Final Remarks and Conclusions

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Now it falls upon me, according to the programme, to formulate final remarks including conclusions, which is more or less a hopeless undertaking considering the very rich and controversial discussion we had.

The topic for us was 'International Dispute Settlement: Room for Innovations?'. What actually is international dispute settlement? As a starting point, it consists of an institution. We did not touch upon the institutional side of international dispute settlement and we equally did not discuss the merits in standing courts or arbitral tribunals and the alternatives thereto.

International dispute settlement also concerns procedure. Here, we touched upon the role of counsel in our third panel, and we discussed the procedure as such, particularly in the first panel with Georges Abi-Saab and David Unterhalter explaining the WTO and the particularities of that procedure. The views were mixed as to whether it was possible to generalize some of the WTO particularities. Apart from that we heard some criticism on the WTO system as such.

Several panels concentrated on judges and arbitrators. Several issues were discussed in this context – the nomination or selection procedure, the influence of parties on the selection, the qualification of judges and arbitrators (lawyers or also economists), the question of impartiality and independence. One may identify two conflicting tendencies as far as selection and independence is concerned. There seems to be a growing interest of States to control the selection process and at the same point there is an increasing interest in safeguarding the independence of judges or arbitrators.

A further point concerns deliberations. Again, this was touched upon in the first panel by David Unterhalter and Georges Abi-Saab, both of whom explained the deliberations and how conclusions were reached. It

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was done in the advisory opinion panel, but it was also touched upon, briefly at least, in the third panel dealing with counsel. Here, the interaction of the counsel and the judges may result in deliberations. It was considered as the merit of the advisory opinion by this particular panel, namely that here the deliberations are most open, the hearing is all embracing, whereas in the contentious cases, the hearing is less open or less comprehensive and the deliberations are definitely behind closed doors.

Let me come to the next point, which is particular for dispute settlement decisions or judgments or advisory opinions. In my view one has to take a differentiated view depending on the format of the various decisions taken by international courts or tribunals. Judgments in contentious cases are meant to decide legal disputes whereas the interpretation of particular norms is a side aspect. One should not forget that in these situations the court in question deals with facts as well as norms. An advisory opinion constitutes an interpretation based on law. And I could even go further in provisional measures cases. Here again you have a different set of decisions.

We have not touched upon a very interesting issue, namely to what extent can provisional measures be used as a mechanism to finally settle a legal dispute. This is an approach pursued in some national systems and there are certain examples, particularly in ITLOS in the *Land Reclamations* case, where a provisional measure has been used to come to a final decision. This approach has certain merits: being quick, not overdoing it with the facts and very much concentrating on the law.

What was very much discussed – nearly in all panels – is the impact of decisions (judgments or advisory opinions) on international law. Is it lawmaking as Armin von Bogdandy has put it? Or is it interpreting law? Is it further developing law? This was referred to by Marjan Ajevski in his paper on the *stare decisis* question. This is an element which is worthwhile considering in detail. Here we should be more specific. I believe that certain questions of the courts, the tribunals, have different implications for the development of international law. Advisory opinions certainly differ from judgments. In my personal view one should be more careful in declaring decisions by international courts or tribunals as lawmaking. Although the impact on the development of international law is beyond dispute, it significantly differs from lawmaking through international agreements. The impact of international court decisions on international law is always accessory which means it is developed in the context of existing norms whereas concluding a new international treaty is more freestanding.

Finally, let me come to the beneficiaries of decisions of international courts or tribunals. If the beneficiaries are, as Francisco Orrego Vicuña put it, increasingly individuals, then this brings us closer to the question Armin von Bogdandy has raised, namely the question of legitimacy. There is a very strong interconnection. If the decision is only referring to States and only States are beneficiaries, then the question of legitimacy puts itself in a different fashion than when we have individuals or the privatization of cases. Sure, international criminal courts are a totally different system, where it is always the individual which is facing the judgment.

Perhaps we have not come to a conclusion how we should change the system or whether we should change it at all, but one thing we should certainly consider is to make use of the very flexible system of dispute settlement existing. International dispute settlement is more than just the ICJ; it is a variety of dispute settlement mechanisms ranging from the ICJ to arbitration and contains very different facets. These systems are to some extent competing. The various institutions have several means to modify the procedure as to accommodate the interests of the parties and thus to render the very system more competitive. The ICJ has introduced some modifications over the years and Art. 138 of the Rules of Procedure of ITLOS providing for the possibility of advisory opinions should be seen from this point of view.