

## PHILIPPINE POSITION ON BAJO DE MASINLOC AND THE WATERS WITHIN ITS VICINITY

### BACKGROUND ON THE BAJO DE MASINLOC (PANATAG) INCIDENT

Bajo de Masinloc is an integral part of the Philippine territory. It is part of the Municipality of Masinloc, Province of Zambales. It is located 124 nautical miles west of Zambales and is within the 200 nautical-mile Exclusive Economic Zone (EEZ) and Philippine Continental Shelf.

A Philippine Navy Surveillance aircraft monitored eight (8) Chinese fishing vessels anchored inside the Bajo de Masinloc (Panatag Shoal) on Sunday, 8 April 2012, in the conduct of its maritime patrols and its enforcement of the Philippine Fisheries Code and marine environment laws. On 10 April 2012, the BRP Gregorio del Pilar, in accordance with the established Rules of Engagement, dispatched an inspection team that reported that large amounts of illegally collected corals, giant clams and live sharks were found in the compartments of these fishing vessels.

The actions of the Chinese fishing vessels are a serious violation of the Philippines' sovereignty and maritime jurisdiction. The poaching of endangered marine resources is in violation of the Fisheries Code and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).

### BASIS OF PHILIPPINE SOVEREIGNTY OVER BAJO DE MASINLOC AND THE WATERS WITHIN ITS VICINITY

Bajo de Masinloc (Scarborough Shoal) is **not** an island. Bajo de Masinloc is also **not part** of the Spratlys.

Bajo de Masinloc (Scarborough Shoal) is a ring-shaped coral reef, which has **several rocks** encircling a lagoon. About **five** of these rocks are **above water** during high tide. Of these five rocks, some are about **3 meters** high above water. The rest of the rocks and reefs are **below water** during high tide.

Bajo de Masinloc's (Scarborough Shoal's) chain of reefs and rocks is about **124 NM** from the nearest coast of Luzon and approximately **472 NM** from the nearest coast of China. Bajo de Masinloc is located approximately along **latitude 15°08' N** and **longitude 117°45'E**. The rocks of Bajo de Masinloc are situated north of the Spratlys.

Obviously therefore, the **rocks** of Bajo de Masinloc is also **within** the **200 NM Exclusive Economic Zone (EEZ)** and **200 NM Continental Shelf (CS)** of the Philippines.

A **distinction** has to be made between the **rock features** of Bajo de Masinloc and the **larger body of water** and **continental shelf** where the said geological features are situated. The **rights** or **nature of rights** of the Philippines over the rock features

of Bajo de Masinloc is **different** from that which it exercises over the larger body of water and continental shelf.

The Philippines exercises **full sovereignty** and **jurisdiction** over the **rocks** of Bajo de Masinloc, and **sovereign rights** over the **waters** and **continental shelf** where the said rock features of Bajo de Masinloc are situated.

The **basis** of Philippine sovereignty and jurisdiction over the **rock features** of Bajo de Masinloc is **distinct** from that of its sovereign rights over the **larger body of water** and **continental shelf**.

#### **A. The Rock Features of Bajo de Masinloc: Basis of Philippine Sovereignty under Public International Law**

The rock features of Bajo de Masinloc are Philippine territories.

The basis of Philippine sovereignty and jurisdiction over the rock features of Bajo de Masinloc is not premised on the cession by Spain of the Philippine archipelago to the United States under the Treaty of Paris. The matter that the rock features of Bajo de Masinloc are not included or within the limits of the Treaty of Paris as alleged by China is therefore immaterial and of no consequence.

Philippine sovereignty and jurisdiction over the rocks of Bajo de Masinloc is likewise not premised on proximity or the fact that the rocks are within its 200 NM EEZ or Continental Shelf (CS) under the UN Convention on the Law of the Sea (UNCLOS). Although the Philippines necessarily exercise sovereign rights over its EEZ and CS, nonetheless, the reason why the rock features of Bajo de Masinloc are Philippine territories is anchored on other principles of public international law.

As decided in a number of cases by international courts or tribunals, most notably the **Palmas Island Case**, a modality for acquiring territorial ownership over a piece of real estate is **effective exercise of jurisdiction**. Indeed, in that particular case, **sovereignty** over the Palmas Island was **adjudged** in favor of the Netherlands on the basis of "effective exercise of jurisdiction" although the said island may have been **historically discovered** by Spain and **historically ceded** to the US in the Treaty of Paris.

In the case of Bajo de Masinloc, the Philippines has exercised both **effective occupation** and **effective jurisdiction** over Bajo de Masinloc since its independence.

The name Bajo de Masinloc (translated as "under Masinloc") itself identifies the shoal as a particular political subdivision of the Philippine Province of Zambales, known as Masinloc.

One of the earliest known and most accurate maps of the area, named Carta Hydrographical y Chorographica De Las Yslas Filipinas by Fr. Pedro Murillo Velarde, S.J., and published in 1734, included Bajo de Masinloc as part of Zambales.

The name Bajo de Masinloc was a name given to the shoal by the Spanish colonizers. In 1792, another map drawn by the Alejandro Malaspina expedition and published in 1808 in Madrid, Spain, also showed Bajo de Masinloc as part of Philippine territory. This map showed the route of the Malaspina expedition to and around the shoal. It was reproduced in the Atlas of the 1939 Philippine Census.

The Mapa General, Islas Filipinas, Observatorio de Manila published in 1990 by the US Coast and Geodetic Survey, also included Bajo de Masinloc as part of the Philippines.

Philippine flags have been erected on some of the islets of the shoal, including a flag raised on an 8.3-meter high flag pole in 1965 and another Philippine flag raised by Congressmen Roque Ablan and Jose Yap in 1997. In 1965, the Philippines also built and operated a small lighthouse in one of the islets in the Shoal. In 1992, the Philippine Navy rehabilitated the lighthouse and reported it to the **International Maritime Organization** for publication in the List of Lights (currently this lighthouse is not operational).

Bajo de Masinloc was also used as an **impact range** by **Philippine** and **US Naval Forces** stationed in **Subic Bay** in Zambales for defence purposes. The Philippines Department of Environment and Natural Resources together with the University of the Philippines has also been conducting scientific, topographic, and marine studies in the Shoal. Filipino fishermen have always considered it as their fishing grounds owing to their proximity to the coastal towns and areas of Southwest Luzon.

In 2009, when the Philippines' passed an amended Archipelagic Baselines Law fully consistent with the law of the Sea, Bajo de Masinloc's was classified under the "Regime of Islands" consistent with the Law of the Sea.

*"Section 2. The baseline in the following areas over which the Philippines likewise exercises sovereignty and jurisdiction shall be determined as "Regime of Islands" under the Republic of the Philippines consistent with Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS):*

*a) The Kalayaan Island Group as constituted under Presidential Decree No. 1596; and*

*b) Bajo de Masinloc, also known as Scarborough Shoal."*

## COMMENTS ON CHINESE CLAIMS

### Question:

*But what about the historical claim of China over Bajo de Masinloc (Scarborough Shoal)? Does China have a much superior right over Bajo de Masinloc (Scarborough Shoal) on the basis of its so-called historical claim? China is claiming Bajo de Masinloc (Scarborough Shoal) based on historical arguments, claiming it to have been discovered by the Yuan Dynasty? China is also claiming that Bajo de*

*Masinloc (Scarborough Shoal) has been reflected on various official Chinese Maps and has been named by China in various official documents?*

**Answer:**

Chinese assertion based on historical claims must be substantiated by a clear historic title. It should be noted that under public international law, **historical claims** are **not historical titles**. A claim by itself, including historical claim, could not be a basis for acquiring a territory.

Under international law, the modes of acquiring a territory are: discovery, effective occupation, prescription, cession, and accretion. Also, under public international law, for a historical claim to **mature** into a historical title, a mere showing of long usage is not enough.

**Other criteria** have to be satisfied such as that the usage must be **open, continuous, adverse** or in the concept of an owner, **peaceful** and **acquiesced** by other states. Mere silence by other states to one's claim is not acquiescence under international law. **Acquiescence** must be **affirmative** such that other states recognize such claim as a right on the part of the claimant that other states ought to respect as a matter of duty. There is **no indication** that the international community have **acquiesced** to China's so-called historical claim.

In relation to name giving and maps, name-giving (or names in general) and placing of land features on maps, these are also not bases in determining sovereignty. In international case law relating to questions of sovereignty and ownership of land features, names and maps are not significant factors in the determination of international tribunals' determination of sovereignty.

**Question:**

*What about China claims that Bajo de Masinloc as **traditional fishing waters** of Chinese fishermen?*

**Answer:**

Under international law, fishing rights is **not a mode of acquiring sovereignty** (or even sovereign rights) over an area. Neither could it be construed that the act of fishing by Chinese fishermen is a sovereign act of a State nor can be considered as a display of State authority. **Fishing** is an **economic activity** done by **private individuals**. For occupation to be effective there has to be **clear demonstration** of the intention and will of a state to act as sovereign and there has to be peaceful and continuous display of state authority, which the Philippines has consistently demonstrated.

Besides when UNCLOS took effect, it has precisely appropriated various maritime zones to coastal states, thus eliminating so called historical waters and justly appropriating the resources of the seas to Coastal States to which said seas are appurtenant. "Traditional fishing rights" is in fact mentioned only in Article 51 of UNCLOS, which calls for archipelagic states to respect such rights, if such exist, in its archipelagic waters.

It should also be noted, that in this particular case, the activities of these so-called fishermen can be hardly described as fishing. The evidence culled by the Philippine Navy showed clearly that these are poaching activities involving the harvesting of **endangered marine species** which is **illegal** in the Philippines and illegal under international law, specifically the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*.

#### **B. Waters Outside and Around Bajo de Masinloc: Basis of Philippine Sovereign Rights under UNCLOS**

As earlier indicated, there is a **distinction** between the rock features of Bajo Masinloc and the waters within its vicinity. The question of who owns the rocks is a matter governed by the principles of public international law relating to modalities for acquiring territories. On the other hand, the extent of its adjacent waters is governed by UNCLOS. In like manner, the waters outside of the maritime area of Bajo de Masinloc are also governed by UNCLOS.

As noted, there are only about five rocks in Bajo de Masinloc that are above water during high tide. The rest are below water during high tide. Accordingly, these rocks have only 12 NM maximum territorial waters under Article 121 of UNCLOS. Since the Philippines has sovereignty over the rocks of Bajo de Masinloc, it follows that it has also sovereignty over their 12 NM Territorial Waters.

#### **Question:**

*But what about the waters outside of the 12 NM Territorial Waters of the rock features of Bajo de Masinloc, what is the nature of these waters including the continental shelves? Which State has sovereign rights over them?*

#### **Answer:**

As noted, Bajo de Masinloc is located approximately at latitude 15°08' N and longitude 117°45'E. It is approximately 124 NM miles off the nearest coast of the Philippine Province of Zambales. Clearly, the rock features of Bajo de Masinloc are within the 200 NM EEZ and CS of the Philippine archipelago.

Therefore, the waters and continental shelves outside of the 12 NM Territorial Waters of the rocks of Bajo de Masinloc **appropriately belong** to the **200 EEZ** and **CS** of the Philippine archipelago. As such, the Philippines exercises **exclusive sovereign rights** to explore and exploit the resources within the said areas to the exclusion of other countries under UNCLOS. Part V of UNCLOS, specifically provides that the Philippines exercises exclusive sovereign rights to **explore, exploit, conserve, and manage resources** whether living or non-living, in this area. Although, other states have the right of **freedom of navigation** over the said areas, such rights could not be exercised to the **detriment** of the internationally recognized sovereign rights of the Philippines to explore and exploit the resources in its 200 NM EEZ and CS. To do otherwise would be in violation of international law specifically UNCLOS.

Therefore, the current action of the Chinese surveillance vessels in the said 200 NM EEZ of the Philippines that are law enforcement in nature is **obviously inconsistent**

with its right of **freedom of navigation** and in **violation** of the sovereign rights of the Philippines under UNCLOS.

It must also be noted that the Chinese fisherman earlier apprehended by Philippine law enforcement agents may have **poached** not on Bajo de Masinloc *per se*, but likely on the EEZ of the Philippines. Therefore, these **poachers** have likewise **violated** the sovereign rights of the Philippines under UNCLOS.

#### **PRESENCE OF PHILIPPINE-REGISTERED ARCHEOLOGICAL VESSEL**

The Philippine National Museum has been undertaking an official marine archaeological survey in the vicinity of the Bajo de Masinloc.

The archaeological survey is being conducted by the Philippine National Museum on board the Philippine-flag motor yacht M/Y Saranggani.

Chinese Maritime Surveillance vessels have been harassing the M/Y Saranggani. The Philippines has strongly protested these harassments by the Chinese side. Said actions by the Chinese vessels are in violation of the sovereign right and jurisdiction of the Philippines to conduct marine research or studies in its Exclusive Economic Zone.

#### **ENDANGERED SPECIES FOUND IN CHINESE FISHING VESSELS**

The Philippine Navy, during a routine sovereignty patrol, saw eight (8) fishing vessels moored at the Bajo de Masinloc on 10 April. The Philippine side inspected these vessels and discovered that they were Chinese fishing vessels and on board were illegally obtained endangered corals and giant clams in violation of the Philippine Fisheries Code

The Philippines is a staunch advocate in protecting its marine environment from any form of illegal fishing and poaching. It is a state party to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) and Convention on Biological Diversity.

This illicit activity has also undermined the work of the Philippine government as a member of the Coral Triangle Initiative.

The coral colonies in Bajo de Masinloc have been in existence for centuries.

#### **CURRENT SITUATION**

The Philippines is committed to the process of consultations with China towards a peaceful and diplomatic solution to the situation.

As the DFA works towards a diplomatic solution, the Philippine Coast Guard is present in the area and is continuing to enforce relevant Philippine laws.