Managing Philippines v. China: The Role of the Agent

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I. INTRODUCTION

The account that follows is a personal, if abbreviated, narration of my role as agent[1] in *Philippines v. China*,[2] a case that does not require any introduction, even as it consistently demands explanation and elaboration. Both as a legal and an academic matter, the case will be read, studied, and analyzed for its doctrinal and geopolitical importance in the years to come, and there will be

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1. *See* Rules of Procedure, In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19, art. 4, ¶ 1 (Aug. 27, 2013) [hereinafter Rules of Procedure, P.C.A. Case No. 2013-19]. Article 4 of the Procedure states that "[e]ach Party shall appoint an agent and, if it so decides, one or more co-agents. Each Party may also be assisted by persons of their choice." *Id.*

2. In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19 (July 12, 2016). The case was decided by an Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea. *See* Rules of Procedure, P.C.A. Case No. 2013-19, *supra* note 1, art. 3.

no dearth in qualified personnel more than willing to dissect various legal and/or technical aspects of the case that involved 15 submissions.[3] This will not be my task here.

Instead, I would like to provide a peek at the hood of this magnificent case from my perspective as the second[4] agent of the Republic of the Philippines in this momentous arbitration. By its nature, this narration is subjective and autobiographical, and necessarily focuses on what I think are a few of the notable events in this litigation, how I saw these events in relation to my role, and the nature of my participation in that particular chapter of the case. My objective is not to provide a comprehensive report, but a serving of several slices of the pie, so to speak, and give a first person account of the events. These are disconnected snapshots and the only tie that binds them together is the arbitration against China.

II. UNWILLING AGENT

The Solicitor General is the chief counsel of the Republic.[5] His jurisdiction is to articulate the legal position of the government in various forms of legal actions.[6] The most salient role of the Solicitor General is to represent the government, its agencies, and instrumentalities before the Supreme Court.[7] The traditional highlight task of the Solicitor General is to serve as chief constitutionalist of the Republic.[8] This is a role he usually personally performs, the public exemplar of which is appearing for oral arguments before the Supreme Court.[9]

3. Memorial of the Philippines, In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19, vol. I, at 271-72 (Mar. 30, 2014) [hereinafter Memorial of the Philippines].

4. The first was then Solicitor General, now Associate Justice of the Supreme Court, Francis H. Jardeleza.

5. Instituting the "Administrative Code of 1987" [ADMIN. CODE], Executive Order No. 292, bk. IV, tit. III, ch. 12, § 34. & *See* An Act to Strengthen the Office of the Solicitor General by Expanding and Streamlining its Bureaucracy, Upgrading Employee Skills and Augmenting Benefits, and Appropriating Funds Therefor and for Other Purposes, Republic Act No. 9417 (2007).

6. ADMIN. CODE, § 35 (1).

7. *Id.*

8. *Id.* § 34.

9. *Id.* § 35 (1).

The Office of the Solicitor General (OSG) is the biggest law firm in the country,[10] with almost 300 lawyers.[11] The size of the OSG, to some extent, is indicative of its workload. In practice, this means that the Solicitor General has to pick and choose those cases that need to be prioritized and given intimate attention.

I assumed the position of acting Solicitor General upon the appointment of Francis H. Jardeleza to the Supreme Court as Associate Justice on 20 August 2014.[12] At least, in terms of the caseload, I expected the transition from my predecessor would be manageable considering my division at the OSG handled many cases of significance. My experience as Officer-In-Charge for more than a year of a division at the OSG also meant that I had a unique advantage Solicitors General do not have — inside information and knowledge of the institution, its people, and its processes both gained as Associate Solicitor and Senior State Solicitor.

One significant case that was a source of concern was the *Philippines v. China* arbitration, which I was initially not a part of. The OSG was not the only legal department involved in the case; it was the administrative hub, and important decisions were routed to a larger legal and policy team.[13] By the time I assumed the helm at the OSG, the legal team for the arbitration was composed of three offices in the executive department — the OSG, Office of the Executive Secretary, and the Chief Presidential Legal Counsel — as well as the Republic's external counsel, Foley Hoag LLP, led by Mr. Paul S. Reichler.[14]

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10. *See* An Act to Strengthen the Office of the Solicitor General by Expanding and Streamlining its Bureaucracy, Upgrading Employee Skills and Augmenting Benefits and Appropriating Funds Therefor, S.B. No. 2255, explan. n., 13th Cong., 2d Reg. Sess. (2006).

11. *See* Republic Act No. 9417, § 2.

12. *See* Delon Porcalla & Edu Punay, *UP law prof named solicitor general*, PHIL. STAR, Aug. 28, 2014, *available at* www.philstar.com/headlines/2014/08/28/1362589/law-prof-named-solicitor-general (last accessed Mar. 1, 2017).

13. *See generally* Camille Diola, *South China Sea arbitration: Faces behind the Philippines's case*, PHIL. STAR, July 12, 2016, *available at* www.philstar.com/headlines/2016/07/12/1601768/south-china-sea-arbitration-faces-behind-philippiness-case (last accessed Mar. 1, 2017).

14. *See generally* Earl Victor Rosero, PHL legal team, powerhouse delegation show 'united front' on UNCLOS case vs China, *available at* www.gmanetwork.com/news/story/517970/news/nation/phl-legal-team-powerhouse-delegation-show-united-front-on-unclos-case-vs-china (last accessed Mar. 1, 2017).

That the arbitration was new to me was the least of my worries.[15] Novelty, by itself, is generally a welcome challenge and an opportunity to retool. Certainly, the most exciting litigation handled by the OSG are novel, requiring lawyers to dig deep and be creative. However, I have never considered myself an expert on the law of the sea and knew that I did not have the tools to hit the ground running. Looking back, I estimate that it took me around six months to get a comfortable handle of the technical details of the case, even as the big picture aspects of the litigation are easy enough to understand.

The personalities involved in the arbitration were also new to me. I, therefore, made it a point to introduce myself to Executive Secretary Paquito N. Ochoa, Jr., Chief Presidential Legal Counsel (CPLC) Alfredo Benjamin S. Caguioa, Secretary of Foreign Affairs Albert F. del Rosario, and Secretary of Justice Leila M. de Lima.[16] Throughout the arbitration, I was aware that a big part of the task of the agent was managing the various personalities — each of whom had varying interests and motives, and, at times, deeply conflicting views — involved in the case so we could deliver for a hopeful nation.

Unlike ordinary cases handled by the OSG, the policy and strategic choices for which are decided with finality by the Solicitor General, *Philippines v. China* required a more nuanced approach given the nature of the case and the power structure in Malacañan Palace. For my protection as well, I adopted a strategy of attempting to generate consensus, especially among the lawyers closest to President Benigno Simeon C. Aquino, III, namely: Secretary Ochoa and CPLC Caguioa. Because I was not familiar with them, I consistently sought the advice of Justice Jardeleza, who had previously worked with them as Solicitor General.

This did not mean I was excited to take on the work of agent. Given the magnitude of the arbitration — the fact that I was coming in after the

15. By that time, the Notification and Statement of Claim had already been filed on 22 January 2013 with the Tribunal constituted and the memorial submitted.

16. *See also* Louis Bacani, *Philippines sends top execs to South China Sea arbitration*, PHIL. STAR, July 3, 2015, *available at* http://www.philstar.com/headlines/2015/07/03/1472862/philippines-sends-top-execs-south-china-sea-arbitration (last accessed Mar. 1, 2017). I also introduced myself to Senior Associate Justice Antonio T. Carpio. While he was not an official member of the legal team, people were familiar with his expertise on the matter. I am aware that he is a man of strong views, but I hoped he would respect my decisions in this case if I made the effort to at least explain to him my reasoning.

Memorial had already been filed, the attendant controversies,[17] the possible difficulty of managing personalities more senior than myself, and the responsibility of running the biggest law office in the government[18] — I felt there was just too much on my plate to handle. I saw the case not as an opportunity for a legacy, but as a responsibility for which I was simply not prepared.

An opportunity came when Secretary del Rosario proposed that he be appointed co-agent in the case. Whatever his reasons may have been, my counter-proposal was to have the Secretary and/or someone else appointed either sole agent or co-agent instead. The idea of having two agents with equal authority in a case where disagreements on major issues were inevitable was both impractical and unwise, if not dangerous. Such power structure would create unnecessary redundancy, introduce more conflict and intrigues, and double the chances of finger-pointing in the event of a loss.

While the initial reaction in Malacañan to my proposal to recuse was receptive, in the end the final decision was have me appointed as sole agent. This partly explains the reason why my appointment as agent is dated 2 March 2015,[19] several months after I was appointed Solicitor General. Nonetheless, even as I waited for Malacañan's decision, I acted as *de facto* agent for administrative purposes. Luckily, my appointment as Solicitor General coincided with a lull in the arbitration. This gave me the time necessary to get a handle on the various issues surrounding the case while performing my regular tasks as Solicitor General.

17. *See* Francis H. Jardeleza, *Integrity, Itu Aba, and the Rule of Law in the West Philippine Sea Arbitration* (Journal Article to be published by the Integrated Bar of the Philippines Law Journal) (on file with Author) & Paterno Esmaquel II, Jardeleza heeded advice of top China defender?, *available at* http://www.rappler.com/nation/67007-jardeleza-talmon-itu-aba-philippines-china (last accessed Mar. 1, 2017). *See generally* Jardeleza v. Sereno, 733 SCRA 279 (2014).

18. I also had to appear before the Supreme Court for the scheduled November 2015 oral arguments on the constitutionality of the Enhanced Defense Cooperation Agreement in the case of *Saguisag v. Ochoa, Jr.*, my first oral argument as Solicitor General. *See* Saguisag v. Ochoa, Jr., 779 SCRA 241, 318 (2016).

19. *See South China Sea*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, at i.

III. AGENT'S GOALS

As with every case, *Philippines v. China* required the identification of goals that must be kept in mind every time there was a need to make an important decision on the case. There is only one signature that appears in all the submissions of the Republic, that of the agent. The direct burden of accountability for every decision thus falls on him. In less formal terms, the agent is everyone's deniability in case of a loss. I am reminded of Justice Jardeleza's favorite line by former United States President John F. Kennedy — "[v]ictory has a thousand fathers, but defeat is an orphan."[20] In this case, I knew that in the event of a wipeout, everybody's fingers would identify me as the guilty father.

While it is easy to simply declare that the goal is to win, I have consistently found it helpful to disaggregate the meaning of winning which, for this case, I divided into two general baskets: (1) to achieve an efficient win and reduce the impact of potential losses; and (2) to protect the President.

A. Achieve an Efficient Win and Reduce the Impact of Potential Losses

One must remember that *Philippines v. China* is a single case composed of 15 submissions.[21] For purposes of clarity, these submissions are generally divided into three claims: *first*, the attack on the entire nine-dash line; *second*, the claims over the northern sector of the South China Sea which involved issues over the characterization of Scarborough Shoal and rights over it; and *third*, the claims over the southern sector of the South China Sea which involves issues over the characterization of the maritime features in the Spratly Islands (Spratlys) and rights over it.[22]

One of the stories Justice Jardeleza fondly tells audiences during lectures is about a presentation he made before President Aquino. Apparently, after having been briefed on the various issues in the case, he asked then Solicitor General Jardeleza if he could give a percentage or a number on the probability of winning or losing the specific submissions. Being the good lawyer he is, Solicitor General Jardeleza refused to give a number — to the disappointment of the President, an economist, not a lawyer.

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20. *See also* STEPHEN B. GODDARD, RACE TO THE SKY: THE WRIGHT BROTHERS VERSUS THE UNITED STATES GOVERNMENT 58 (2003).

21. Memorial of the Philippines, *supra* note 3, vol. I, at 271-72.

22. *Id.* vol. I, ¶ 1.7.

Making a similar briefing before the President was something I had anticipated, so I prepared a response in case the question was again raised. When the opportunity came, I responded in terms of "levels of confidence," a term familiar to economists. This was a compromise between the problem of giving a percentage and giving the President an honest assessment he could use in understanding the case and making decisions.

On the issue of the nine-dash line, I informed the President that I had a high level of confidence that the Arbitral Tribunal will rule in our favor. With respect to the issues involving Scarborough Shoal, I dropped the word "high" and simply said I was confident about a favorable result. With respect to the Spratlys, I stated that it could go either way, but hoped the Tribunal would have a sense of danger ruling in favor of China. The law was uncertain, both on jurisdiction and on the merits, but practicalities of the case and the geopolitical implications were in our favor. Ruling for China would destabilize the entire region — it would only enable China and validate its wild claims. This assessment was shared by the entire legal team.

This same assessment was also the basis for the level of my intervention in the case. As the Memorial had already been filed[23] by the time I assumed the position of Solicitor General, I made it a point to ensure that we stayed the course, maintained theoretical consistency, and kept foreign counsel disciplined and executing efficiently. I focused my efforts, however, on the Spratlys, as I was greatly concerned by the possibility of losing it. This was also the area where I thought I needed to enforce discipline and show forcefulness. Thus, while I adopted a liberal attitude with respect to how members of the legal team handled the nine-dash line and Scarborough Shoal submissions, I was an interventionist on the Spratlys submission.

It is easy now to look at the case as having been won overwhelmingly in favor of the Philippines. But, for the almost two years that I managed the case, I saw it as a set of at least five cases that could go either way, with various degrees of confidence and hope, depending on my sense of the temperament of the members of the Tribunal, all of whom were strangers to me. As with every case, decision points over major issues entail a calibration of costs and benefits of making an argument, and when and how to deploy such a strategy. There are many paths to victory, and discernment requires making calculated risks such that a path to victory is opened, with minimal exposure. The reality, of course, is that given the uncertain terrain, every movement was powered by the knowledge that what we were doing was for the good of the nation, and by hope.

23. The Memorial was filed on 30 March 2014. *See South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, at xv.

B. Protect the President

While the agent bears legal responsibility for the strategic legal choices made in the case, ultimately, the politically accountable officer is the President who, in the first place, is responsible for making the decision to take a risk by ordering the filing of the case against China.[24] He is, after all, the chief architect of foreign relations,[25] the chief executive,[26] and the commander-in-chief.[27] President Aquino is on record as having stated that one of the most difficult decisions he made was to initiate the case against China.[28] While the ultimate goal is to protect the interests of the Republic, the direct principal is the President, the highest ranking political official of the Republic. Thankfully, protecting the interests of the Republic and those of the President were not incompatible tasks.

I saw my special duty to the President as involving primarily the task of giving reasonable assessment of the various aspects of the arbitration as it unfolded and managing the arbitration the best way I could. Occasionally, the President would require an update in the form of a personal presentation or a memo. This would happen before or after a major event in the arbitration or when a major decision reaches him and he decides to participate in the decision-making process.

As agent, I sought to shield the President from personal or direct responsibility by ensuring that I was ready to make a decision on my own on contentious issues, so far as it was possible without compromising the President's ability to make certain policy judgments about the case. The task of the agent, after all, as the official representative of the Republic, is to make binding decisions. However, every now and then, a proposed course of action may be so contentious that the matter may reach the President, or the President himself decides to ask for input. It may also be prudent that

24. *See generally* Paterno Esmaquel II, Aquino: The president who brought China to court, *available at* www.rappler.com/nation/137939-president-aquino-west-philippine-sea-china-dispute (last accessed Mar. 1, 2017).

25. *See* Bayan (Bagong Alyansang Makabayan) v. Zamora, 342 SCRA 449, 494 (2000) (citing IRENE R. CORTES, THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER 195 (2d ed. 1966)).

26. PHIL. CONST. art. VII, §§ 1 & 17.

27. PHIL. CONST. art. VII, § 18.

28. Tarra Quismundo, *Victory dinner set for sea row team: So who's picking up tab?*, PHIL. DAILY INQ., July 17, 2016, *available at* https://globalnation.inquirer.net/141348/victory-dinner-set-for-sea-row-team-so-whos-picking-up-tab (last accessed Mar. 1, 2017).

some decisions reach the President, given the gravity of the potential consequences.

In those cases where the President took matters into his own hands or sought clarification on a decision about to be made, I took it as my solemn task to provide the most honest and clear analysis of the situation, ensuring the delivery of the relevant information necessary to make a well-grounded decision.

IV. THE AGENT AS TEAM MANAGER

The role of the agent is akin to that of a team manager of a basketball franchise. Team Philippines was owned by the President, who is responsible to his stockholders — the Filipino people.[29] The basketball players are composed of the international team[30] originally brought together by Justice Jardeleza and Mr. Reichler who, for all intents and purposes, was the playing coach. The senior advisers of Team Philippines were Secretaries Ochoa and del Rosario, and CPLC Caguioa. There were also various teams from the Office of the President, the Department of Foreign Affairs, the Department of Justice, and the OSG that constituted the support staff.[31]

As team manager, the role of the agent is simultaneously legal and administrative — to ensure that the entire team is happy and able to deliver the goods to the owner and his stockholders. The legal aspect, on one hand, involved making decisions based on recommendations by the players. Every submission goes to the agent for approval. Some decisions are non-controversial, while others are consequential. In short, it is the power to say

29. *See generally* PHIL. CONST. art. XI, § 1.

30. The Foley Hoag LLP lawyers were Mr. Paul S. Reichler, Mr. Lawrence H. Martin, and Mr. Andrew B. Leowenstein. The non-Foley members of the team were Professors Bernard H. Oxman of the University of Miami, Philippe Sands QC of University College London, and Alan Boyle of the University of Edinburgh. *See* Foley Hoag LLP, Foley Hoag Wins Historic Victory for the Philippines in the South China Sea, *available at* www.foleyhoag.com/news-and-events/news/2016/july/foley-hoag-wins-historic-victory-for-the-philippines-in-the-south-china-sea (last accessed Mar. 1, 2017).

31. *See* Albert F. del Rosario, Statement of Secretary Albert F. del Rosario on the Submission of the Philippines' Memorial to the Arbitral Tribunal (Dated 30 March 2014), *available at* https://www.un.int/philippines/sites/www.un.int/files/Philippines/press_statement_of_sfa_albert_del_rosario_submission_of_ph_memorial_to_the_arbitral_tribunal.pdf (last accessed Mar. 1, 2017). Crucial administrative support was provided by my Chief of Staff Melbourne Ziro D. Pana and Associate Solicitor Elvira Joselle R. Castro. *See South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 70.

yes or no to any proposed course of action that constitutes the core function of the agent. My decisions on these issues were necessarily anchored on the two specific goals I had just mentioned.

The administrative part of managing the arbitration, on the other hand, requires patience, people skills, and the discipline of choosing battles. Managing the costs of the arbitration and ensuring that the Republic's expenses were within contract and legally justifiable, by itself, requires a different expertise. For the most part, this was done through the device of placing a cap on the fees of foreign counsel. Managing the hearings is not very different from arranging a wedding.

V. TRADITIONAL FISHING RIGHTS AT SCARBOROUGH SHOAL

The submission of the Republic, with respect to Scarborough Shoal (Panatag Shoal or Bajo de Masinloc in Filipino) is, at bottom, two-fold: that it is a rock, and that traditional fishing rights exist at said shoal.[32] The characterization of Scarborough Shoal as a rock is meant to indirectly limit the territorial dispute over the feature to within the 12-mile territorial sea (TS) of the shoal, the incidental effect of which is recognition that there are no maritime features that can generate a 200-mile exclusive economic zone (EEZ).[33] The ultimate consequence is that Luzon's upper western coast along the provinces of Zambales, Pangasinan, and Ilocos would be able to generate a 200-mile EEZ without any potential overlap with any other feature.

The other submission is about the nature of rights within Scarborough Shoal, regardless of who owns it.[34] The Republic's argument here is that the Filipinos enjoy private fishing rights within that area and that those rights are recognized under the United Nations Convention on the Law of the Sea (UNCLOS).[35] This submission has two components that needed to go hand in hand — the articulation of the theory and the furnishing of the necessary facts. That the theory is fact-dependent only meant that even if the Tribunal were convinced that traditional fishing rights can exist within the TS of a feature such as Scarborough Shoal, the Republic still needed to make the

32. *See* Memorial of the Philippines, *supra* note 3, vol. I, ¶¶ 1.45 & 1.49.

33. *Id.* vol. I, ¶ 1.45.

34. *Id.* vol. I, ¶¶ 1.49 & 1.50.

35. *Id.* vol. I, ¶¶ 6.39-6.47 & United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

theory benefit Filipinos by showing, through evidence, that our fisherfolk indeed used the area as traditional fishing grounds.

While Filipinos knew that Scarborough Shoal was a traditional fishing ground[36] — they take for granted the facts they assume — the Republic still needed to establish evidence of that knowledge in order to establish it as fact. The Republic's submission made general claims about this fact, which needed to be supplemented during the hearing on the merits in November 2015. Thus, several days prior to the hearings, Mr. Reichler asked about the possibility of bringing fishermen from the town of Masinloc, Zambales, to the hearings at The Hague, Netherlands.

I immediately knew that such proposal was a non-starter. While it was easy to find fishermen in Masinloc, it was an entirely different matter finding those willing to testify in a proceeding they were not familiar with. Understandably, there was initial hesitation on their part to testify because they did not know whether the testimony would help their cause in the first place or bring unnecessary dangers to them. What was even more difficult was the possibility of finding fishermen who had ready travel documents — passports and visas. In all likelihood, the most that they would have would be birth certificates. The best move forward in situations like these is to find a patron, someone the fishermen trusted well enough to make them agree to narrating in affidavit form.

As it happened, luck was on the side of the Philippines. The chauffeur I had at the OSG was born and raised in the town of Masinloc and personally knew the town mayor. In order to get the narration we needed, I sent a team of OSG lawyers with said chauffeur to Masinloc with instructions to request the town mayor to assist in the task of finding fishermen who could provide details of traditional fishing rights at Scarborough. Having a cooperative town mayor was crucial because of the initial hesitation on the part of the fishermen to participate in the project. This trust issue was understandable given their lack of familiarity with the OSG and the purpose for which their narration was being taken. However, because the request for interview was made through the town mayor, our subjects were assured that their words were being taken for their benefit. I hope that, one of these days, the children of those fishermen would have the opportunity to read

36. Fishermen, particularly from the town of Infanta, Pangasinan, have been fishing at the shoal for generations. *See* Allan Macatuno & Gabriel Cardinoza, *Small PH fishermen losers in sea dispute*, PHIL. DAILY. INQ., June 15, 2015, *available at* https://globalnation.inquirer.net/124650/small-ph-fishermen-losers-in-sea-dispute (last accessed Mar. 1, 2017).

Philippines v. China and find the names of their parents talking about not just their livelihood, but their history as well.[37]

VI. PROVISIONAL MEASURES

One of the concerns that arose post-filing was the island-building activities of China in the various maritime features in the South China Sea.[38] These activities extended within the EEZ of the Philippines, such as in Mischief or Panganiban Reef, and destroyed the marine environment in the area and affected the ecosystem in the South China Sea.[39] All these activities began after the filing of the Notification and Statement of Claim and were extensively discussed within the team, headed by then Solicitor General Jardeleza.

For various strategic reasons, the team did not recommend requesting for provisional measures and everybody in Manila agreed it was prudent not to make such a request before the Tribunal. A part of the consideration was that the likelihood that China would abide by the provisional measures was very small, assuming the Tribunal issued them.

On 21 April 2016 the Tribunal issued Procedural Order No. 4,[40] bifurcating the proceedings,[41] that is, dividing the proceedings into a jurisdictional phase and a merits phase. This meant that the case would be heard twice, thereby doubling the expense, delaying the arbitration, and multiplying our anxiety. This set back the timeline for the arbitration by at least six months.

This was seen in Manila as an unanticipated loss in the middle of the arbitration, not only because we opposed the bifurcation but also because of

37. *See South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶¶ 761-70.

38. *See* Julian Borger & Tom Phillips, *How China's artificial islands led to tension in the South China Sea*, GUARDIAN, Oct. 27, 2015, *available at* https://www.theguardian.com/world/2015/oct/27/tensions-and-territorial-claims-in-the-south-china-sea-the-guardian-briefing (last accessed Mar. 1, 2017).

39. This finding was affirmed by the Tribunal in its ruling. *See* Julie Makinen, *China has been killing turtles, coral and giant clams in the South China Sea, tribunal finds*, L.A. TIMES, July 13, 2016, *available* at http://www.latimes.com/world/asia/la-fg-south-china-sea-environment-20160713-snap-story.html (last accessed Mar. 1, 2017) (citing *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 983).

40. *See* Procedural Order No. 4, In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19 (Apr. 21, 2015).

41. *Id.* ¶ 1.3.

what we thought could be the meaning of that procedural order. I was already Solicitor General when the Republic responded to a request from the Tribunal to comment on the possibility of bifurcating the proceedings. The decision to oppose the bifurcation was grounded on the argument that the jurisdictional arguments were so tied to the substantive arguments it made little sense to bifurcate. It was, therefore, feared that the bifurcation signaled the Tribunal's willingness to dismiss the case (or some aspects of it) on jurisdictional grounds.

In any case, the bifurcation meant that the first set of hearings in July of 2015 would be limited to the jurisdictional aspects of the arbitration.[42] In the meantime, our external counsel proposed that we now request the Tribunal for provisional measures. While the desire to do something about the outrageous island-building activities of China was strong in everyone, I did not think the proposal was well-timed. For me, the best time — if there ever was an appropriate time — to ask for provisional measures was when we first learned about the island-building activities. As everybody was in agreement that China would not comply even if the Tribunal issued provisional measures before the end of 2015, it made little sense to ask for them. In fact, if everybody knew that the chances of compliance was nil, then we might be exposed as requesting for such measures only for public relations purposes.

Just as important, by the time it was reconsidered and proposed that we ask for provisional measures, China's island-building had already been substantially accomplished (horizontally) and what was primarily left was the vertical construction (of buildings and other facilities).[43] I, therefore, concluded that the best time to ask for a declaration of the illegality of the island-building activities was during the merits phase of the arbitration, not the jurisdictional phase. To seek provisional measures would be to test the Tribunal's jurisdiction just when it had bifurcated the proceedings. In addition, we risked being asked by the Tribunal why it was only when the island-building activities had already been nearly finished that the Philippines would ask the Tribunal to restrain China's illegal activities. Finally, I considered it paramount that the Republic help the Tribunal preserve its reputation. Given the expected Chinese rejection of a provisional measures order from the Tribunal, such a situation would only harm the reputation of the Tribunal and I did not intend to proceed with the merits phase of the

42. *Id.* ¶ 1.5.

43. *See generally* Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES, Oct. 27, 2015, *available at* https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html (last accessed Mar. 1, 2017).

arbitration arguing before a Tribunal that people believed had been rendered powerless by China's disrespect. Of course, if the Tribunal were rejected by China on provisional measures, it might also affect the views of the members of the Tribunal about the utility (or futility) of deciding the case against China in the first place.

In the end, the final decision was to defer asking the Tribunal to rule on the legality of the island-building activities, and our foreign counsel, after the hearing on jurisdiction, agreed that it was the correct decision to make. We were, of course, able to survive the jurisdictional phase[44] and moved on to the merits phase in which the Republic showed the extent of the island-building activities and how they damaged the ecosystem of the South China Sea. The extent of the evidence the team presented was only possible because they had enough time to gather sufficient information in the form of photographs and expert testimonies. That would not have been possible had we decided to seek provisional measures early on. In my view, one of the more memorable moments in the arbitration was when one of our foreign lawyers presented the Republic's case against the island-building activities because the photographs and other visual aids had such a visceral effect on everyone in the session hall.[45]

VII. SPRATLY ISLANDS AND JOINT DEVELOPMENT

It is accepted that the southern portion of the claim dealing with rights over the Spratlys area[46] was the most contentious and challenging among the various submissions. The multiplicity of the claimants, the sheer number of the maritime features involved, the political consequences,[47] and the level of confidence over our ability to win the submission meant that any argument would be subjected to the highest level of scrutiny and would be, as it was, a source of disagreements.

The central concern in the southern sector was to ensure that none of the maritime features in the area generate an EEZ[48] and, therefore, avoid any

44. *See South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 164 & *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 413.

45. *See* Transcript of Day 2 of the Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, In the Matter of the South China Sea Arbitration (Phil. v. China), at 24-32 (Nov. 25, 2015) [hereinafter Transcript of Day 2].

46. *See* Memorial of the Philippines, *supra* note 3, vol. I, ¶¶ 5.57-5.58.

47. *See generally* BBC News, Why is the South China Sea contentious?, *available at* www.bbc.com/news/world-asia-pacific-13748349 (last accessed Mar. 1, 2017).

48. *See* Memorial of the Philippines, *supra* note 3, vol. I, ¶ 5.57.

of them from projecting any entitlement that overlapped with the Philippines' EEZ. This meant that the Republic's argument was to characterize the maritime features in the area as rocks (such as Itu Aba and Pagasa),[49] low-tide elevations (such as Mischief or Panganiban Reef),[50] or fully submerged reefs (Reed Bank).[51]

This strategy was meant to establish our entitlement to the full breadth of our EEZ. To the extent that the Philippines argued that Itu Aba was a rock under UNCLOS,[52] we wanted to prevent such a feature from generating an EEZ that could overlap with that of the Philippines. The general consequence would be to disentangle our EEZ generated from the side of Palawan from any adverse maritime claim. One specific consequence is that we would end up having exclusive rights over Reed Bank, a submerged reef reputed to have oil and gas.[53] The Philippines has awarded certain rights over the area, but Chinese interference has made attempts to explore the area no longer feasible in the past couple of years.[54]

In the middle of this controversy over the Spratlys is Itu Aba (also known as Taiping Island), a formation almost half a square kilometer, the largest among the maritime features.[55] The feature, just right outside the EEZ of the Philippines, is presently occupied by Taiwan,[56] ownership of which is contested by the Philippines, China, and Vietnam.[57]

Given its size, everyone looked at Itu Aba as the potential measure of a feature that might qualify as an island under UNCLOS and thus generate not only a 12-mile TS but also a 200-mile EEZ. While the definition of Article

49. *Id.* ¶ 5.114.

50. *Id.* ¶ 5.59.

51. *Id.* ¶ 3.48.

52. *Id.* ¶ 5.114 & *See* UNCLOS, *supra* note 35, pt. VIII, art. 121 (3).

53. Memorial of the Philippines, *supra* note 3, vol. I, ¶¶ 3.48-3.49.

54. *Id.* ¶¶ 6.15-6.28.

55. *Id.* ¶ 5.96.

56. *Id.* ¶ 5.97 & *See* Tarra Quismundo, *Itu Aba: PH biggest worry is biggest win*, PHIL. DAILY INQ., July 18, 2016, *available at* https://globalnation.inquirer.net/141362/itu-aba-ph-biggest-worry-is-biggest-win (last accessed Mar. 1, 2017).

57. *See* Memorial of the Philippines, *supra* note 3, vol. I, ¶ 5.57 & Ivan Watson & Mark Phillips, South China Sea: Taiwan enters power struggle, *available at* http://edition.cnn.com/2016/03/26/asia/taiwan-south-china-sea (last accessed Mar. 1, 2017).

121 (3) of UNCLOS[58] does not refer to size, it is natural to look first at bigger formations among the miniscule maritime features as candidates for islands.

The possible declaration of Itu Aba as an island under Article 121 was the worst possible scenario for the littoral states in the South China Sea, especially the Philippines.[59] Such declaration would result in three dangerous consequences: *first*, the Tribunal would lose jurisdiction over many of our submissions because of China's jurisdictional reservation; *second*, it would be seen as a big win for China as it would legitimize China's activities in the area — think of a Chinese aircraft carrier parked near the coast of Palawan, to borrow from one of the Malacañan lawyers' nightmare scenarios; and *third*, we would lose exclusive rights over Reed Bank and the only way we could salvage the situation would be to agree to a joint development with China, assuming it would be generous enough to share, which is probably unlikely.

One important reason why Itu Aba was such a contested topic had to do with the level of confidence of the entire team over the issue, both as to the facts and the law, during the entire arbitration. This ambivalence is reflected in the fact that Itu Aba was not even mentioned in the Notification and Statement of Claim filed by the Philippines on 22 January 2013.[60] The strategy adopted by the Republic was to identify specific features and ask the Tribunal to rule on their character (as island, rock, low-tide elevation, or fully submerged feature)[61] instead of simply asking, shotgun-style, that the Tribunal declare that none of the features in the South China Sea generates an EEZ that overlaps with the Philippines'.

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58. UNCLOS, *supra* note 35, pt. VIII, art. 121 (3). Said Article provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." *Id.*

59. Embarrassingly, as well, because China did not participate, the Philippines had to shoulder the portion of the expenses of China had it actively participated in the arbitration. *See generally* Ellen T. Tordesillas, How much did PH pay for foreign lawyers in case vs China?, *available at* news.abs-cbn.com/focus/07/20/16/how-much-did-ph-pay-for-foreign-lawyers-in-case-vs-china (last accessed Mar. 1, 2017).

60. *See* Republic of the Philippines: Department of Foreign Affairs, Notification and Statement of Claim, *available at* www.gov.ph/downloads/2013/01jan/20130122-Notification-and-Statement-of-Claim-on-West-Philippine-Sea.pdf (last accessed Mar. 1, 2017).

61. Memorial of the Philippines, *supra* note 3, vol. I, ¶¶ 5.57-5.114.

This omission was not lost on pro-China scholars who belittled the Philippine claim and argued that the failure to include Itu Aba would affect the jurisdiction of the Tribunal and compel it to dismiss the case because, in their view, Itu Aba was a "proper island in terms of Article 121 (2) [of the] UNCLOS."[62] Perhaps, this placed some pressure on the part of the Philippine team to respond, which is why the Memorial of the Philippines mentioned Itu Aba as a feature that could not generate an EEZ.[63]

By the time I assumed leadership over the case, the theories of the various submissions had already been fixed in the Memorial. For me, this meant that the best way to manage the arbitration was to focus on ensuring the logical consistency of our claims, keeping in mind the goal of maximizing our entitlements with the least possible exposure. This led me to the conclusion that the idea of agreeing to a joint development was totally incompatible with the logic of our arguments and inimical to the national interest. I made this position clear from the beginning and tagged any arguments favorable to joint development within the team as a concern.

The logic is straightforward. Our fundamental goal was to ensure that none of the features in the Spratlys generated an EEZ. At the time, I figured that people had spent enough time arguing whether Itu Aba was an island or a rock. In the end, the position we had taken was that it was a rock. The logical consequence of that claim was that we were staking our full and exclusive rights to the full breadth of our EEZ. We, therefore, had to commit to that argument fully.

I noted, for example, in a memorandum to the Office of the President dated 17 December 2014, that our foreign lawyers seemed open to the idea of joint development with China as a creative solution or compromise down the line. While I understood their desire to exhaust all possibilities, I took it as a matter of principle that I should avoid any appearance of being favorable to any form of compromise that might be seen as less than faithful to the Constitution, the national interest, and the goal of maximizing our entitlements. Most important of all, it was clear to me that openness to discussing joint development in any of the Republic's pleadings would constitute a clear sign of lack of confidence in our core position that none of the features in the Spratlys could generate an EEZ.[64]

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62. *See* Michael Sheng-ti Gau, *Issues of Jurisdiction in Cases of Default of Appearance, in* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 93 (Stefan Talmon & Bing Bing Jia eds., 2014).

63. Memorial of the Philippines, *supra* note 3, vol. I, ¶ 5.114.

64. *See generally* Memorial of the Philippines, *supra* note 3, vol. I, ¶ 5.114.

Prior to the hearing on the merits, the Tribunal sent to the parties an "Annex of Issues the Philippines May Wish to Address" on 10 November 2015.[65] One of issues raised by the Tribunal related to the jurisdictional problem it had to confront if the dreaded situation — where it finds that there are overlapping entitlements to an EEZ within the southern portion of the case — happened.[66] The original, proposed answer of external counsel was that the Tribunal would retain jurisdiction to control, by some means, the conduct of the parties "pending agreement on delimitation or joint development arrangements."

In a meeting with our foreign lawyers, Secretary del Rosario, Justices Antonio T. Carpio and Francis H. Jardeleza, Philippine Ambassador to the Netherlands Jaime Victor B. Ledda, and Deputy Executive Secretary Menardo I. Guevarra, I objected to this language; specifically, the mention of joint development arrangements because it would indicate that the Philippines was offering a compromise in case of a loss. We would, therefore, be committing the basic mistake of telegraphing our punches. For myself, I was particularly worried about being seen as inserting a very specific economic incentive as trade-off for losing the Itu Aba question. For emphasis, and to communicate to everyone that I had no intention on signing off to such a strategy, I told everyone — "I will not be the Solicitor General who sold this case to China."[67]

VIII. CONCLUSION

In the aftermath of that meeting, our foreign counsel strengthened (even more) the arguments on Itu Aba, dropped "joint development," and recast the Philippines' post-loss scenario to not make it appear we were not confident about winning Itu Aba. At the conclusion of the hearings, Mr. Reichler and Professor Bernard H. Oxman (who delivered a wonderfully powerful speech on the subject) thanked and congratulated me for my intervention. On my flight back home to Manila, I emailed Professor Oxman — "I am serious when I tell you that your speech on the third day will probably be remembered as one of the most important speeches on the South China Sea disputes, and I'll surely remind everyone of that fact."

The rest, of course, is history.

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65. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 63.

66. *See* Transcript of Day 2, *supra* note 45, at 35-38.

67. Paterno Esmaquel II, Hilbay defends aborted strategy vs China, *available at* http://www.rappler.com/nation/140482-hilbay-itu-aba-philippines-china-case (last accessed Mar. 1, 2017).