ITLOS procedural rules: Between change and stability

Niki Aloupi[*]

1. *Introduction*

ITLOS' procedural rules, its case law concerning their application and interpretation, as well as its working practice constitute a topical example of the 'special balance between the need for change and adaptation to the special interests of the parties and the need to ensure stability of international dispute settlement'. Largely inspired by those of the ICJ, but adapted nevertheless to the special needs of the law of the sea, the very formation of ITLOS' procedural rules illustrate an interesting equilibrium between all kinds of different public and private interests: those of the coastal State interests, the flag State, marine environmental preservation, shipowners interests, *etc.* The interpretation and application of these rules by the Tribunal in its case law and their consequent evolution further reinforce this first impression of balancing.

The particularities of its procedural aspects are the direct consequence of the need for ITLOS to find its place in the international legal order: initially considered by some as a dangerous duplicate of the ICJ leading to potential fragmentation of international law, the Tribunal had to reassure the States as to its *raison d'être.* This, amongst other things, explains why its case law is largely inspired by ICJ's one, in substantial matters as well as in procedural ones; and this trend is one of stability. However, in order to precisely justify its existence as a specialized international tribunal in the law of the sea the Tribunal also needed to adapt to the special needs of the latter and to take into account the special interests of the parties of international law of the sea disputes. This second trend is one of change. Furthermore, in a cross-fertilization process, the modifications and adaptations of procedural rules before ITLOS have

[*] Professor at University Paris II Panthéon-Assas.

influenced in their turn – and will definitely continue to do so – other international courts and tribunals, thus contributing to harmonization of ICJ, ITLOS and arbitral tribunals case law and to the development of international substantial and procedural law.[1]

This is the case for instance concerning jurisdiction to delimit the continental shelf beyond 200 nautical miles: the Tribunal refused to follow the ICJ precedent that considered that any claim of continental shelf rights beyond 200 miles should be reviewed by the Commission on the Limits of the Continental Shelf and accepted to exercise its jurisdiction independently of the Commission. After the ITLOS decision, the ICJ, without explicitly admitting doing so, changed its own case law and accepted its jurisdiction in similar cases.[2] This could also be the case as far as provisional measures are concerned. ITLOS's case law can definitely play an important role in a cross-fertilization process with regards provisional measures conditions, such as 'plausibility of the rights invoked'.[3]

[1] See on this subject: A Pellet, 'The Indispensable Contributions of the Tribunal: A Practictioner's View' in *International Tribunal for the Law of the Sea, The contribution of the International Triubunal for the Law of the Sea to the Rule of Law: 1996-2016* (Brill/Nijhoff 2017) 203-207 and 'Le regard du Conseil sur le Tribunal international du droit de la mer', Contribution to the Round Table 'Le point de vue des praticiens sur le TIDM', in G Le Floch (ed), *Les 20 ans du Tribunal international du droit de la mer* (Pedone 2018) 383-389; Ch Brown, 'The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals' (2008) 30 Loyola LA Intl & Comparative L Rev 219; O Diouf, 'The International Tribunal for the Law of the Sea (ITLOS): Innovations and Prospects in the International Maritime Disputes Settlement System after More than Fifteen Years of Effective Practice' (2014) World Maritime U Dissertations 471; H Tuerk, 'The Contribution of the International Tribunal for the Law of the Sea to International Law' (2007) 26 Penn State Intl L Rev 289.

[2] See ITLOS, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (Judgement of 14 March 2012) para 341-394; ICJ, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, 759 para 319; ICJ, *Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast (Nicaragua v Colombia)* (Preliminary objections, Judgment) [2016] ICJ Rep 100; see also *Arbitration between Barbados and the Republic of Trinidad and Tobago* (Decision of 11 April 2006) XXVII RIAA 147, 209 para 217; the arbitral tribunal had already accepted in principle jurisdiction for delimitation beyond 200 miles, contrary to what another arbitral tribunal had decided in 1992 in *Case concerning the delimitation of maritime areas between Canada and France* (Decision of 10 June 1992) XXI RIAA 292-293.

[3] For the more recent examples of ITLOS 'plausibility' doctrine see *The M/T 'San Padre Pio' Case (Switzerland v Nigeria)* (Provisional Measures, Order of 6 July 2019) paras

Mutatis mutandis, ITLOS's provisional measures judgements ordering the coastal State to release a vessel and its crew after the posting of a bond by the flag State can be imitated by other international courts and tribunals, thus allowing for a procedure alternative to the UNCLOS' 'prompt release' to exist.[4]

These examples go to show that if ITLOS has been influenced by other international courts and tribunals, and especially by the ICJ, its case law can in turn become an influence for them. Such a process is essential for the harmonized development of international law. Thus, in a rather circular way, what was initially sign of change can later become guarantee of stability. In any case, flexibility and adaptation of international procedures according the special needs of the parties and the subject matter at hand can be considered inherent to the settlement of international disputes and to its decentralized consensual nature. This is particularly clearly stated in Article 11 of the Resolution on the Internal Judicial Practice of the Tribunal: 'The Tribunal may decide to vary the procedures and arrangements set out above in a particular case for reasons of urgency or if circumstances so justify.'

This contribution will first examine the formation of ITLOS' procedural rules (2), before turning to their interpretation and application (4). Trying to shed some light on the legal processes that lead to the adoption and enforcement of those rules will allow for a critical appraisal upon the similarities and potential differences between procedural and substantial international rules in the law of the sea (4).

2. *Formation of ITLOS procedural rules*

2.1. *Actors*

The formation of the procedural rules that govern ITLOS is threefold: formation by the States creating the international court (states that

77-110; *Case concerning the detention of three Ukrainian naval vessels (Ukraine v Russian Federation)* (Provisional Measures, Order of 25 May 2019) paras 91-99.

[4] Two such examples exist in ITLOS case law: *The M/T 'San Padre Pio' Case (Switzerland v Nigeria)* (Provisional Measures, Order of 6 July 2019) and *The 'Arctic Sunrise' Case (Kingdom of the Netherlands v Russian Federation)* (Provisional Measures, Order of 22 November 2013).

negotiated and adopted UNCLOS and more globally State parties), by the Court itself (Rules, Resolutions and Guidelines), but also by the parties to a dispute. The formation can be 'formal' when provisions are laid down in an international instrument (Convention, Statute, Rules *etc.*) or 'informal' resulting from the conduct of the States or from the precedents of the Tribunal itself. Thus, there are actual written rules, but also practices that can become rules by force of repetition and will manifestation, or that can function as rules although legally they have not been created as such and do not officially have such a normative value. Both categories, written and unwritten, rules and practices, can be stability- or change-oriented. Of course, it is more probable that the written formal rules will be rather a guarantee of stability, whereas the unwritten ones will be more likely to adapt and thus express or allow a change. However, even written rules can be specially adapted to the needs of the law of the sea, whereas even unwritten ones can be inspired by general principles or by other courts procedural practice, thus aiming towards stability.

Prima facie, it seems that the ITLOS procedural rules are created as any other international rules and that they are adopted by the same actors following similar processes: multilateral/conventional, unilateral (by the Tribunal itself) or even customary ones. It also seems that both hard law and soft law, and even sometimes, as we will see below, non-legal procedural considerations, play a role regarding ITLOS procedure. What is however different with regard to 'ordinary' international rules may be the proportion of each type of creation: in procedural matters before ITLOS soft law and unilateral rules adopted by the Tribunal itself will be essential, seemingly more important than the formal conventional source, whereas for substantial international law this will not always be the case.

Indeed, only a small part of procedural rules has been formally adopted by the States. The rules and guidelines concerning the conduct of cases before the Tribunal are contained in the Convention and the Statute of the Tribunal, but also in the Rules of the Tribunal,[5] adopted on 28 October 1997 (and amended many times, lastly on the 25 September 2018), the Resolution on the Internal Judicial Practice of the Tribunal, adopted on 31 October 1997, and the Guidelines concerning the

[5] For a general presentation of the Rules see R Chandrasekhara, Ph Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Martinus Nijhoff 2006).

Preparation and Presentation of Cases before the Tribunal, adopted on 28 October 1997.

2.2. *Imitation of ICJ procedural rules*

If the process of the formation of ITLOS procedural rules varies according to the type of rule, the content of those rules is largely inspired by ICJ similar provisions and general principles of procedural law. Indeed, many of ITLOS procedural provisions reflect similar provisions of the ICJ Statute and of the ICJ Rules. For instance, in a purely illustrative and non-exhaustive manner, as far as the 'Procedure' provisions of each Statute are concerned, the following are identical or very similar: institution of proceedings rules (Articles 24 of the Statute of ITLOS and 40 of the Statute of ICJ), hearing (respectively Articles 26 and 45/46), conduct of case (respectively Articles 27 and 48), default (respectively Articles 28 and 53), majority for decisions (Articles 29 and 55), judgement (Articles 30 and 56/57), request to intervene (Articles 31 and 62/63). It goes the same for many of the Rules of the Tribunal provisions (Articles 88 ICJ Rules and 105 ITLOS Rules on suspension of proceedings; Article 80(1) ICJ Rules and Article 98 ITLOS Rules on counter-claims procedure even if there is no such practice before the ITLOS; Articles 62 ICJ Rules and 77 ITLOS Rules on request of evidence).

2.3. *Evolution of ITLOS procedural rules due to time laps*

However, ITLOS procedural rules were also created in order to allow it to adapt to the evolution of the international settlement of disputes and to the special needs of the law of the sea and its actors. Indeed, the ITLOS provisions are much more recent and specialized on the interpretation and application of the UNCLOS, and they differ to some points from those concerning ICJ. Several differences are simply due to the fact that the ITLOS provisions were adopted years later than the ICJ ones and, logically, the law of international disputes had evolved since. These changes have thus been reflected into the ITLOS procedural rules.

For instance, Article 294(1) of the UNCLOS provides for summary dismissal of abusive and/or ill-founded applications by an Article 287 body, on request of the parties or *proprio motu*. Article 96 of ITLOS

Rules specifies the procedure for the exercise of this power.[6] Such a procedure has no *textual* basis before the ICJ, although summary dismissal for manifest lack of jurisdiction has been invoked before the Court since the *Nuclear Tests* cases.[7] The fact that before the ITLOS there is an unequivocal textual basis can be considered as a sign of change and adaptation, but since this basis has been inspired by ICJ practice it is also a sign of stability.

In a similar sense, UNCLOS Article 282 concerning *lis pendens* cases,[8] which does not have its equivalent before the ICJ, reflects the new needs of an international legal order much more fragmented and with much more special international law branches. That being said, the way the ITLOS has interpreted and applied this provision is itself a sign of adaptation and change as we will see below. Moreover, the 'six-month rule' adopted by the Tribunal (Article 59(1) of the Rules) for the filing of the first round of pleadings was actually proposed at the fiftieth anniversary ICJ colloquium[9] in order to avoid 'the leniency shown by the ICJ in fixing and enforcing time-limits'. In this case, ICJ's experience and practice have served as a counterexample to allow ITLOS to innovate successfully, since its time-limits have never exceeded six months. This goes to show that taking the Rules of the ICJ as basis for the formation of the ITLOS Rules went both ways: in many instances in order to 'copy' from

[6] See the International Law Association, Committee on the Procedure of International Courts and Tribunals, *Procedure of International Courts and Tribunals Interim Report* (1 May 2018, corrected 12 August 2018) Interim Report, finalized by H Ruiz Fabri, Sh Hamamoto, Ph Sands, A Savarian, F Fontanelli, <http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_InternationalCourts.pdf>.

[7] See ICJ, *Nuclear Tests (New Zealand v France) (Australia v France)* (Provisional Measures, Order of 22 June 1973) [1973] ICJ Rep 99, 100 para 6, 135-137 para 7, 141-142 paras 32-34; *Legality of the Use of Force (Yugoslavia v Spain)* (Provisional Measures, Order of 2 June 1999) [1999] ICJ Rep 761, 768-783 paras 19-33; *Legality of the Use of Force (Yugoslavia v United States of America)* (Provisional Measures, Order of 2 June 1999) [1999] ICJ Rep 916, 923-925 paras 19-33; *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Burundi)* (Order of 30 January 2001) [2001] ICJ Rep 3, 4.

[8] Art 282 reads: 'If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.'

[9] See (n 6) 19.

the ICJ, in other in order to avoid its problems, such as the slowness and the expensiveness of its justice.

2.4. *Evolution of ITLOS procedural rules due to the special needs of the law of the sea*

Most of the procedural rules whose formation is symptomatic of change and adaptation of the ITLOS are due not to the time laps between the ICJ creation and the ITLOS creation, but to the special needs of the law of the sea, which have been taken into account by the actors that created those procedural rules. It is not possible to be completely thorough in the limits of this contribution, but some of the ITLOS special procedural rules are topical as to its adaptation to the law of the sea special needs.

First, Article 292 of the UNCLOS on prompt release of vessels and crews is emblematic of the special needs of the law of the sea and of the necessity to find a procedure able to balance between flag State and coastal State interests, but also vessels' shipowners. This procedure, close but not at all identical to diplomatic protection or protection of the vessel by the flag State, is without any doubt a very original and interesting one. Para 2 stipulates: 'The application for release may be made only by *or on behalf* of the flag State of the vessel', thus vesting individual shipowners with the right to file application for release. Such a possibility for a private entity to file an application in an interstate procedure is extremely stimulating and goes to show that the pragmatic needs of the law of the sea (namely the fact that 'flag of convenience' States may not be proactive enough to file for prompt release themselves) have been taken into account.[10]

Of course, the special needs of the law of the sea are also considered by all the special procedural rules concerning the Seabed Disputes Chamber and the other Special and *ad hoc* Chambers (UNCLOS Articles 186-191; ITLOS Statute Articles 14 and 15, as well as 35-40; Rules Articles 23-31 and 115-123). Rules on the jurisdiction of the Seabed Chamber, on the participation and appearance of sponsoring States in proceed-

[10] Indeed, only three of ITLOS prompt release cases have been directly brought by the flag State of the detained vessel — the *Volga*, *Hoshinmaru*, and *Tomimaru* cases.

ings, on its advisory opinions and on the proceedings before it in contentious cases are all specially adapted to the particular nature of the positive internationalization of the Area and of its legal status as common heritage of mankind. Notably, these procedural rules must adapt to the existence of the Authority, its powers and functions. Contrary to the purely interstate nature of ICJ proceedings, the Seabed Chamber proceedings 'shall be open to the States parties, the Authority and the other entities referred to in Part XI, section 5' (*i.e.* Enterprise, State enterprises and natural or juridical persons which possess the nationality of States parties or are effectively controlled by them or their nationals, when sponsored by such States). Furthermore, as far as special chambers are concerned, Article 15 of the ITLOS Statute requires that a chamber be constituted with the 'approval' of the parties, whereas ICJ Statutes and Rules are silent on the composition of *ad hoc* chambers.

Moreover, procedural rules concerning experts (UNCLOS Article 289, Rules Article 15 and Article 42) before the ITLOS are more detailed than those of the ICJ, probably because of the high technicity and scientific importance of legal issues raised by the application of the UNCLOS.

Finally, except for these special procedural rules laid down in the UNCLOS, ITLOS Statute or Rules and aiming to adapt the international settlement of disputes to the needs of the law of the sea, the Statute vests in the Tribunal and the parties to the disputes the power to create new rules of procedure when deemed it necessary. Indeed, according to Article 16 of the ITLOS Statute, echoing Article 30 of the ICJ Statute: 'The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure' (see also Article 50 of the Rules).[11] Furthermore, the parties to a dispute can propose modifications to the procedural rules that can be adopted if deemed 'appropriate' by the ITLOS (Rules Article 45[12] and Article 48[13]). Such provisions allow for

[11] Art 50 reads: 'The Tribunal may issue guidelines consistent with these Rules concerning any aspect of its proceedings, including the length, format and presentation of written and oral pleadings and the use of electronic means of communication'.

[12] Art 45 reads: 'In every case submitted to the Tribunal, the President shall ascertain the views of the parties with regard to questions of procedure. For this purpose, he may summon the agents of the parties to meet him as soon as possible after their appointment and whenever necessary thereafter or use other appropriate means of communication.'

[13] Art 48 reads: 'The parties may jointly propose particular modifications or additions to the Rules contained in this Part, which may be applied by the Tribunal or by a chamber

change and adaptation on a case by case basis and thus become a guarantee of great flexibility as far as procedural rules and practices are concerned.

For instance, in the recent judgement of the Tribunal rendered on 10 April 2019 in the *Norstar* case we can read in para 12: 'In accordance with article 45 of the Rules of the Tribunal (hereinafter 'the Rules'), on 28 January 2016, the President of the Tribunal held consultations with the representatives of the Parties at the premises of the Tribunal to ascertain their views with regard to questions of procedure in respect of the case. During these consultations, the President indicated to the Parties that, in light of article 108, paragraph 1, of the Rules, the case would be considered by the full Tribunal.' And further in para 43: 'On 26 June 2018, the President of the Tribunal held telephone consultations with the Agents of the Parties to ascertain their views regarding the conduct of the case and the organization of the hearing'. *Mutatis mutandis,* in a the even more recent case *concerning the detention of three Ukrainian naval vessels*, in the Tribunal's order rendered on 25 May 2019, para 6 reads: 'On 23 April 2019, pursuant to articles 45 and 73 of the Rules, the President of the Tribunal held consultations by telephone with the Agent of Ukraine and Mr Evgeny Zagaynov, Director, Legal Department of the Ministry of Foreign Affairs of the Russian Federation, to ascertain the views of Ukraine and the Russian Federation with regard to questions of procedure.'

Adaptation on a case by case basis is also possible through the judgements of the ITLOS for every particular dispute or advisory opinion brought before it. However, the interpretation and application of procedural rules in this or that case can create precedents that will be followed by the Tribunal as judicial practice. Such a practice, although not officially a mandatory rule (since there is no *stare decisis* principle before ITLOS), creates a precedent that is generally followed *as if* it was an actual rule, thus further contributing to the adaptation of ITLOS to the special needs of the law of the sea.

if the Tribunal or the chamber considers them appropriate in the circumstances of the case.'

3. *Interpretation and application of procedural rules by ITLOS and before ITLOS*

3.1. *Interpreter(s)*

As far as interpretation and application of procedural rules are concerned, once again, we can *prima facie* consider that the processes are similar to the ones about ordinary substantial rules and follow the same methods. But this assertion can also be nuanced. Contrary to other rules, which have as their principal interpreters States themselves (since in order to apply the rules of which they are the recipients they interpret them constantly), ITLOS procedural rules have as their main interpreter the Tribunal. It is the judges themselves who apply and interpret them (in addition to often having been the ones to create them). This gives them a more important margin of interpretation than for other rules and thus renders procedural rules' interpretation and application special. Therefore, whereas for ordinary rules unilateral interpretations by the rules creators are all equal between them even when contradictory, for procedural rules such a scenario will be rare: either the Tribunal that adopted the rules interprets them thus delivering an 'authentic interpretation' or the Tribunal interprets the rules adopted by the States thus delivering a 'third party interpretation'.

3.2. *Imitation of ICJ case law and trends of stability before ITLOS*

Procedure and working practice by and before the ITLOS are also balanced between stability and change. In a similar manner as the actual creation of procedural rules, their interpretation and application can be symptomatic of both a need for stability in the international settlement of disputes and a requirement for adaptation and change.

We saw above that a great number of ITLOS procedural rules are inspired by ICJ ones and follow the same general orientations. *Mutatis mutandis,* interpretation and application of above said rules by ITLOS often follows and makes references to PCIJ and ICJ case law, as well as general principles of international settlement of disputes law, notably as reflected in ICJ case law.

These stability and predictability trends are obvious as far as jurisdiction, admissibility, obligation to exchange views,[14] proof[15] or even provisional measures are concerned. It is the same for the Annex VII arbitral tribunals. The Tribunal constituted in the *Mox Plant* case for instance, concerning its power to grand provisional measures other than those requested, referred to ICJ's and ITLOS's case law and asserted: 'Although the language of article 290 [of UNCLOS] is not in all respects identical to that of article 41 of the Statute of the International Court of Justice, the Tribunal considers that it should have regard to the law and practice of that Court, as well as to the law and practice of ITLOS, in considering provisional measures (…)'.

Otherwise, the absence of non-State actors[16] before the ITLOS, as it is the case before the ICJ is also revelatory of the 'stability' or 'imitation' trend, since once again the ITLOS follows the ICJ practice, although the non-State actors presence is actually possible for ITLOS, given that there is no constraint in its Statute similar to the one before the ICJ. Nevertheless, in this case it seems that 'stability' may become a synonym of international tribunals' rigidity and inflexibility concerning non-State actors.

As far as *amicus curiae* is concerned, Article 31(3) of the ITLOS Statute renders judgments binding upon intervenors, and because of Article 103(4) of the Rules[17] third State intervention seems unlikely. The absence of an *amicus curiae* mechanism, the absence of a practice of intervention before the ITLOS and the absence of non-State actors' participation are all proof that sometimes stability is more easily reached than change in traditional interstate settlement of disputes *fora.*

[14] See MJ Aznar, 'The Obligation to Exchange Views before the International Tribunal for the Law of the Sea: A Critical Appraisal' (2014) *Revue Belge de Droit International* 237-254.

[15] But the Tribunal is ready to show flexibility and adaptability when necessary. See ITLOS, *The 'Norstar' case (Panama v Italy)* (Judgement of 10 April 2019) paras 87-99.

[16] Prompt release procedures remain nevertheless interstate since the shipowner acts 'in the name of the flag State'. See *The 'Arctic Sunrise' case (Netherlands v Russia*) (Provisional Measures, Order of 22 November 2013) [2013] ITLOS Rep 230, 234 paras 15-18.

[17] Art 103(4) reads: 'The intervening State Party shall not be entitled to choose a judge ad hoc or to object to an agreement to discontinue the proceedings under article 105, paragraph 1.'

3.3. *Evolution of its case law and trends of change before ITLOS*

What is more interesting however, because it goes to show the Tribunal's discretionary margin in adapting its procedural rules to the special needs of the law of the sea, is the illustration of those cases in which the ITLOS did not follow ICJ precedents (as for instance concerning its jurisdiction to delimit the continental shelf beyond 200 nautical miles presented above) or general principles of international procedural law, as well as those cases in which it used such precedents and principles, but it adapted them to the special needs of the law of the sea. Indeed, ITLOS case law has contributed to the formation of new trends concerning procedural rules. Some rather blatant examples must be underlined here.

First, the advisory jurisdiction of the full Tribunal which, contrary to the one of the Seabed Disputes Chamber (UNCLOS Article 191), is not explicitly enshrined in its constituent instrument.[18] It is the Tribunal itself, in its Rules (Article 138), that asserted that it 'may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion'. Despite strong objections of various States, the Tribunal in the case of the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission* (2015) considered that it had indeed a broad advisory jurisdiction on the basis of Article 138 (in spite of the high threshold[19] that the actual conditions laid down by this article set) and found that there were no compelling reasons to exercise its discretionary power to dismiss the request. Such an innovative way of acquiring a jurisdiction, that neither UNCLOS nor its Statute explicitly recognized, is clearly revealing of the discretionary margin the Tribunal has. The ITLOS' interpretation[20] departs from the ICJ's one, since 'reference to "all matters" in Article 21 ITLOS Statute provided an "implicit" legal basis for the competence of the full Tribunal to

[18] See T Ruys, A Soete, 'Creeping Advisory Jurisdiction of International Courts and Tribunals? The case of the International Tribunal for the Law of the Sea' (2016) 29 Leiden J Int L 155-176.

[19] See, R Wolfrum, 'Advisory Opinions: are they a suitable alternative for the settlement of international disputes?', in R Wolfrum, I Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013) 35, 54.

[20] See ITLOS, *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission* (Advisory opinion of 2 April 2015) paras 52-59.

issue advisory opinions', whereas the relevant provisions of the PCIJ and ICJ Statutes (after which the provision was modelled), notably Article 36(1) of the ICJ Statute, have been interpreted by the Court as referring to contentious procedures submitted to the Court pursuant to the consent of the parties involved. In its 2015 advisory opinion, in order to justify the remoteness from ICJ precedent, the ITLOS reminds its *Mox dictum* according to which: 'the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*'.[21]

Nevertheless, whereas the affirmation of the advisory jurisdiction *per se* is rather audacious, the procedural rules that the Tribunal applied remain constant and follow ICJ's case law as far as matters of admissibility as to what constitutes a legal question[22] and of the Tribunal's power to dismiss the request[23] are concerned. However, one can argue that this 'careful cherry-picking from the ICJ's case-law'[24] constitutes an effort by the Tribunal to justify its decision and reassure the States.

As far as adaptation to the special needs of the law of the sea is concerned, we can also mention the way that the ITLOS has used provisional measures procedural rules in order to allow for the release of vessels in cases not falling under Article 292 of UNCLOS[25]. The usefulness of the provisional measures procedure in this regard is evidenced in three recent cases: the *ARA Libertad Case,* the *Arctic Sunrise Case* and the *San Padre Pio Case*. In the latter two, the Tribunal ordered the release of the vessel and its crew, but only after a bond posting by the flag State, thus creating an alternative procedure to the prompt release one as laid down by the UNCLOS.

[21] ibid para 57.

[22] ibid paras 64–65, where the Tribunal confirmed that the questions were 'framed in terms of law'. The Tribunal referred to the relevant passages of the prior 2011 advisory opinion of the Sea-Bed Dispute Chamber (*Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Advisory opinion of 1 February 2011)), which in turn quoted the established case law of the ICJ.

[23] See references made by the ITLOS to the PCIJ and ICJ case law para 71 of the 2015 advisory opinion (n 20).

[24] See T Ruys, A Soete (n 18).

[25] S Trevisanut, 'Twenty Years of Prompt Release of Vessels: Admissibility, Jurisdiction, and Recent Trends' (2017) 48 Ocean Development & Intl L 300-312.

Moreover, the Tribunal may prescribe provisional measures not only to preserve the respective rights of the parties to the dispute, but also to prevent serious harm to the marine environment. The Tribunal's power to prescribe provisional measures has been invoked in several cases dealing with the protection of the marine environment, such as the *Southern Bluefin Tuna* cases, the *Mox Plant* case and the case concerning *Land Reclamation by Singapore in and around the Straits of Johor*. According to Article 95 of the Tribunal Rules: 'each party shall inform the Tribunal as soon as possible as to its compliance with any provisional measures the Tribunal has prescribed. In particular, each party shall submit an initial report upon the steps it has taken or proposes to take in order to ensure prompt compliance with the measures prescribed'. The Tribunal also has the possibility to send the notices relating to the prescription, modification, or revocation of provisional measures, 'not only to the parties to the dispute, but also to such other States Parties to the Convention it considers appropriate'.[26] In short, the way the ITLOS handles provisional measures cases reveals a pragmatic approach that aims at balancing between State interests and the need of preservation of marine environment.

The Tribunal *lato sensu* (including Annex VII arbitral tribunals) also innovated in its case law concerning *lis pendens* cases. Although it interpreted Article 282 UNCLOS in a very restrictive way in both the *Southern Bluefin Tuna* cases[27] and the *Mox Plant* case, the arbitral tribunal in the *Mox Plant* case innovated and showed its flexibility and adaptation to the current international legal order. Without applying Article 282 and without recognizing a non-existing customary international law of *lis pendens,* it decided to suspend its procedures waiting for the ECJ to decide upon the case with a very interesting – yet not legal – argument that deserves to be here quoted *in extenso*: 'In the circumstances, and bearing in mind considerations *of mutual respect and comity* which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the

[26] See ITLOS, *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999).

[27] ibid

problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties. For these reasons, the Tribunal has decided, in exercise of its powers under article 8 of the Rules of Procedure, that further proceedings on jurisdiction and the merits in this arbitration will be suspended'.[28] Such a solution based on comity and good administration of justice is not a procedural *legal rule,* but certainly constitutes a very interesting procedural *practice* that can inspire other international judges. Furthermore, it goes to show the discretionary margin that the judges preserve: without creating a legal precedent, and without interpreting *lato sensu* Article 282, they can still suspend a procedure when this feels appropriate.

Finally, more technical procedural matters have also benefited from the ITLOS working practice, that can contribute to the development of general procedural international law. This is the case of initial deliberations (Article 68 ITLOS Rules, Article 5 of the Resolution on the Internal Judicial Practice of the Tribunal as applied in the advisory opinion of 2011[29] and in the *Bangladesh/Myanmar Delimitation* case[30] as well as more recently in the *Norstar* case[31]) and for the pre-hearing questions (Article 76 of the ITLOS Rules as applied in the *Bangladesh/Myanmar Delimitation* case[32] and in the *Norstar* case[33]).

[28] *Mox Plant* Case *(Ireland v United Kingdom*) (Order no 3 of 24 June 2003) paras 28-29 (emphasis added).

[29] Prior to the opening of the oral proceedings, the Chamber held initial deliberations on 10, 13 and 14 September 2010 (see the 2011 advisory opinion (n 22) para 18).

[30] In accordance with art 68 of the Rules, the Tribunal held initial deliberations on 5, 6 and 7 September 2011 to enable judges to exchange views concerning the written pleadings and the conduct of the case (see the 2012 judgment (n 2) para 21).

[31] In accordance with art 68 of the Rules, prior to the opening of the oral proceedings, the Tribunal held initial deliberations on 6 and 7 September 2018 (see the 2019 judgement (n 15) para 51).

[32] On 7 September 2011, the Tribunal decided, pursuant to art 76(1) of the Rules, to communicate to the Parties two questions which it wished them specially to address (see the 2012 judgement (n 2) para 21).

[33] On 9 September 2018, the President held consultations with representatives of the Parties to address a number of procedural matters pertaining to the oral proceedings. During the consultations, the President communicated to the Parties a list of questions which the Tribunal wished the Parties specially to address, in accordance with art 76(1) of the Rules (see the 2019 judgement (n 15) para 52).

4. *Differences with 'ordinary' international rules*

The examples that presented in this contribution showed that, to some extent, ITLOS' procedural rules do differ from ordinary rules of the law of the sea, as far as their creation but also their interpretation and application are concerned. The observed differences have a twofold explanation: relative to the legal process of their creation, interpretation and application, on one hand, and to their *rationale* or *raison d'être*, on the other.

4.1. *Legal creation process*

From a formal point of view, procedural rules differ from substantial ones because they depend much more on the Tribunal and its practice than on the States and their practice. Indeed, the Tribunal is the main creator, applicator and interpreter of those rules (in the same way as States are the main creators, applicators and interpreters of ordinary rules). Thus, the formation of procedural rules does not always follow the usual normative pattern of substantial rules. Indeed, a great number of procedural rules – even if they are not all formally, normatively, 'rules' but some of them are rather practices followed with such constancy that they function as if they were rules – have been created solely by the Hamburg judges, and not by the States parties to the UNCLOS. This of course can also be the case for substantial 'rules', when they are not provided for in the UNCLOS but have been 'created' thanks to the ITLOS and other international courts and tribunals case law and repeated precedents. The method of maritime delimitation between two exclusive economic zones or two continental shelfs constitutes of course the perfect example of such a process. But this will be the exception for ordinary rules, whereas it seems to be much more recurrent for procedural rules.

4.2. *Rationale*

Moreover, ITLOS procedural rules also differ from substantial rules of the law of the sea because they aim at different things: if the latter are mainly intended to allow for optimal public order of the oceans, balancing between State individual interests and more global, humanity or en-

vironmental ones, the former aim more modestly to achieve optimal international proceedings likely to balance between different conflicting interests of the parties to a dispute and to assure an effective and efficient mechanism of dispute settlement. This difference of objective and of *raison d'être* explains that the Tribunal has a more active role in the development of procedural rules. Indeed, to succeed at such a delicate task, the Tribunal must conserve an important discretionary margin, much more so than with ordinary rules when it is more clearly limited by the will of States and applicable law. This discretionary margin, that some of the examples presented in this contribution have brought to light, allow the Tribunal to remain flexible and to adapt its procedure to the special needs of the law of the sea.

Thanks to it, the contribution of the ITLOS to the settlement of disputes international law from a procedural point of view cannot be minimized. The Tribunal managed that far to find a certain balance between stability and change as far as procedural rules are concerned. Much more can still be done in that perspective. In the terms of the ILA Committee on the Procedure of International Courts and Tribunals, 'Times of challenge also bring opportunity. (…) The ITLOS remain a part-time tribunal with a low number of contentious cases brought before it. In exercising [its] powers to reform [its] procedures and working practices, […] the Tribunal can strive to attract States to participate in greater numbers'.[34]

[34] See the conclusions of the report (n 6) 32.