIES OF STATES IN THE UNDELIMITED MARITIME AREA (2)

- Article 74 and 83 do not obligate States to refrain from any use of the disputed areas.
- A parallel issue: the method of the delimitation
  - Continental Shelf Convention of 1958 equidistance line (Article 6)
- Balance of interests under these articles:
  - State parties' desire to make use of the area (and not to suspend economic development) ; and
  - Demand for State parties' reaching to the final delimitation agreement.



# DUTY OF SELF-RESTRAINT

- Duty of self-restraint (obligation to exercise self-restraint).
  - Cf. the principle of good faith (UNCLOS Article 300) and the obligation to cooperate
- Contents and consequences under Article 83(3) (as well as Article 74(3), the same provision on EEZ) are debated.
  - The obligation's temporal and geographical scope.
  - The categories of the activities that are prohibited and permitted within undelimited areas.



# OBLIGATION TO MAKE EVERY EFFORT TO ENTER INTO PROVISIONAL ARRANGEMENTS

- Obligation to negotiate for the provisional arrangements
  - North Sea Continental Shelf (Federal Republic of Germany v. Netherlands; Denmark, ICJ, Judgment 1969)
    - Obligation to enter into negotiations with a view to arriving at an agreement.
    - The negotiations shall be **meaningful, which will not be the case when either of them insists upon its position without contemplating any modification of it.** (para.47).
- Provisional arrangements
  - Does not have to be a formal treaty.
  - Joint development, joint fishing zones, moratoriums



# LIMITS OF THE UNILATERAL ACTIVITIES

(1)

## ○ Permanent physical change

- Aegean Continental Shelf (Greece v Turkey, Interim Protection Order ICJ, 1976)
  - ICJ distinguished between activities of a **transitory character** and activities that **risk irreparable prejudice to the position of the other party**. (para.30)
    - activities to cause physical damage
    - actual appropriation of the resource (exploration) or other use of natural resources
- Arbitration Award, Guyana v. Suriname (2007)
  - An act that causes **permanent physical change** would have to be undertaken pursuant to an agreement between the parties to be permissible, as they may hamper or jeopardise the reaching of a final agreement on delimitation. (para.467)



# LIMITS OF THE UNILATERAL ACTIVITIES (2)

- Activities that do not cause permanent physical change
  - **Provocative or threatening actions** against the other party
    - Guyana v Suriname (2008):
      - Suriname's action to threaten the private individuals exploring the area (licensed by Guyana) was deemed to violate the provision. (para.445)



# LIMITS OF THE UNILATERAL ACTIVITIES

(3)


- Activities that do not cause permanent physical change (cont'd)
  - Fishing activities
    - Fisheries Jurisdiction (UK v Iceland, ICJ, Provisional Measures, 1972):
      - The exceptional dependence of the Icelandic nation upon coastal fisheries was taken into account. (para.23)
  - Acquisition and use of information about the resources
    - Ghana v Côte d'Ivoire (ITLOS, Provisional Measures, 2015)
      - The acquisition and use of information about the resources of the disputed area would create a risk of irreversible prejudice to the rights of the other party (para.95)



# RIGHTS AND DUTIES OF STATES IN A WATER SURROUNDING A DISPUTED ISLAND OR A ROCK

- Whether and to what extent the arguments on undelimited area apply remain uncertain.
- General provisions such as **the obligation to cooperate** and the **obligation of the peaceful use** of the sea applies to the use of the sea even when the coastal State is not determined.
- **The principle of non-use of force** (UN Charter Article 2(4)) applies.



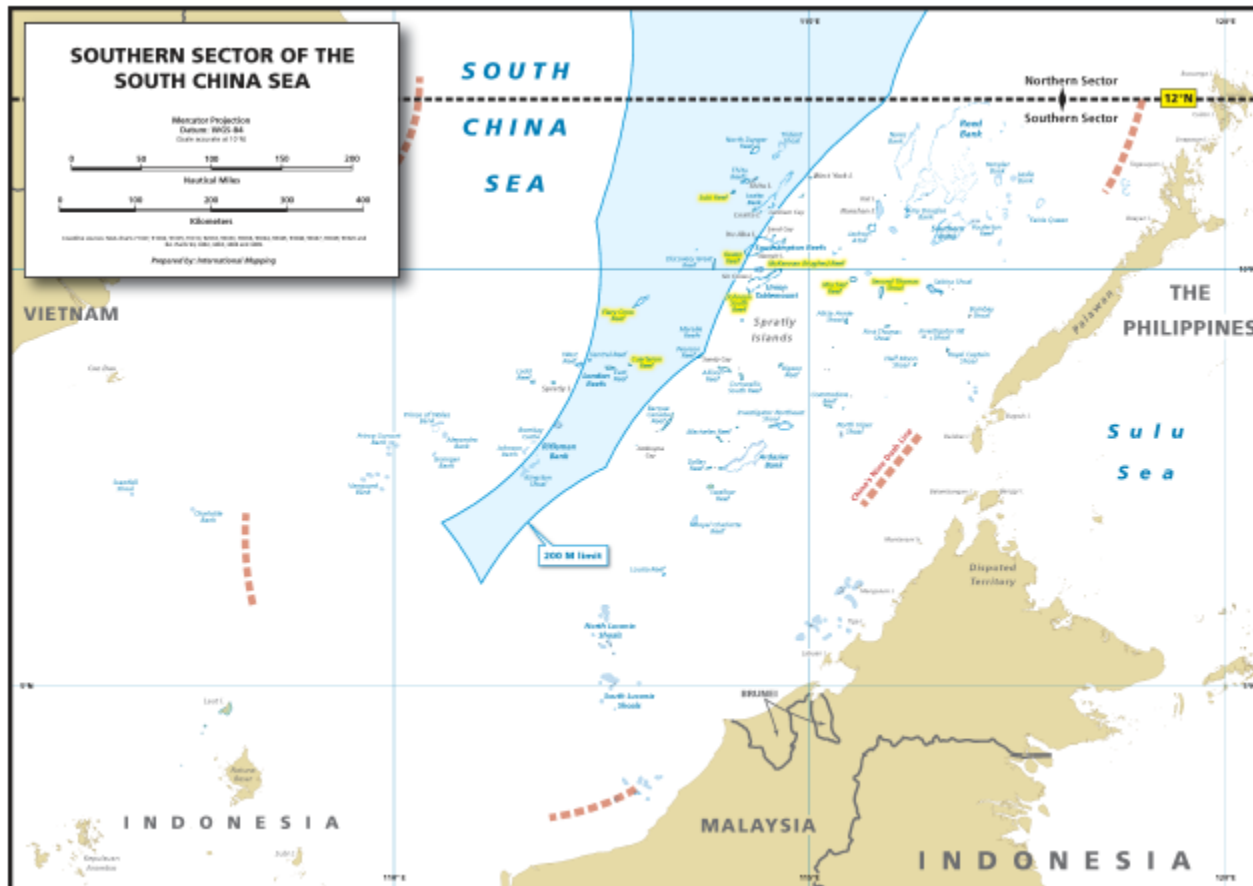


**THE IMPLICATION OF THE  
PHILIPPINES V CHINA  
ARBITRATION AWARD**



# PHILIPPINES V CHINA ARBITRATION CASE

Figure 4: "Southern Sector of the South China Sea" (including Spratly Islands and high-tide features identified in the Philippines' Submission) (Annexed, Figure 2.3)



Source: PCA Case N° 2013-19 between Philippines v China, Award on Jurisdiction and Admissibility, p.7.

# PHILIPPINES V CHINA: AWARD ON JURISDICTION AND ADMISSIBILITY, OCTOBER 29, 2015

- Philippines brought the case in front of Arbitration Tribunal established by Annex VII of the UNCLOS.
  - The legal status of islands, rocks and LTEs (i.e., whether certain features have TS, EEZ and/or CS.)
  - The legality of China's activities done in the vicinity of certain features.
  - Maritime title of Philippines over certain areas.
- China refused to participate in the procedure.
  - On December 7, 2014, it submitted a “position paper.”



# THE TRIBUNAL FOUND THAT IT HAD JURISDICTION OVER THE FOLLOWING MATTERS

- To determine **the legal status** of Scarborough Shoal; Mischief Reef, Second Thomas Shoal and Subi Reef; Gaven Reef and McKennan Reef; Johnson Reef, Cuarteron Reef and Fiery Cross Reef.
- To declare that
  - China has **unlawfully prevented Philippine fishermen** from pursuing their livelihoods in of Scarborough Shoal;
  - China has violated its obligations under the Convention to **protect and preserve the marine environment** in of Scarborough Shoal and Second Thomas Shoal;
  - China has breached its obligations under the Convention by **operating its law enforcement vessels in a dangerous manner** in the vicinity of Scarborough Shoal.



# THE TRIBUNAL RESERVED ITS CONSIDERATION OVER THE FOLLOWING MATTERS (1)

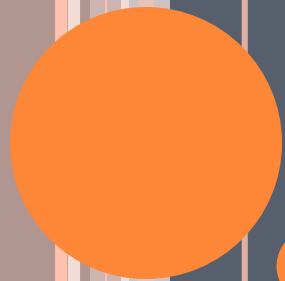
- China's **maritime entitlements** in the South China Sea may not extend beyond those permitted by UNCLOS.
- China's claims with respect to maritime areas encompassed by the **Nine-dash line** are contrary to UNCLOS.
- Mischief Reef and Second Thomas Shoal are **part of the EEZ and CS of the Philippines**.



# THE TRIBUNAL RESERVED ITS CONSIDERATION OVER THE FOLLOWING MATTERS (2)

- China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its EEZ and CS;
- China's occupation and construction activities on Mischief Reef
  - (a) violate the provisions of UNCLOS concerning artificial islands, installations and structures;
  - (b) violate China's duties to protect and preserve the marine environment under UNCLOS; and
  - (c) constitute unlawful acts of attempted appropriation in violation of UNCLOS;



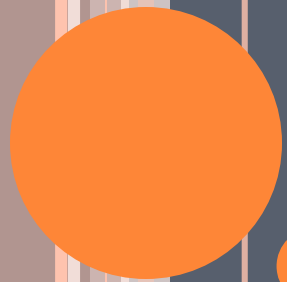


## CONCLUDING REMARKS

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- The obligation to negotiate for the provisional arrangement for the use of the undelimited area and the duty of self-restraint are positive rules, of which violation may incur state responsibility.
- If one of the parties tries to bring the case before the third-party dispute settlement mechanism, however, the jurisdictional hurdles remain.





## REFERENCES



## REFERENCES (1)

- David Anderson, "Negotiating Maritime Boundary Agreements," *Modern Law of the Sea* (2008) p.417.
- David Anderson and Youri van Logchem, "Rights and Obligations in Areas of Overlapping Maritime Claims," *The South China Sea Disputes and Law of the Sea* (S. Jayakumar et al eds., 2014) p.192.
- Robert Beckman, "Disputed Areas in the South China Sea," *Power, Law and Maritime Order in the South China Sea* (Tran Truong Thuy and Le Thuy Trang eds., 2015) p.103.



## REFERENCES (2)

- Francesco Francioni, "Peacetime Use of Force, Military Activities and the New Law of the Sea," *Cornell International Law Journal*, Vol. 18 (1985) p.203.
- Ranier Lagoni, "Interim Measures pending Maritime Delimitation Agreements," *American Journal of International Law* Vol. 78 (1984), p.354.
- Yann-huei Song and Keyuan Zou, "South China Sea Issues in European and American Perspectives: An Introduction," *Major Law and Policy Issues in the South China Sea* (Yann-huei Song ed., 2014)



## REFERENCES (3)

- Robert Volterra, "The infringement of the Obligations of Self-Restraint and Cooperation under Articles 74(3) and 83(3), and Possible Strategies to Bring Disputes emanating from such Infringement before Relevant Courts and Tribunals," Feb 12-13, 2015, Ministry of Foreign Affairs Japan, International Symposium on the Law of the Sea, *available at* <http://www.mofa.go.jp/mofaj/files/000074508.pdf>.
- Naoya Okuwaki, "Obligation of Self-Restraint and Cooperation of Coastal States in Maritime Areas pending Delimitation," *ibid*, *available at* <http://www.mofa.go.jp/files/000074507.pdf>.
- Irini Papanicolopulu, "Enforcement Action in Contested Waters: the Legal Regime," 6th IHO-IAG ABLOS Conference, 2010, *available at* [https://www.iho.int/mtg\\_docs/com\\_wg/ABLOS/ABLOS\\_Conf6/S7P2-P.pdf](https://www.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S7P2-P.pdf).

