



İstanbul :

Sayı
Our Reference: 4067Konu
Subject : **Filipinler'in Zambales Bölgesi'ndeki Kıyı Denetleme Ücretleriyle İlgili Güncelleme Hk.**

Sirküler No: 739/ 2015

Sayın Üyemiz,

İlgi: 12.10.2015 tarih ve PRESS (15)57 sayılı ICS Sirküleri ve Eki.

İlgi yazı ile, Filipinler İçişleri ve Yerel Yönetimler Bakanlığı tarafından Parlamento üyesi Jesulito Manalo'ya gönderilen bir mektup (Ek A) hakkında Uluslararası Deniz Ticaret Odası (ICS – International Chamber of Shipping) üyelerine bilgi verilmektedir.

İlgi yazı ekinde, ICS'nin Zambales Yerel Yönetimi tarafından düzenlenen faturaların Birleşmiş Milletler Deniz Hukuku Sözleşmesi'ne (UNCLOS) uygun olmadığı yönündeki görüşü desteklenmekte olup, bunun yanı sıra söz konusu faturalandırmaların Filipin Hukuku ile uyuşmadığı noktalar da dile getirilmektedir.

Bundan bir süre önce ICS'ye, Zambales Yerel Yönetimi'nin Zambales Bölgesine yakın sulardan transit geçiş yapan yabancı bayraklı gemileri çevre vergisi ödemekle sorumlu tuttuğu bilgisi gelmiştir. ICS, Filipinli Gemi Sahipleri Birliği'ne durumu bildirdiği yazısında **söz konusu uygulamanın UNCLOS Sözleşmesi'nin 26.1 no'lu Maddesi'ne ve dolayısıyla bu sözleşmeyi kabul eden Filipin Hukuku'na uygun olmadığını, çünkü karasularından transit geçen gemilerin ek bir hizmet almıyorlarsa herhangi bir ücrete tabi tutulamayacağını belirtmiştir.** ICS'nin savunması Filipinli Gemi Sahipleri Birliği'nin yanı sıra, Filipinler İçişleri ve Yerel Yönetimler Bakanlığı ile Parlamento üyeleri tarafından da haklı görülmüştür. Durumun mahkemeye intikal ettiği ve 60-90 gün için karara varılmasının beklendiği ICS tarafından bildirilmiştir.

ICS, ekteki mektubun anılan faturaları alan şirketlere gönderilmesini üyelerinden istemektedir.

İlgi yazı ve Eki ilişikte sunulmuştur (EK-1).

Bilgilerinizi arz ve rica ederiz.

Saygılarımızla,

Murat Tuncer
Genel Sekreter

EKLER:

Ek-1: İlgi yazı ve Eki.

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Bilgi:

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Deniz ve İçsular Düzenleme Genel Müdürlüğü
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12 October 2015

To: **MARINE COMMITTEE**

MC(15)57

CC: **Maritime Law Committee
Shipping Policy Committee
All Full and Associate Members (for information)**

FURTHER UPDATE ON PHILIPPINES PROVINCE OF ZAMBALES - CHARGES FOR COASTAL SURVEILLANCE

Action required: Members are invited to review a letter on the subject of the charges for coastal surveillance off the Province of Zambales in the Philippines. The letter should be copied to companies that have received invoices from the Province of Zambales.

Further to circular MC(15)56, members are invited to review a letter (Annex A) sent by the Philippines Department of the Interior and Local Government to Congressman Jesulito Manalo. The letter is supportive of the view of ICS that the invoices being raised by the Province of Zambales are contrary to UNCLOS but in addition raises points where the charging is contrary to Filipino law. Members are requested to forward the letter to companies that have received invoices.

This letter does not change the information in MC(15)56 which explains that the Filipino Shipowners' Association has begun a court action on behalf of international shipping and that this may not see a result for 60-90 days.

Peter Hinchliffe
Secretary General



Republic of the Philippines
DEPARTMENT OF THE INTERIOR AND LOCAL GOVERNMENT
DILG-NAPOLCOM Center, EDSA cor. Quezon Avenue

OCT 06 2015

HON. JESULITO A. MANALO

Representative

ANGKLA Party-list

613 North Wing Building

House of Representatives

Batasan Hills, Quezon City

Dear Rep. Manalo:

This has reference to your letter dated 21 September 2015 bringing to the Department's attention **Provincial Ordinance No. 28, s. 2015** entitled "AN ORDINANCE FOR THE PROVINCIAL COAST WATCH SURVEILLANCE AND ENVIRONMENT MONITORING SYSTEM IN THE PROVINCE OF ZAMBALES" which was adopted through Resolution No. 2015-106 by the Members of the Sangguniang Panlalawigan in its regular session held on 08 June 2015.

Section 2 of Provincial Ordinance No. 2015-28 (hereinafter, the "Ordinance") states its main purpose, that is, *"to upgrade the monitoring capacity and facilities of the Province of Zambales over its territorial waters to international standards for national and local security, prevention of maritime crime transportation of illegal substances, the improvement of port operations, and the maintenance and improvement of the maritime air environment of the Province"*.

Moreover, Section 7 of the Ordinance provides:

"Section 7: Implementation and Commissioning of the Provincial Coastwatch Surveillance and Environment Monitoring System

Under this ordinance, and by virtue of the MOA between the Province of Zambales and Xanatos Marine Ltd., signed on April 13, 2015, Xanatos Marine Ltd. is hereby commissioned to undertake and ensure the full implementation of the project under such terms of this Ordinance and the MOA such as, but not limited to:

- 1. Establishment of all the monitoring sites in different strategic parts of the province;*
- 2. Ensure the efficient operation and maintenance of the system;*

3. *Prepare a daily monitoring report to the Governor or to his official representative;*
4. *Ensure confidentiality of all the reports, data and monitoring documentation;*
5. *Prepare monthly billing for all shipping agents covered by this project;*
6. *Maintain close coordination with the Office of the Governor as to documentation and operation; and*
7. *Establish, appoint and empower its local representative Xanatos Philippines Corporation for the sole purpose of maintaining proper coordination between the parties, billing and accepting payments."*

Per your letter, following the issuance of the Ordinance, the Provincial Government of Zambales started to impose fees against foreign-flagged vessels which were merely transiting through the Philippine territorial waters, contiguous zone and economic zone adjacent to the coast of the Province of Zambales without entering its port or harbor area.

The issues raised against the Ordinance may be summarized as follows:

In sum, the Ordinance is being assailed on these grounds:

1. *The Ordinance violates Article 26 of the United Nations Convention on the Law of the Sea (UNCLOS);*
2. *The Provincial Government of Zambales, by enacting the Ordinance, in effect usurped the functions delegated by law to the maritime administrative bodies authorized to implement the vessels traffic services (VTS) System in the country;*
3. *The imposition of fees and charges under the Ordinance violate Section 133 (e) of the Local Government Code (hereinafter, the "Code") and DILG Memorandum Circular No. 2011-151 as the same was enacted merely to raise revenue by imposing fees and charges to all vessels entering its territorial waters.*

As to the first ground, we note that the purpose for the installation of a provincial coastal-wide monitoring system based on Section 2 of the Ordinance is to upgrade the Province of Zambales' (hereinafter, the "Province") monitoring capacity and facilities over its territorial waters for security and crime prevention purposes, and the improvement of the port operations therein.

Coastal watch, as defined in the Ordinance, pertains to the monitoring of territorial waters by the use of state-of-the-art equipment for real-time observation of sea

traffic, events, activities and operations in these waters. The provision of this service is undertaken by Xanatos Marine Ltd. (XML) allegedly "at no cost to the Province".

The Ordinance is silent as to its coverage, hence, it appears that it covers all vessels that enter the territorial waters of the Province. Moreover, the Ordinance states that ships docking at any port in the Province that has not paid the appropriate fees and charges after the given grace period shall not be allowed to leave, until such fees are paid and issued clearance by the Office of the Governor. As to the fees and charges imposed, the same depends on the ship type/classification and its country of registry.

We note that in a letter dated 08 September 2015, the Department of Foreign Affairs (DFA), through its Legislative Liaison Unit, already gave its position on this issue:

- *It is however submitted that the charges may be levied upon a foreign ship as payment only for specific services rendered to the ship.*

In the current situation, there seems no specific services rendered to the ship by installing coast watch surveillance and environment monitoring system: hence, said resolution is not consistent with UNCLOS.

- *The Philippines is a signatory to UNCLOS on 10 December 1982 in Jamaica. On 27 February 1984, the Batasang Pambansa ratified UNCLOS.*
- *The 1987 Philippine Constitution, Article II, Section 2 states:*

'The Philippines x x x x adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations'

By principle of incorporation, UNCLOS is considered part of the Philippine laws. *The adoption of Resolution No. 2015-106 is not only inconsistent with UNCLOS but also not in keeping with the constitutional provision.* (Emphasis Supplied)

As regards the second ground on whether the Provincial Government of Zambales, by enacting the Ordinance, in effect usurped the functions delegated by law to the maritime administrative bodies authorized to implement the vessels traffic services (VTS) System in the country.

We also note that Hon. Maximo Q. Mejia, Jr., Administrator, Maritime Industry Authority (MARINA) in his letter dated 03 September 2015 states:

"Vessel traffic services are a function exercised by the national government through the Philippine Coast Guard. Republic Act No. 9993, or the 'Philippine Coast Guard Law of 2009' specifically mandates the Philippine Coast Guard (PCG) to coordinate, develop, establish, maintain and operate aids to navigation, vessel traffic system, maritime communications and search and rescue facilities within the maritime jurisdiction of the Philippines. Likewise the PCG has the mandate to enforce regulations in accordance with all relevant maritime international conventions, treaties or instruments and national laws for the promotion of safety of life and property at sea within the maritime jurisdiction of the Philippines and conduct port state control implementation.

The invoices represent a contravention of Article 26 of the UN Convention on the Law of the Sea (UNCLOS), 1982, as shown below

Article 26

Charges which may be levied upon foreign ships

- 1. No charge may be levied upon foreign ships by reason only of their passage through the territorial sea.*
- 2. Charges may be levied upon a foreign ships passing through the territorial sea as payment only for specific services rendered to the ship. These charges shall be levied without discrimination.*

The Zambales ordinance makes no mention of UNCLOS 1982, but instead cites as one of its bases IALA Recommendation V-102 on the application of the 'User Pays' principle to Vessel Traffic Services. However, nothing in the documents received indicates that vessel traffic services were rendered. to traffic in transit through territorial waters to 'specific services' only Moreover, even the cited IALA Recommendation (IALA V-102) refers to UNCLOS 1982 and recognizes 'Political and legal acceptability of charging users' as being a significant challenge. In fact, IALA V-102 explicitly warns that, 'A further constraint exists in that Article 26 of UNCLOS limits user charging to traffic in transit through territorial waters to 'specific services' only'.

Also, the fact that the invoices direct shipping companies to remit payment to the account of 'Xanatos Philippines Corp' at Security Bank, rather than to the Zambales Provincial Government, gives rise to additional apprehension". (Emphasis Supplied)

Clearly, the MARINA states that the establishment, maintenance and operation of vessel traffic system (VTS) is a function of the Philippine Coast Guard (PCG) citing Republic Act No. 9993 or the Philippine Coast Guard Law of 2009. Such being the case, the Provincial Government of Zambales, in enacting the Ordinance which designated XML to bill vessels and accept payments for the provision of VTS in the Province under the "*User Pays Principle*" pursuant to International Association of Lighthouse Authorities (IALA) Recommendation V-102, dated March 1998, appears to have unreasonably assumed the functions that should have been exercised by the PCG.

With regard to the third issue on whether the imposition of fees and charges under the Ordinance violate Section 133 (e) of the Local Government Code (hereinafter, the "Code") and DILG Memorandum Circular No. 2011-151, the Department notes that the fees and charges imposed under the Ordinance does not appear to be pass through fees as defined under Section 133 (e) of the Code, viz.:

"Section 133. Common Limitations on the Taxing Powers of Local Government Units. - Unless otherwise provided herein, the exercise of the taxing powers of provinces, cities, municipalities, and barangays shall not extend to the levy of the following:

x x x

(e) Taxes, fees, and charges and other impositions upon goods carried into or out of, or passing through, the territorial jurisdictions of local government units in the guise of charges for wharfage, tolls for bridges or otherwise, or other taxes, fees, or charges in any form whatsoever upon such goods or merchandise; [Emphasis supplied]

It should be emphasized that in order to qualify as a pass through fee, the taxes, fees, or charges should be imposed on the "*goods or merchandise*".

In addition to the foregoing grounds, the Department also notes that the fundamental principles governing the exercise of the taxing and other revenue-raising powers of LGUs under Section 130 of the Code were not properly observed, viz.:

"Section 130. Fundamental Principles. - The following fundamental principles shall govern the exercise of the taxing and other revenue-raising powers of local government units:

(a) Taxation shall be uniform in each local government unit;

(b) Taxes, fees, charges and other impositions shall:

(1) be equitable and based as far as practicable on the taxpayer's ability to pay;

- (2) *be levied and collected only for public purposes;*
- (3) *not be unjust, excessive, oppressive, or confiscatory;*
- (4) *not be contrary to law, public policy, national economic policy, or in the restraint of trade;*
- (c) *The collection of local taxes, fees, charges and other impositions shall in no case be let to any private person;*
- (d) *The revenue collected pursuant to the provisions of this Code shall inure solely to the benefit of, and be subject to the disposition by, the local government unit levying the tax, fee, charge or other imposition unless otherwise specifically provided herein; and,*
- (e) *Each local government unit shall, as far as practicable, evolve a progressive system of taxation.* [Emphasis supplied]

In the case herein, the Province of Zambales delegated the billing and collection of taxes to XML that appears to run counter to the fundamental principle on the non-delegation of local tax collection to a private person. In fact, in the aforesaid position of MARINA, it was stated that the invoices issued by XML direct shipping companies to remit payment to the account of "Xanatos Philippines Corp." at Security Bank, which are apparently private entities, rather than to the Zambales Provincial Government, through its depository bank.

Said delegation also appears contrary to Section 170 of the Code, which specifically mandates local treasurers, or their duly authorized deputies, to collect all local taxes, fees, and charges of the LGU, viz.:

"Section 170. Collection of Local Revenue by Treasurer. - All local taxes, fees, and charges shall be collected by the provincial, city, municipal, or barangay treasurer, or their duly authorized deputies.

The provincial, city or municipal treasurer may designate the barangay treasurer as his deputy to collect local taxes, fees, or charges. In case a bond is required for the purpose, the provincial, city or municipal government shall pay the premiums thereon in addition to the premiums of bond that may be required under this Code."

Moreover, the “*net profit*” from the fees and charges collected by the Province are divided between the latter and XML, which appears contrary to the fundamental principle that revenue collections shall inure solely to the benefit of the LGU levying the local taxes, fees and charges.

Lastly, the Department notes that the statutory remedy of the taxpayer to file a written protest with the local treasurer contesting the assessment of the tax, fee or, charge under Section 195² of the Code appears to have been disregarded in the Ordinance in view of the penalty clause therein, which causes the detention of ships for non-payment of the fees and charges absent the observance of due process, *viz.*:

“Section 11: Penalty Clause

Ships docking at any port in Zambales that has not pay (sic) the appropriate fees and charges after the given grace period shall not be allowed to leave, until such fees and charges are paid and clearance shall be issued by the office of the Governor. A penalty of 20% a month shall be billed for unpaid fees on the total billing including such other surcharges as may be provided by law or ordinance.”

Note however the requirement of mandatory public hearing pursuant to Section 186 of the Code prior to the enactment of the ordinance levying the tax, fee, or charge, *viz.*:

“Section 186. Power to Levy Other Taxes, Fees or Charges. – Local government units may exercise the power to levy taxes, fees or charges on any base or subject not otherwise specifically enumerated herein or taxes under the provision of the National Internal Revenue Code, as amended, or other applicable laws: Provided, That the taxes fees, or charges shall not be unjust, excessive, oppressive, confiscatory or contrary to declared national policy: Provided, further, That the ordinance levying such taxes, fees or charges shall not be enacted without any prior public hearing conducted for the purpose.”

We would like to inform your good Office that the Department already wrote the Governor and the Sangguniang Panlalawigan of Zambales enjoining them to review/revisit Provincial Ordinance No. 28, s. 2015 taking into account the foregoing


² Section 195. Protest of Assessment. - When the local treasurer or his duly authorized representative finds that correct taxes, fees, or charges have not been paid, he shall issue a notice of assessment stating the nature of the tax, fee, or charge, the amount of deficiency, the surcharges, interests and penalties. Within sixty (60) days from the receipt of the notice of assessment, the taxpayer may file a written protest with the local treasurer contesting the assessment; otherwise, the assessment shall become final and executory. The local treasurer shall decide the protest within sixty (60) days from the time of its filing. If the local treasurer finds the protest to be wholly or partly meritorious, he shall issue a notice cancelling wholly or partially the assessment. However, if the local treasurer finds the assessment to be wholly or partly correct, he shall deny the protest wholly or partly with notice to the taxpayer. The taxpayer shall have thirty (30) days from the receipt of the denial of the protest or from the lapse of the sixty (60) day period prescribed herein within which to appeal with the court of competent jurisdiction otherwise the assessment becomes conclusive and unappealable.

observations and/or issues, and at the same time, recommending the suspension of the enforcement of the Ordinance pending such review/revisit.

Attached is a copy of such letter for your ready reference.

Thank you.

Very truly yours,



AUSTERE A. PANADERO

Undersecretary

Ls/17

Copy furnished:

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Brgy. Maimpis, City of San Fernando
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