21 July 2016
UP College of Law

Response to Ms. Hofileña and Ms. Vitug
By: Prof. Florin T. Hilbay[1]

I respond to Ms. Hofileña's and Ms. Vitug's Rappler piece accusing me (and Justice Francis Jardeleza) of "miscalculation."

First. I do not suppose the writers consider themselves experts in the law of the sea, much less official participants with personal knowledge of the West Philippine Sea litigation. I am therefore amused at the accusatorial tone they have taken on previously undisclosed legal strategy which, in fact, resulted in an overwhelming victory. Whether they are adopting the opinion of any person officially or unofficially connected with the case is also not stated. I am therefore left to respond to conclusions based on gossip, even as they were written by people I consider respectable journalists.

Second. In the coming months and years, the nation will have an opportunity to look under the hood of this magnificent legal accomplishment. Thankfully, given the positive legal result, the challenge will be about proper documentation and accurate narration of how this result came about, not about who should be blamed for what. The room is big enough and the pages of history books (or even Facebook) sufficiently spacious to toast the contributions of women and men privileged enough to have had a direct or indirect connection with the case. The bucket can accommodate decent human beings, and there's no need to reduce oneself into a crab.

Third. Given the magnitude of this case and the multi-layered controversies surrounding it, I consciously adopted a policy of keeping documents and having multiple witnesses. This should eliminate erroneous factual claims and reduce subjective elements in the narration of the history of this case, which I intend to write. I saw myself simultaneously as a participant and an observer. As the former, my goals were to achieve an efficient win, reduce the impact of potential losses, and protect the President. As the latter, I was an excited case biographer.

Fourth. I saw the Itu Aba issue as belonging to the baskets where there was a need to reduce the impact of a potential loss and protect the President. By now, people should be aware that the Itu Aba issue is one where the *entire* team's level of confidence was not at its highest. This explains why that feature was not included in our "complaint" in the first place. My discomfort with the treatment of Itu Aba figured prominently in a 2014

[1] Former Solicitor General and Agent, *Philippines v. China*.

Memorandum I sent to Executive Secretary Paquito Ochoa, Jr. and Chief Presidential Legal Counsel (now Justice) Alfredo Benjamin Caguioa. This should be remarkably self-explanatory, and an interesting read.

I invite Ms. Hofileña and Ms. Vitug to reveal any other 2014 "official communication" from me to Malacanan.

Fifth. Ms. Hofileña and Ms. Vitug have a wildly mixed-up sequencing of events, which is to be expected from those who do not have official documents or had no direct and personal knowledge of events. Let me take the cudgels for them on one critical decision-point.

In the hearing on the merits last November 2015, the Tribunal made the Philippines grapple with a hypothetical: what happens if a feature (Itu Aba) were declared an island under UNCLOS (which therefore generates an Exclusive Economic Zone of 200 nautical miles from its coastline)? The original, proposed answer 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." I thought this was both novel and strange. This was the first time this theory was broached, and the proposal to softly offer "joint development arrangements" if we lose on the Itu Aba issue was problematic.

Witnesses to the agent's discussion with foreign counsel, assuming they're not deliberately forgetful, will remember two important points I repeatedly emphasized—

1) *Commit to the wave.* I did a short lecture on how surfers are able to catch big waves. Itu Aba is a wave we absolutely needed to catch, and we should not signal to the Tribunal that we think we might lose. We needed to focus our firepower on winning that issue instead of sheepishly offering "joint development arrangements" for when we lose. We should not, therefore, telegraph our punches.

2) *Avoid impression of selling out.* The Philippines, in this litigation, should not be seen as offering "joint development arrangements" as a second option or a compromise. 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. I told everyone "I will not be the Solicitor General who sold this case to China."

Those who were in that meeting were former Secretary of Foreign Affairs Albert Del Rosario, Justice Francis Jardeleza, Justice Antonio Carpio, Ambassador Jaime Ledda, Deputy Executive Secretary Menardo Guevarra, and the entire contingent of Foley & Hoag.

In the aftermath of that meeting, 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, Paul Reichler and Bernard Oxman (who delivered the wonderfully powerful speech for that hypothetical) thanked and congratulated me for my intervention. On my flight back home to Manila, I emailed Prof. 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."

I think we won the Itu Aba issue because everyone from the Philippine side and the foreign counsel's side was professional enough to realize that our occasional disagreements in this case could lead, rather thankfully, to compromises over our strongly held opinions. Fortunately, the brew was sufficient to convince the Tribunal that our arguments on the various submissions were correct.

Moving forward, I think the wise attitude here is to celebrate the victory, not malign anybody's contribution. Justice Jardeleza, always fond of quoting JFK, would usually remind me that victory has a thousand fathers, but defeat is an orphan.

I couldn't care less if this victory had a million parents.

Republic of the Philippines
Office of the Solicitor General

MEMORANDUM

To: **Executive Secretary PAQUITO N. OCHOA, JR.**
Chief Presidential Legal Counsel ALFREDO BENJAMIN S. CAGUIOA

From: **Acting Solicitor General FLORIN T. HILBAY**

Re: **Updates on the WPS and Meeting with Paul Reichler at Foley & Hoag, Wash., D.C.**

Date: **17 December 2014**

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1. The 10 December 2014 meeting with Mr. Reichler was planned about a month after I assumed the position of SolGen in an acting capacity. The goal was a meet-and-greet with updates on the WPS arbitration.

2. A meeting was appropriate for purposes of introducing myself to Mr. Reichler and getting a sense of what he thinks will most likely happen given the 15 December 2014 deadline for China to respond to the Philippine memorial.

3. I invited former SolGen, now Justice, Francis Jardeleza to join the trip to facilitate the transition. I was also joined by Usec. Mike Musngi, Asec. Lucille Tesoro, and Asec. Naealla Bainto, all from the OP.

4. A week before my trip, I separately met with SFA del Rosario (after our Senate hearing on the EDCA) and SOJ de Lima.

5. In my meeting with SFA del Rosario (1 December 2014), I specifically inquired about the kind of working arrangement he wanted on the WPS. He informed me that I should "take the lead," just as J. Jardeleza did when he was SolGen. He added that J. Jardeleza worked closely with him and ConGen Henry Bensurto. That meeting was attended by Evan Garcia, Ed de Vega, Charmaine Serna-Chua, and Tess de Vega.

6. In my meeting with SOJ de Lima (5 December 2014), I informed her that I see my role as a coordinator among the various agencies working on the WPS and that I would like to get as much information as possible and ensure everyone's

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on the same page. I informed the SOJ that people seem to view her as the disengaged participant on the WPS and to that extent is seen as objective. I also told her I will seek her advise from time to time and provide her with relevant updates.

7. Upon arrival in D.C. (9 December 2014), I was informed by Mr. Reichler that SFA del Rosario, Amb. Cuisia, and ConGen Bensurto were joining us at the meeting at Foley & Hoag. The SFA was supposed to go to Korea, but decided to fly to D.C. instead.

8. SFA del Rosario, Amb. Cuisia, and ConGen Bensurto were already at Foley & Hoag when the OP contingent arrived. SFA del Rosario, upon seeing me, asked if he could talk to me before the meeting.

9. In that short talk, SFA del Rosario informed me that, although he said that I should take the lead on the WPS arbitration, he has changed his mind and now wants to become a co-agent. I said I will inform Malacanang about it.

10. Mr. Reichler opened the meeting by saying that he was happy with the three recent publications on the WPS by China, the United States, and Vietnam.

11. For the Philippine side, I opened the meeting with questions about what he expects will happen next and how the China statement changes things for the tribunal. I asked if there was anything in the China statement that was unanticipated and Mr. Reichler stated that there was none. He said that even though one cannot predict the exact language of an idea, he found nothing in the language of the China statement that he did not expect. One of his associates even noted that China's statement was weaker than they expected, at least in comparison with the Talmon publication.

12. Mr. Reichler proceeded to make a general presentation of the Philippine case against China, basically reiterating what is in the memorial. The first part focused on the Northern Portion of the claim, while the second part dealt with its Southern Portion.

13. Mr. Reichler stated that he was very confident about the Northern Portion of our claim, that the 9-dash line is unjustifiable. I asked if there's any way China can justify its 9-dash line under any theory. Mr. Reichler said that while we cannot predict the future, he does not really see the tribunal ruling against us on this issue. He also seemed very confident about the status of the Scarborough shoal, based on the photos he presented.

14. Mr. Reichler's tone and confidence was very different with respect to the Southern Portion of the claim. He opened with the features that were included in the Notification & Statement of Claim and stated the theory of the memorial—that the goal is not to determine sovereignty over the features but to determine the legal status of such features under the UNCLOS.

15. He stated that the inclusion of Itu Aba in the memorial was a prudent and wise choice. He did not immediately say why.

16. I asked what the dangers are of Itu Aba generating an EEZ. His answer was that he believes we have a "decent argument" on the issue. He then added that by including the Itu Aba issue in the memorial, we are "no worse off" than we were before.

17. Mr. Reichler then went on to say that "we cannot go into arbitration with only our strongest arguments," that we have to be prepared "to give the tribunal something" for the other side. He said "we had to put in features where we won't just win." But he repeated that we have decent arguments re Itu Aba.

18. According to Mr. Reichler, under a "worst case scenario" (where Itu Aba is declared an island, generating an EEZ), we could enter into a delimitation agreement. I retorted that a delimitation is not automatic. He then broached the idea of a second case—compulsory conciliation under the UNCLOS.

19. I responded by saying that conciliation is not binding. In response, Mr. Reichler spoke of the possibility of a third case, and said that that "there's a theory" that the report of the conciliation panel, if not heeded by China, could be the basis of another compulsory proceeding.[1] ConGen Bensurto spoke to say that it was his theory.

20. Mr. Reichler finished the discussion on the case by saying that "possibilities open up for the Philippines." Prefacing his statement by saying he was not making a suggestion, he said one "creative" solution is "joint development between the Philippines and China over Reed Bank." He said we can make China a "junior partner," with a share of 25% or even 10 %.

21. Mr. Reichler concluded his remarks by stating we are at a "cross-roads" and that it is a good opportunity to evaluate the possibility of having co-agents in the arbitration case. He mentioned this in the context of the fact that the tribunal is composed of diplomats, and that it would be a good idea to have a "very senior

[1] Whether this is compulsory delimitation or arbitration, I cannot remember.

official" of the country speak to make the opening statement. He specifically mentioned SFA del Rosario as someone known to the community. He also mentioned "the minister of justice" (presumably SOJ de Lima) as a third co-agent. Finally, he spoke of the possibility of having a "deputy agent."

22. He added, however, that this was only a suggestion and that he will fully respect whatever decision we will have on the matter of co-agents.

23. Usec. Musngi stated that it is a good idea to have a senior statesman speak. He even floated the idea of Justice Antonio Carpio as a known expert who can open the case strongly for the Philippines. But he added that being speaker does not require one to be an agent.

24. I responded to Mr. Reichler that the Solicitor General is a statutory agent of the Republic on these cases. I added that I appreciate his candor, and will inform the OP about his suggestion. I added that I would even strongly suggest that SFA del Rosario speak during the proceedings, and wouldn't discount the possibility of requesting the President to speak, if what we want is publicity and impact. But none of those speakers need to be an agent for them to make the opening statement.

25. The final point of discussion was with respect to timeline. SFA del Rosario declared there was a need to "speed up" the process or at least make sure the arbitration is not delayed.

26. The next day, we were invited at Foley & Hoag to attend a talk by ITLOS President Vladimir Golitsyn. In attendance, as reactor, was the eminent law of the sea expert John Norton Moore. In the Q&A, someone asked about the WPS case. Prof. Moore stated that the 9-dash line is just so "outrageous" it cannot be justified at all. He noted however that the southern portion is just too complicated it is "highly unlikely" that the tribunal will rule on it.