

B O O K

Rock solid: How the Philippines won its maritime case against China

By Marites Dañguilan Vitug

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There is, perhaps, no other piece of international legislation that has better captured the imagination—if not the sense of justice and fairness—of the Filipino in recent years than the 1982 United Nations Convention on the Law of the Sea, more commonly abbreviated as “UNCLOS”. Public debate, especially since the promulgation of the South China Sea Arbitration Award (SCS Award) in 2016, has been replete with expert and dilettante references to its jargon and technical quirks. However, such developments, which came seven years since the Scarborough standoff in 2012, have not provided much clarity for all parties concerned (*Philippine Daily Inquirer* 2019). Not only do armchair experts today continue to misappreciate the legal constitution of the Tribunal, which ultimately decided that China’s nine-dash line had no basis in international law, presidential policy in subsequent years had also taken such drastic turns that would make even the unborn anxious over questions on the sufficiency of marine resources for future utilization.

In *Rock solid*, veteran journalist Marites Dañguilan Vitug marries legalese and contemporary history to provide a story that generations will tell and retell, of the time a small, archipelagic David took down an expansionist Goliath before an international tribunal (Vitug 2018). Previously, Vitug has showcased a penchant for the law and the workings of institutions that leverage the same, especially in the landmark works *Shadow of doubt: Probing the Supreme Court* and *Hour before dawn: The fall and uncertain rise of the Philippine Supreme Court* (2010, 2012). Divided into four parts, *Rock solid* takes readers on a journey through mostly personal narratives that color what otherwise would be available as bluntly stated facts in diplomatic correspondences, judicial documents, minutes of committee hearings, and media reports.

Rock solid opens with a recollection of the beginnings of the South China Sea disputes, backtracking from the moment Philippine rights were vindicated by an UNCLOS Annex VII Tribunal with the Permanent Court of Arbitration in The Hague, Netherlands as its Registry, in July 2016. Aptly titled “The present and the past”, the first part paints a picture of the inhospitable conditions in the Spratlys

that would-be occupants—Filipino, Vietnamese, or Chinese alike—would have had to combat to ensure that certain maritime features remain part of their claimed sovereign territory. From the clandestine sojourn of the Philippine Marines as stranded fishermen under former President Marcos’ orders to occupy the more manageable parts of these uninhabited features, to the Viet Cong’s consolidation of power in offshore areas at the end of the Vietnam War, and to China’s quiet occupation of Mischief Reef in 1995 under the guise of establishing civilian commercial distant fishing facilities, Filipino readers would find themselves asking how much more could have been done then to permanently secure rights in the turbulent semi-enclosed sea. We are also reminded of a time when the Armed Forces employed more creative thinking in securing national interests (running ships aground, installing prefabricated lighthouses, among others) and how diplomats—emboldened by clearheaded principals—were more resolute in asserting Philippine positions on the illegality of Chinese actions.

In the chapter “Coveting rocks and reefs”, Vitug explains why so much depends on Scarborough Shoal—an assemblage of rocks outside the Philippines’ territorial sea, but within its exclusive economic zone (EEZ). Citing earlier research on the same, as well as maps used for early maritime trade by European powers in the South China Sea, the Philippines and its colonial predecessors appear to have implemented substantive acts of administration over Scarborough Shoal. While such acts are possibly enough to inform a decision on who owns said features, questions of sovereignty are considered beyond the jurisdiction of the Annex VII Tribunal in the South China Sea Arbitration (SCS Award 2016, para. 154, 793). Aside from the grounded ship that gave the Shoal its name, thrilling cat-and-mouse episodes at Scarborough involved blue-seal cigarette smugglers from Macao, Taiwanese fishing boats, and smuggling activities from communist China to their Philippine counterparts.

Rock solid also takes a look at the not-so-distant events that inch closer to the country’s current China conundrum: former President Gloria Macapagal-Arroyo’s Beijing-friendly policy during her nine-year tenure, the decline in frequency of maritime patrols, and the PH-China Joint Marine Seismic Undertaking (JMSU) that was scrapped at Vietnam’s behest. Though not much connection is drawn, brief mention is also made of the corruption-ridden North Rail Project. Things certainly took a turn in 2010 when Benigno Aquino III came into the presidency, whose most notable legacy is the arbitration award itself. Apart from the Scarborough standoff, one of the most serious challenges to Philippine rights in the South China Sea at the time of the book’s writing was the harassment of survey ship *M/V Veritas Voyager* at Reed Bank in 2011. To this day, this event continues to impair the country’s energy security. Aside from changes in leadership, Vitug also looks at “Factors that matter” (Part two), thus situating the above events in the context of an inevitable global backdrop: China’s economic rise and recovery from a century of

national humiliation (Su 2019), a fractured US–Philippine relationship (from the non-renewal of the Bases Agreement in 1992 to the controversial forging of a new defense cooperation agreement in 2014), and the ASEAN Member States’ ongoing reassessment of loyalties and priorities.

Oddly placed midway in *Rock solid* is a brief discussion on the history of the UNCLOS and the negotiating positions that China adopted then. For one, it did not harp on grand notions of historic rights but aligned itself with developing nations, which consented to put an end to expansive maritime entitlements by following the Convention’s parameters on the breadth of maritime zones. However, commentators err in ascribing finality to negotiating positions. After all, international law, which is largely unenforceable if not for the political will to comply by state actors, is very much defined not just by rules delineated in treaties but also by the practice of states. Thus, despite the prominence of an instrument like the UNCLOS in resolving conflicts in sea rights, the law of the sea is still very much developing. Even the Chinese occupation of Mischief Reef came barely a year after the UNCLOS entered into force, whereas the *South China Sea Arbitration* award is the first judicial decision to extensively shed a light on how the Convention differentiates and allocates rights to “rocks” vis-a-vis “islands” (SCS Award, para. 473–553; UNCLOS, Art. 121, 3). Prior to this debut, the last time the Philippines had primarily figured before a world court was in a case between the United States, as the successor to Spain’s rights to the archipelago, and the Netherlands, which had suzerainty over territories now comprising Indonesia, including Palmas or Miangas during that time (Island of Palmas Case 1928). Therefore, by its current continuing hesitation to shape bilateral relations with China primarily on the basis of the Award, the Philippines risks contributing to another aspect of public international law—this time, on acquiescence to foreign presence in, or worse, the loss of part of, its maritime spaces. In sum, *Rock solid* creates a narrative wherein Chinese presence and strategy have grown markedly even before the standoff at Scarborough, and present-day maritime territorial dilemmas—as shown in the inadequacy and deterioration of facilities at Philippine-occupied features and of capacity to surveil the same—could be partly rooted in the government’s failure to predict the escalation of Chinese assertiveness and investments in Southeast Asia. Simply put, the Philippines, much like the rest of the world, has failed to anticipate the rise of Xi Jinping.

If Xi is China’s hero, effectively an emperor in all but name (*BBC News* 2018), the Philippines, as *Rock solid* shows in more ways than one, also has key people to thank for its “stunning victory” in the arbitration. Aside from stories of security sector actors facing operational challenges in the South China Sea and policy influencers in the government, several chapters are dedicated to recount the legal travails of the new champions for Philippine rights in the South China Sea. For one, apart from his role as a senior magistrate of the Supreme Court, Associate

Justice Antonio Carpio is credited for being the brains behind the initiation of the arbitration and for recruiting a handful of young law of the sea scholars to bounce ideas off of in strategizing for the same. Former Associate Justice Carpio continues to prove his advocacy of debunking China's "historical lies" with archival materials and maps, showcasing the same throughout the country with exhibits and talks. Likewise, former Secretary of Foreign Affairs Albert del Rosario was considered instrumental in convincing former President Aquino to take China to court, thereby changing the course of Philippine foreign policy. Meanwhile, Paul Reichler, the Philippines' main counsel and partner at the Washington, D.C.-based firm Foley Hoag, is hailed for his passion for fighting so-called "Sisyphean legal battles" (Vitug 2018, 163), as the South China Sea Arbitration joins the landmark International Court of Justice case, *Nicaragua v. United States*, in his portfolio of award-winners (*Nicaragua v. United States* 1986).

As in any compelling story, *Rock solid* also identifies antagonists, however unintended. The shelving of plans under two presidents to build a lighthouse and run a ship aground in Scarborough, were apparently at the urging of Former Secretary of Foreign Affairs Domingo Siazon, in a bid to preserve China's support for his potential ascent to the leadership of the United Nations. In the eyes of some, former Energy Undersecretary Eduardo Mañalac, who brokered important deals with China, may very well be perceived as having put business interests in joint development ahead of geopolitical considerations. The same may be said of former Speaker of the House of Representatives Jose De Venecia, who especially advocated for the JMSU under Former President Arroyo and the Joint Development Agreement under President Rodrigo Duterte.

Most intriguing is the book's discussion of another controversy that stirred even the Supreme Court to its core: the disagreement between the camps of Former Solicitor General Francis Jardeleza, his successor Florin Hilbay, and Former Executive Secretary Paquito Ochoa, on the one hand, and of Carpio, Del Rosario, the Philippines' foreign counsels, and eventually Former Chief Justice Maria Lourdes Sereno, on the other hand, over the inclusion of Itu Aba in Philippine claims during the arbitration. In the end, the latter group's view prevailed: that it would be in the Philippines' best interest if the Tribunal ruled on the legal status of Itu Aba, the largest feature in the South China Sea currently occupied by Taiwan, under the international law of the sea. Excluding Itu Aba would leave room for either China or Taiwan to later claim that their EEZs overlap with Palawan, under which area the Reed Bank falls. This important detail did draw Taiwan's ire, as Jardeleza predicted. Ultimately, the Tribunal declared that Itu Aba had no inherent source of potable water and, thus, could not be deemed capable of sustaining human habitation. It is this fact, as well as the Tribunal's resort to characterization of an island based on its original, unmodified state, that makes the South China Sea Arbitration award crucial not only for the Philippines but also for all maritime nations.

Unlike other books written on the South China Sea disputes, *Rock solid* makes no pretense about being written for the Filipino; in fact, it employs language characterizing the bringing of suit as a “brave decision”, “built in a compelling manner”, involving a “small country confronting a megapower” (Vitug 2018, ix), and winning a “stunning victory” despite its “feeble military muscle” (7–9), among others. In its totality, however, the award virtually sets a precedent for all coastal nations, thereby limiting the parameters by which they can claim maritime entitlements from offshore features.

While *Rock solid* offers few perspectives from the Chinese side apart from the contents of several documents, including diplomatic notes, China’s Position Paper (Ministry of Foreign Affairs, PRC 2014), which had been considered by the Tribunal in the arbitration, and the anecdotes of government officials who acted in the capacity of envoy to China at one point or another, Vitug walks readers through the legal arguments the Philippine lawyers would have had to advance against China’s claims, had the latter actually participated in the proceedings. After all, the Tribunal under an UNCLOS Annex VII proceeding not only had to satisfy itself of its jurisdiction but also the legal basis on which its decision would be based. In other words, China’s non-participation could not result in a direct victory for the Philippines. Far from an overwhelming win, the Final Award still blew a heavy punch to the latter, especially with the Tribunal’s declaration that other claimant States also enjoyed traditional fishing rights in the territorial sea around Scarborough Shoal (SCS Award, para. 805).

As Vitug writes in the book’s preface, only time can tell whether she will succeed with *Rock solid*—just as the arbitration did—in restoring the Filipinos’ sense of national self-esteem. One year since its publication, and three years since President Duterte came into power, the South China Sea disputes still do not consistently receive top billing in the national agenda, nor in the debates during the recent elections for Congress early in 2019. China remains steadfast in its claims based on the nine-dash line, Filipino fishermen are still harassed from their usual fishing grounds, evidence of harm to the marine environment continues to rack up, and Chinese-occupied maritime features have looked more and more like islands despite the Tribunal’s findings. The book’s real value, however, is in providing Filipino readers a reminder of the human dimensions to an international dispute settlement proceeding that is so far removed from realities on the ground (or, in this case, at sea). Thus, what then seemed to be an imprudent move for the Philippine government to submit unredacted files into evidence in the arbitral process, actually ended up democratizing access to this wealth of legal, historical, and technical materials which are crucial for every Filipino’s understanding of the nation’s sovereign claims.

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