

The Application of Teachings by the International Tribunal for the Law of the Sea

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Matter commented on: teachings by the ITLOS

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<https://academic.oup.com/jids/article-abstract/11/1/20/5715401>

1. Introduction and methodology

How international judges use academic texts is a topic that attracts a small but steady degree of attention from the international legal academy. This blog post and the related article look at the International Tribunal for the Law of the Sea (ITLOS), an institution that has not yet been the subject of such analysis.

This blog post and the related article focus on the role of teachings in answering specific legal questions that come before an international tribunal. Teachings also have other functions in international law. They help systematise the law and can present broader criticisms and reflections on the law's history and future development. Examining these functions of teachings would require a methodology different from the one used here.

This blog post and the related article cover the 27 cases that were listed on the ITLOS' website as of March 2019: 25 contentious cases and 2 advisory proceedings. Those 27 cases include 14 judgements, 2 advisory opinions, and 79 orders. This gives a total of 95 majority opinions. None of them cites teachings. Individual opinions are included in the study. The 27 cases include 149 individual opinions, where 89 are attached to judgments, 5 to advisory opinions, and 55 to orders.

This blog post and the related article use two methodologies: a quantitative and a qualitative. The quantitative element is a counting of teachings citations in ITLOS opinions. The qualitative element is analysis of the context of those citations, including the statements made and approaches used by the judges.

The ICJ Statute Article 38 does not apply to the ITLOS. The ITLOS has its own applicable law clause, in the United Nations Convention on the Law of the Sea (UNCLOS) Article 293 and the Statute of the International Tribunal for the Law of the Sea (ITLOS Statute) Article 23, which do not mention teachings. It is commonly assumed that the enumeration of sources in Article 38(1) reflects customary international law, which means that all international lawyers, including judges at the ITLOS, 'shall apply' the 'teachings of the most highly qualified publicists of the various nations' as 'subsidiary means'.

That teachings are designated as 'subsidiary means' means that they do not create international law. A 'subsidiary means' cannot be the basis of a legal conclusion, it only can affect how a judge views and decides a legal question. This blog post and the related article uses the term 'weight' to denote this effect. The more teachings affect how judges view and decide legal questions, the more 'weight' they have.

‘Teachings’ are texts that are suited to answer legal questions. Works that instead document facts, or merely reproduce a primary source, fall outside this definition. Dictionaries are not teachings, since they explain how language is used, which is a matter of fact and not law. Works produced by the ILC fall somewhere in between ‘teachings’ and official documents. For the purposes of this article, ILC works are not considered teachings, primarily because of their official status and the involvement of states in their creation.

2. The Overall Weight of Teachings

The most striking fact about teachings in the ITLOS is that no majority opinion has ever cited teachings. The complete absence of teachings from majority opinions is an indication that teachings play at best a minor role in the ITLOS’ decision-making. Teachings could play a bigger role in practice, but that is not reflected in the ITLOS’ written opinions. While ITLOS majority opinions do not cite teachings, they have cited ILC works. Such works have been cited in three opinions, a total of 16 times.

In individual ITLOS opinions, teachings have been cited 250 times 149 opinions. That gives an average of 1.7 citations per individual opinion. A general caveat to this statistic is that the sample size is small, with only 27 cases in total. The numbers are heavily influenced by individual judges and cases. An important judge in that respect is Judge Laing, who is responsible for 127 of the citations (divided among his 6 individual opinions). The average without Judge Laing is 0.9 citations per opinion.

Even the individual opinions that do cite teachings, often simply cite them in a footnote without any further comment. In other words, there is a lack of engagement with teachings. This, in turn, indicates that ITLOS judges assign teachings limited weight. If judges generally assigned significant weight to teachings, they should quote, interpret, debate with, and contrast the words used in teachings, akin to what one might do with a treaty text or an important judicial decision.

There are some examples of ITLOS judges engaging with teachings, but examples constitute only a small minority of all citations, and are only found in the opinions a minority of judges. Combined with the fact that teachings are completely absent from majority opinions, the overall impression given by the text of the ITLOS’ opinions is that teachings are assigned low weight.

3. The Weight of Specific Teachings

When attempting to assess the weight accorded to specific teachings in the ITLOS, a simple measurement is to count which writers are cited most often. Shabtai Rosenne is the most cited writer, with twice as many citations as the second-most cited. Another way to count citations is to look at how *many judges* who have cited each writer. This gives a more complete picture than a pure citation count, especially since the overall numbers are quite small. Rosenne tops this list too, having been cited by seven judges (Laing, Ndiaye, Nelson, Vukas, Anderson, Rao, and Jesus). Behind Rosenne, though, the lists are different. Sztucki, Elkind, Merrills are ranked 2nd, 4th, and 5th by citations, but are cited by only one judge (Laing). Lowe and Oxman have, by contrast, the best citations-to-judges ratio, with four citations across four judges. They share second place in the rankings by the number of judges, despite being only joint 15th when ranked by citations.

The rankings are heavily influenced by Judge Laing, who is responsible for more than half of all citations. Three of the top five writers, and six of the top 19, are cited only by Laing. Laing has cited all but one of the top 19 writers, Andreas Zimmermann being the sole exception.

It is not only interesting to know which *writers* are cited most often, but also which of their *works* that are most popular. Four of the top twelve writers have the Virginia Commentary as their most-cited work. To the extent that it is possible to identify the ‘teachings of the most highly qualified publicists’ according to this study, the Virginia Commentary is it. Looking at the works that are cited, one sees a good mix of works on general international law and law of the sea-specific works. Excluding the works that have been cited only by Judge Laing, i.e. those of Sztucki, Elkind, Merrills, and Oppenheim, the top works of the seven most-cited writers are all law of the sea-specific works.

It is also possible to identify factors that may influence the weight that ITLOS judges accord specific teachings. This is done by analysing how judges explicitly refer to teachings in their opinions, and how they indicate and justify citations.

The quality of specific teachings seems to be important, since it has been emphasised by various ITLOS judges. For example, judges have called teachings they cited ‘leading’ (e.g. *M/V “SAIGA” (No. 2)*, Judge Laing) and ‘well-known’ (*M/V “Louisa”*, Judge Jesus). Other judges have used phrases that focus more on the value of teachings to the specific judge, such as ‘useful’ (*M/V “Louisa”*, Judge Cot), ‘relevant’ (*M/V “Louisa”*, Judge Lucky), and ‘worthwhile’ (*M/V “Virginia G”*, Joint Dissenting Opinion). This points to the intuitive conclusion that judges will assign more weight to teachings when those teachings hold a level of quality that makes them more helpful to the judges. In some cases, judges have referred to the inherent qualities of the teachings, as opposed to their status in legal community or their helpfulness to the judge. Judges have called teachings ‘comprehensive’ (*Bangladesh/Myanmar*, Judge Gao) and ‘persuasive authority’ (*Southern Bluefin Tuna*, Judge Shearer). Judge Shearer wrote in *Southern Bluefin Tuna* that the teachings he cited ‘well explained’ the issue at hand. Similarly, in *Grand Prince*, Judge Nelson noted that a statement from teachings ‘holds good’, i.e. that it was correct. One of the designations as ‘comprehensive’ was made by Judge Gao in *Bangladesh/Myanmar*, where he also added that the work in question was a ‘study of state practice’.

The weight of teachings may increase when multiple writers agree. In the ITLOS, many judges have invoked such agreement. For example, Judge Nelson in *Saiga (no. 2)* cited teachings, and held that these were ‘among others’. In other words, there were an unstated number of other writers who agreed with the ones who were cited, which may increase their combined weight. Judges have referred to ‘at least two jurists’ agreeing on a point, to ‘a considerable literature’ (*Southern Bluefin Tuna*, Judge Shearer), and to a ‘generally recognised’ view (*M/V “Virginia G”*, Joint Dissenting Opinion). In Judge Gao’s opinion in *Bangladesh/Myanmar*, he cited the introduction to an edited study, and emphasised the introduction’s conclusions were ‘reached after consideration of the global and regional papers and the individual boundary reports published in the study’. The conclusions were thus based on the views and contributions of a number of writers, which apparently increased their weight. Judges have also referred to ‘works’, ‘views’, ‘the doctrine’ (*M/V “SAIGA” (No. 2)*, Judge Laing), ‘authors’ (*M/V “Virginia G”*, Judge Sérvulo Correia), and ‘scholarly opinion’ in general (*Bangladesh/Myanmar*, Judge Gao). It should also be added that the *Virginia Commentary*, which is the most-cited work of several of the most-cited writers by ITLOS

judges, is a collective work. The judges' respect for that work may in part stem from its collective nature.

The importance of agreement between writers boils down to the intuitive assumption that multiple writers are more likely to be correct than a single writer, all else being equal. It also matters who the writers are. If the agreement is between high-quality teachings or expert writers, it may have exponentially more weight. This can be illustrated by the opinion of Judge Shearer in *Southern Bluefin Tuna*. He cited 'at least two jurists' (i.e. more than one), who were also 'jurists of note' (i.e. experts).

4. The Approaches of Individual Judges

Judges vary by how often they cite teachings. Judge Laing has cited the most teachings, by a significant margin. He has an average of 22 citations per individual opinion. The next three judges (Sérvulo Correia, Heidar, and Hoffmann) average 12, 4, and 3 citations respectively, but have all written only a single individual opinion. The closest judge with more than one opinion is Gao, who has an average of 3.3 citations per individual opinion. Judge Laing is alone responsible for 127 of the total 250 citations, i.e. around half. Of the total 149 individual opinions, only 46 cite teachings. This is 31 %, roughly one third. Of the 42 judges who have written at least one individual opinion, 23 have cited teachings at least once, while the other 19 have not.

Judges also differ in how much they engage with teachings. Most judges cite teachings as appendages to their argument (often in footnotes), without further comment. Some rare examples of 'engagement' were discussed in Section 2, but they mostly involve only a select few judges, with Judge Laing being heavily overrepresented.

Judges' approaches vary according to their professional backgrounds. Put simply, academics cite more teachings than non-academics. Among the 41 ITLOS judges who have written at least one individual opinion, there are 18 who were primarily academics before their election or appointment to the Tribunal. The remaining 23 judges comprise 16 diplomats, 2 civil servants, 2 politicians, 2 international civil servants, and 1 judge. The academics cite teachings on average 2.4 times per opinion, while the corresponding figure for non-academics is 0.5. Judge Laing was an academic, and he contributes to a significant increase of the academics' citation numbers. Even without him, however, the academics cite teachings twice as often as non-academics (1.0 times per opinion on average).

A higher citation rate for former academics may be a matter of habit, since they are used to citing teachings in their scholarly work. Academics may also be more familiar with the breadth and depth of available teachings, and may moreover have more respect for them, since they and their colleagues have been involved in producing them. It is also possible that judges who were academics have a more 'academic' judicial style, where it is more appropriate and relevant to cite teachings.

Judges can also be compared by nationality, as is done in the table below. One basis of comparison is Western and non-Western judges. For the sake of simplicity, membership of the Organisation for Economic Co-operation and Development (OECD) is used as a rough proxy.

There is an apparent difference, with non-OECD judges citing teachings on average 1.9 times per opinion, while the equivalent number for Western judges is 0.7. However, Judge Laing is from a non-OECD State (Belize), and heavily influences the citation count. Without Judge Laing, non-OECD judges also cite teachings 0.7 times per opinion on average, exactly like the Western judges. Any apparent difference between the two groups is therefore down to a single individual.

Another way to divide the judges is between permanent judges and judges ad hoc. The two groups have similar numbers, with permanent judges citing teachings on average 1.4 times per opinion, and judges ad hoc doing so 1.3 times. However, here too it can be useful to look at the numbers without Judge Laing. He was a permanent judge, and the other permanent judges cited teaching only 0.7 times per opinion on average.

5. Conclusion

Even though it is based on a limited sample of cases, this article has revealed numerous aspects of how the ITLOS and its judge have applied teachings. Teachings seem to be used only as a 'subsidiary means' in the ITLOS, as directed by the ICJ Statute Article 38. Teachings moreover seem to have generally low weight in the ITLOS. This is indicated by the fact that no ITLOS majority opinion has ever cited teachings, which is in itself a significant finding. It is also indicated by the trend that even where teachings are cited in individual opinions, most judges rarely make an effort to 'engage' with them. While teachings generally seem to have low weight, different writers and works are treated differently. Some writers and works seem to have more weight, with the Virginia Commentary being the most significant work and Shabtai Rosenne the most significant writer. When assessing the weight of teachings, judges seem to primarily consider the quality of the text and whether multiple judges agree. There are also differences between the judges. Some judges seem to assign teachings more weight, with Judge Laing being the most significant outlier. The judges' professional backgrounds correlate with how they use teachings, with academics citing teachings more often than non-academics.