

Miguel García García-Revillo

# The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea

By

Miguel García García-Revillo

Foreword by

Tullio Treves Rafael Casado



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The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea

In loving memory of Dad (1925–2008)

#### **Foreword**

This book is clear evidence that the International Tribunal for the Law of the Sea (ITLOS) is today a thriving reality. The twenty-three cases, contentious and on requests for advisory opinions, that currently appear in its official List, support this statement. This is particularly noteworthy as the establishment of the International Tribunal for the Law of the Sea, a new international judicial organ created by the United Nations Convention on the Law of the Sea, the so-called Constitution of the Oceans, was strongly contested during the Third United Nations Conference on the Law of the Sea. During the early years since its establishment scholars and practitioners frequently expressed doubts as to the usefulness of this new judicial body and expressed concern that it would contribute to fragmentation of international law. Considering the relatively narrow scope of its jurisdiction, the Tribunal has fared quite well and the opposition of principle to it has vanished. States of all continents have been parties in cases before it and a number of the practitioners that frequently appear before the ICI have pleaded before it. The contacts between the ICI and the Tribunal are now amicable. Judges of the Tribunal have served as ad hoc judges in the ICJ, and currently the President of the ICJ is serving as judge ad hoc in the Tribunal.

The author of this book, Miguel García García-Revillo, is a well-known expert in the settlement of law of the sea disputes His first contacts with the topic began in 1997 and, since then, he has made excellent contributions to the knowledge of ITLOS, in all its facets. These contributions include books, chapters of books and papers, but also his participation, as a guest speaker, in a number of international congresses and symposia all over the world. Among his scholarly writings, we must mention the monograph El Tribunal Internacional del Derecho del Mar. Origen, organización y competencia, published in 2005 by the Spanish Ministry of Foreign Affairs and Cooperation and the University of Córdoba (Spain), the latter being the academic institution in which Miguel Garcia works as a senior lecturer on international law. In that book, whose prologue-writer assured that "we are in presence of the best monographic study that has been written to date" on ITLOS, the author analyzed three of the four major areas worthy of investigation on this international judicial organ: its history, its organization and its jurisdiction. The fourth one, relating to the proceedings before the Tribunal, was not addressed in that book and still remains open on the author's desk for future writings.

Being ITLOS an international tribunal, and, accordingly, an institution depending on the States' consent (or on the limits imposed by them), its most

XII FOREWORD

interesting and stimulating facet is by far its jurisdiction. ITLOS jurisdiction is subject to constant jurisprudential developments and must be analyzed and understood in light of recent practice. It is consequently easy to understand that the important chapter on jurisdiction of the 2005 monograph required an update. Since 2005, ITLOS has received ten new cases (one of them pending at the time of writing these lines, namely the *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean*) including the first request for an advisory opinion to the tribunal in its plenary composition, *Request for an advisory opinion submitted by Sub-Regional Fisheries Commission.* These cases enrich the analysis already done, help in the verification of the ideas developed and in the formation of new ones. Nevertheless, the reading of this book will show that the most of what was written in 2005 is still valid and confirmed by the new developments. Just in a few cases the approach taken in the work of 2005 has required review.

Needless to say, this monograph on the contentious and advisory jurisdiction of ITLOS has all the features of good scholarly work: adequate methodology, scientific rigor, reference to abundant jurisprudence and selected bibliography and documentation, discussion of opinions and critical analysis. In this respect, the bibliographical and documental research originally done by professor Miguel García at the libraries of the International Tribunal for the Law of the Sea in Hamburg, the Peace Palace in The Hague and several Spanish universities, has been enriched, for this new book, with that carried out at the libraries of the American University Washington College of Law, the Georgetown University School of Law and the Law Library of Congress of the United States, all in Washington DC, among others.

His contacts with ITLOS, along with his participation in meetings and committees of the American Society of International Law, the European Society of International Law, the Association internationale du droit de la mer and in several research Projects, such as MARSAFENET (at the European level) and EUROMAR (at the Spanish national level), and the success of the book of 2005, motivated García-Revillo to prepare this monograph and to do so in English. This time he focuses exclusively on the most important facet of ITLOS: its jurisdiction. In this regard, the author not only addresses general aspects but also tackles challenging topics such as the compulsory jurisdiction of ITLOS, its capacity to deal with non-law of the sea disputes, its jurisdiction regarding disputes between private persons or entities and the advisory jurisdiction conferred upon the full Tribunal by article 138 of its Rules.

### Acknowledgements

In the preparation of this book I have received, over various periods of time, the unselfish help of a number of people to whom I am sincerely thankful.

Firstly, I would like to express my gratitude to those who belong, in one way or another, to the "family" of the International Tribunal for the Law of the Sea through its successive Presidents. Either in ITLOS' premises at Hamburg or in several other places, like the United Nations Headquarters in New York and a number of universities and entities around the world, I have enjoyed the hospitality and availability of the judges and the staff of the Tribunal. Particularly, I would like to express my appreciation to former Judges Treves, Yankov, Caminos, Anderson, Vukas, Nelson, Marsit and Eiriksson, to Judges Akl, Wolfrum, Marotta Rangel, Cot and Jesus, to Judge *ad hoc* and Professor Bernard Oxman and to the memory of those judges who have passed away: Kolodkin, Park and Bamela Engo. I want to also express my particular appreciation to the Registrar of ITLOS, Dr. Philippe Gautier.

I would also like to express my gratitude to those universities and research centers that allowed me to access to their libraries and archives, literally opening their doors for my investigations, like the Universities Complutense de Madrid (Profs. Pastor and Martínez), Cantabria (Profs. Valle and Escobar Hernández) and Navarra (Prof. Espaliú) all of them in Spain, as well as the American Society of International Law (Prof. E. Andersen and Ms. Sheila Ward), the American University Washington College of Law (Profs. D. Hunter and M. Radnovic), the Georgetown University Law Center (Ms. Mariah J. Strauch-Nelson) and the Law Library of Congress of the United States (Ms. L-A. Rupple).

I would like to offer a special mention in these acknowledgements, to the members of the Public International Law Department of the University of Cordoba, Profs. Manuel Hinojo Rojas, Eva Mª Vázquez Gómez and Mrs. María Garrido Ramos, to whom I am particularly thankful for their help and encouragement over these many years.

Finally, and above all, I would like to express my deepest gratitude and affection to my mentor, supervisor and friend, Professor Rafael Casado Raigón, and to my family, for their infinite patience and their unconditional and ongoing support.

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### **Abbreviations and Acronyms**

1994 Agreement, Seabed Agreement Agreement Relating to the Implementation of

Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, signed in

New York, 28 July 1994

1995 Agreement, Straddling Stocks

Agreement

Agreement for the Implementation of the

Provisions of the United Nations Convention on

the Law of the Sea of 10 December 1982 relating

to the Conservation and Management of Straddling Fish Stocks and Highly Migratory

Fish Stocks, adopted on 4 August 1995

The Court of Justice of the European CIEC, CIEU

Communities, The Court of Justice of the

European Union

Division for Ocean Affairs and the Law of the DOALOS

Sea of the United Nations

European Community, European Union EC. EU

European Court of Human Rights ECHR

The International Court of Justice ICI, The Hague Court, the Court

The Rules of the International Court of Justice ICJ Rules, RC ICJ ST

The Statute of the International Court of Justice

The International Seabed Authority ISBA

The International Tribunal for the Law of the ITLOS, the Hamburg Tribunal, the

Tribunal Sea

ITLOS Rules The Rules of the International Tribunal for the

Law of the Sea

The Statute of the International Tribunal for the ITLOS ST. ST

Law of the Sea

The Permanent Court of International Justice PCII

Seabed Disputes Chamber

The seabed and ocean floor and subsoil thereof, Seabed Area, The Area

beyond the limits of national jurisdiction

United Nations Convention on the Law of the

Sea of 10 December 1982

Third United Nations Conference on the Law of

the Sea (1973-1982)

United Nations General Assembly

UNCLOS, the 1982 Convention,

the Convention

Third Conference, 111

Conference, III LOS Conference

UNGA

RGDIP

SYIL

IIN United Nations Organization UNSC United Nations Security Council WG Informal Working Group on the Settlement of Disputes Anuario de Derecho Internacional (University of ADI Navarra) AFDI Annuaire Français de Droit International American Journal of International Law AIILProceedings of the American Society of ASIL Proceedings International Law Annuaire IDI, III. Yearbook Annuaire de l'Institut de Droit International BYTL British Yearbook of International Law Coll. ERM Collection Espaces et Ressources Maritimes Commentary, Virginia United Nations Convention on the Law of the Sea Commentary 1982: A Commentary, Center for Oceans Law and Policy, University of Virginia, Martinus Nijhoff, 1989-2010 (M. Nordquist, Gen. Ed.) EJILEuropean Journal of International Law GYILGerman Yearbook of International Law ICJ Reports, CIJ Recueil Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice, Recueil des Arrêts, Avis Consultatifs et Ordonnances de la Cour internationale de Justice ICLQ International and Comparative Law Quarterly The International Journal of Marine and Coastal IIMCL. Law ILMInternational Legal Materials The Law and Practice of the International Courts LPICT and Tribunals NYILNetherlands Yearbook of International Law Ocean Development and International Law ODIL Revue Belge de Droit International RBDI Recueil des Cours de l'Académie de Droit RCADI International de La Haye (Collected Courses of The Hague Academy on International Law) Revista Española de Derecho Internacional REDI

Revue Générale de Droit International Public

Spanish Yearbook of International Law

Zaö RV

 $Zeitschrift \ f\"ur\ ausl\"and disches\ \"off entliches\ Recht$ 

und Völkerrecht

art.

cit.

doc., docs. ed., eds.

Of.Docs.

p., pp.

para., paras.

res.

SS.

v. vol. article

cited

document, documents

editor, editors

Official Documents

page, pages

paragraph, paragraphs

resolution

et sequentes (and following)

versus volume

#### **Contents**

Foreword XI Acknowledgements XIII Abbreviations and Acronyms XIV

Introduction 1

#### PART 1 Contentious Jurisdiction

## SECTION 1 Ratione Materiae

1	Principal Jurisd	(Mainline Jurisdiction or Jurisdiction						
	on the Merits)	10						

- 1 The Voluntary or Compulsory Nature of the Principal Ratione Materiae Contentious Jurisdiction of ITLOS 10
- The Maximum Extent of the Voluntary Jurisdiction of ITLOS. Can ITLOS Deal with Non-Law of the Sea Disputes? 13
- 3 Ways of Conferring Jurisdiction on ITLOS 29
  - 3.1 Ante controversiam 30
    - 3.1.1 UNCLOS as the Main axle of ITLOS Jurisdiction 31
    - 3.1.1.1 A General view of the Disputes Settlement System of UNCLOS 31
    - 3.1.1.2 Disputes Concerning the Interpretation or Application of Convention 37
    - 3.1.1.3 Disputes Not Submitted to the Settlement System of UNCLOS and Disputes Submitted to it 48
    - 3.1.1.4 Disputes Falling and not Falling under the Compulsory Procedures Entailing Binding Decisions of UNCLOS 77
    - 3.1.1.5 The Position of ITLOS within the Dispute Settlement
      System of UNCLOS: Disputes Falling under the
      Compulsory Jurisdiction of the International Tribunal for
      the Law of the Sea 145
    - 3.1.2 Other Treaties where ITLOS is Envisaged among the Means for Settlement 173
  - 3.2. Post Controversiam 186
    - 3.2.1 Special Agreement (Compromis) 187
    - 3.2.2 Forum Prorogatum 200

2 Incidental (Accessory) Jurisdiction	203
---------------------------------------	-----

- 1 Introdution 203
- 2 Competence de la Competence 205
- 3 Conduct of Proceedings 211
- 4 Incidental Jurisdiction Stricto Sensu 212
  - 4.1 Jurisdiction on Provisional Measures (Articles 25 ST, 290 UNCLOS and 89 to 95 RT) 213
    - 4.1.1 Provisional Measures in General 213
    - 4.1.2 Jurisdiction of the International Tribunal for the Law of the Sea to Prescribe Provisional Measures 216
    - 4.1.2.1 Regulation 216
    - 4.1.2.2 Disputes Concerning the Interpretation or Application of UNCLOS 218
    - 4.1.2.3 Disputes Concerning the Interpretation or Application of other International Treaties 247
  - 4.2 Jurisdiction to Decide through a Preliminary Proceeding on the Allegation of Abuse of Legal Process (Article 294.1 in Relation to Article 297 of the Convention and Article 96 RT) 250
  - 4.3 Jurisdiction to Decide on the Allegation of Preliminary Objections
    (Articles 294.3 UNCLOS and 97 RT) 252
  - 4.4 Jurisdiction to Decide on the Admission or not of a Counter-Claim (Article 98 RT) 254
  - 4.5 Jurisdiction to Decide on a Request for Intervention (Articles 31 and 32 ST, and Articles 99 and 100 RT) 256
  - 4.6 Jurisdiction to Decide on the Discontinuance of the Proceedings as requested by the Applicant (article 106 RT) 259
- Jurisdiction after the Judgment or the Final Decision 261

### SECTION 2 Ratione Personae

- 3 Regulation 267
- 4 States Parties. Special Reference to the European Union 268
- 5 Entities Other Than States Parties. Is the International Tribunal for the Law of the Sea Competent to Deal with Disputes between Private Entites or Persons? 288

## PART 2 Advisory Jurisdiction

- 6 Difficulty in Defining the Advisory Jurisdiction of ITLOS 297
- 7 Regulation 300
- 8 The Advisory Jurisdiction Expressly Conferred on Itlos by the Law of the Sea Convention: The Advisory Jurisdiction of the Seabed Disputes Chamber 301
- 9 Extending the Advisory Jurisdiction of the International Tribunal for the Law of the Sea by Means of Its Own Rules: The Advisory Jurisdiction of Itlos Itself 310

Bibliography 315 Index 336

#### Introduction

It is well known that the United Nations Convention on the Law of the Sea (UNCLOS), signed in Montego Bay (Jamaica) the 10th of December 1982, represented a milestone in the codification and progressive development of both Public International Law and its branch, the international law of the sea. Among its innovations, UNCLOS meant the creation *ex novo* of three international entities, each responsible for handling a particularly sensitive issue: the International Seabed Authority, to organize and control the activities in the so-called Area (arts. 156 and 157), the Commission on the Limits for the Continental Shelf, to make recommendations on State proposals regarding the limits of their continental shelves extending beyond 200 nautical miles (art. 76 and Annex II) and the International Tribunal for the Law of the Sea, to which this book is devoted. The Tribunal is entrusted with the delicate task of playing a key-role in the complex system for the settlement of disputes as set out in the Convention (article 287 and Annex VI).

The establishment of ITLOs became very controversial during the Third United Nations Conference on the Law of the Sea. The main reason was that a number of States considered the proposed institution unnecessary and a source of future problems. Unnecessary, from their point of view, since the settlement of disputes was sufficiently covered by the International Court of Justice, the arbitral tribunals and the non-judicial means also at their disposal for a peaceful settlement of their disputes. And a source of troubles for the future, because a new international tribunal with universal geographic competence, even though constrained to law of the sea issues, might pose a dramatic risk of conflicting jurisdiction and jurisprudence with that of the ICJ and arbitral tribunals.

More than thirty years after those debates, and nearly twenty years after its inauguration, the International Tribunal for the Law of the Sea is a reality and even when the discussion regarding conflicting jurisdiction and conflicting jurisprudence is still active, nobody considers the existence of ITLOs at stake. To date (28 February 2015), 21 cases have been resolved by ITLOs (the last is its Judgment of 28 May 2013 in the M/V Louisa case (Saint Vincent and the Grenadines v. Spain)). In addition, two cases are still pending: the Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) and the Dispute concerning Delimitation of the Marine Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire). These have provided the Hamburg Tribunal with a solid hull, so to speak, clearly resistant to

2 INTRODUCTION

those who at first advocated for not creating it and who subsequently, after its establishment, lobbied for its dismantling.

In order to maintain a coherent structure, certain divisions frequently employed by scholars to explain and study the competence of the International Court of Justice and that of the Permanent Court of International Justice have been used in this book. In particular, I am referring to the "traditional" distinctions between contentious and advisory jurisdiction, jurisdiction ratione materiae and ratione personae, and finally, incidental (or accessory) jurisdiction and principal jurisdiction (mainline jurisdiction or jurisdiction on the merits). The main division has been made between contentious and advisory jurisdiction while all other classifications are used in the form of subdivisions when necessary.

Turning back for a moment to the main division, it is not easy to draw a clear border between contentious and advisory jurisdiction, due to the ongoing transformation that the advisory jurisdiction of the ICJ has been experiencing for years. In this respect, while it is more or less universally accepted that contentious jurisdiction is linked to the idea of a dispute, as it was defined by the PCIJ in the *Mavrommatis Palestine Concessions* Judgment, and to the idea of a judgment, that is to say, a final and binding decision over the dispute (if the requirements for that judgment to be delivered are met), it is not currently as widely accepted to associate the advisory jurisdiction to its original content, that is, a question on a point of law to be answered by means of a non-binding opinion. Nevertheless, insofar as this classification is frequently used by scholars (and as it may help to clarify the contents of this book) I have found it preferable to utilize these terms here and revert back to the precise meaning of the advisory competence in its corresponding part.

Contentious jurisdiction is divided into two major sections respectively focused on material jurisdiction (ratione materiae) and personal jurisdiction (ratione personae). Both types of jurisdiction are directly linked to each other to the extent that they could be considered as two sides of the same coin. Nonetheless, insofar as one tribunal may be competent to deal with a case attending its material aspects and may not be competent to deal with the same case for its personal aspects, and vice versa, it is worthwhile to maintain a distinction that offers the advantage of more clearly delineating some issues where the material or personal aspects of the Tribunal's competence are relevant. On the one side, for example, the maximum range of the Tribunal's voluntary jurisdiction as related to that of its material jurisdiction,

<sup>1 &</sup>quot;A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (Judgment of 30 August 1924, CPJI Series A, n° 2, page 11).

INTRODUCTION 3

and on the other side whether or not this international judicial organ is even open to disputes between private persons or entities as related to its personal competence.

In respect to contentious *ratione materiae* jurisdiction (Part 1, Section 1) a division will be made between principal jurisdiction (or jurisdiction on the merits) that is, jurisdiction which covers the case or dispute submitted for the tribunal's consideration and decision, and accessory or incidental jurisdiction, which is, by exclusion, that which covers issues other than the main dispute, though connected to it, whose resolution is required to continue with the proceedings, to deliver a judgment, to complete or clarify its content, or to execute it.

So as to the principal (contentious *ratione materiae*) jurisdiction of the Tribunal (Chapter 1) its analysis is oriented to two questions that I find critical, both of them linked to its voluntary or compulsory nature:

The first, as derived from the discordance between article 288.2 UNCLOS and article 21 of ITLOS Statute, concerns the maximum extent of its jurisdiction on the merits (principal) in those cases where the parties agree to submit the dispute to it. It poses the question: can the parties, acting by mutual consent, submit any kind of dispute to ITLOS, even if such dispute is totally alien to the law of the sea? Or, on the contrary: even when the parties agree, are there disputes, like those totally alien to the law of the sea, that fall outside of this tribunal's jurisdiction?

The second question refers to the actual range of the compulsory jurisdiction of the International Tribunal for the Law of the Sea. In general terms, it is understood by compulsory jurisdiction of an international tribunal that which enables one of the parties in a dispute to unilaterally submit it to the said tribunal without the explicit consent of the other party or even against its objection, on the basis of a prior consent agreed to before the dispute arises. Therefore, it is necessary to distinguish, among the so-called "ways of jurisdiction", those conferring jurisdiction upon the Tribunal *ante controversiam*, that is, before the dispute arises, from those conferring it *post controversiam*, that is, after the dispute arises, because only in the first case can compulsory jurisdiction of that international judicial body take place.

In respect to the jurisdiction of ITLOS as accepted *ante controversiam,* it is clear that the 1982 Convention, aside from the constitutive treaty and the statute of the Hamburg Tribunal, is by far its main source of compulsory jurisdiction, thus making it convenient to treat it separately in its own block. In this matter I would like to point out that not every issue referred to UNCLOS involves compulsory jurisdiction, much less the compulsory jurisdiction of ITLOS. The complex system for settlement of disputes as organized in the 1982