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## Summary

*Plurality of Courts – Unity of Procedure?*

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International courts and tribunals have become a significant phenomenon of international law. Many scholars think that they constitute the final cornerstone of the evolution of a modern international legal order. Important legal debates of the last years, like the debate held over the paradigm of 'constitutionalisation', would be unimaginable without international judicial dispute settlement. International courts and tribunals become, according to this perception, the incarnation of progress in international law, the decisive steps on the path towards a fully fledged international legal order. Only if one bears this (presumably) exceptional role of the international judiciary in mind does the current discourse on unity and fragmentation of international law (and of international judicial dispute settlement) become understandable.

Traditional forms of dispute settlement, the classical modes of arbitration in particular, had been fragmented by definition. Only with the creation of the PCIJ in the context of the League of Nations did the idea of an (institutional) unity of international judicial dispute settlement become conceivable. The promised utopia of an 'international community' had nourished visions of a centralised, obligatory judicial dispute settlement in international relations. Such a 'New World Order', however, proved to be a mere utopia – not only in the inter-war period, but also after 1945. Nevertheless, the ICJ remains the prototypical institution of global judicial dispute settlement, notwithstanding its very limited scope of action. The ICJ constitutes the central institution of dispute settlement for certain sectors, but enjoys only a symbolic role, although it also serves as a source of inspiration in a lot of other sectors of international law.

The reduction of procedural complexity and the minimisation of the time needed for finalising a procedure argue in favour of constructing special institutions of judicial dispute settlement in a number of highly technical fields. In addition, arguments of professional specialisation speak in favour of creating special institutions of judicial dispute settlement. In each special case, there were cogent arguments that convinced states to create new, specific institutions and procedures of judicial dispute settlement – instead of the (at least in theory always possible) alternative to submit cases to the ICJ. The multiplicity of international courts and tribunals accordingly is an expression of the growing functional differentiation in international law.

International law thus must relinquish any vision of an overarching legal unity achieved through centralised dispute settlement. International law accordingly experiences a process which has transformed national legal orders fundamentally: functional differentiation expands the risks of contradictory rule-making, of conflicts between partial legal orders – conflicts which might no longer be solved in a systemic way, at least as long as no central institution of decision-making exists. 'Unity of the legal order' proves not to be a pre-existing characteristic of legal orders, but must be achieved as a result of legal institutions and procedures.

Such a 'unifying' factor may not be found in legal procedures as such – the specific modalities of procedural law vary a lot even between the various institutions of international

judicial dispute settlement. The different functional logic of the various systems of international judicial dispute settlement leads to divergent modes of procedure. The needs served by the WTO system of dispute settlement are different from the needs served by a typical ICJ procedure. If phenomena of convergence in procedure may be detected at all, they may be found in the various 'families' of mechanisms of judicial dispute settlement reacting to similar functional necessities – notwithstanding the fact that the different rules of procedure follow the divergent functional logics of the specific systems. Such a differentiation does not exclude convergence in basic issues. Estoppel, transparency, fundamental fairness and due process are always referred to as basic guidelines of procedure in the jurisprudence of all organs of international judicial dispute settlement, even if the concrete deductions from such principles may vary quite a lot. Fundamental similarities seem to exist in particular concerning the rules of evidence. Procedural mechanisms of creating unity, however, are underdeveloped in international dispute settlement. The statutes and rules of procedure of most institutions of judicial dispute settlement neither know a clear rule of *lis pendens* nor provide for clear rules of precedent concerning other mechanisms of dispute settlement. 'Legal pluralism' in international law argues against precise rules of precedence.

The proposals made by certain observers – in particular by the judges of the ICJ – must be judged as unconvincing. The proposed strengthening of the ICJ's role as appellate body vis-à-vis the ordinary bodies of judicial dispute settlement would negate the functional differentiation between the existing bodies of international judicial dispute settlement – and thus would endanger the acceptance of the various mechanisms of dispute settlement. In comparison one might conclude that a reference procedure would fit much better into the international legal system than any model of hierarchical control of dispute settlement bodies; but even the chances for such a reference procedure are scarce. As a result, a kind of 'unity of international law' can only be achieved in pragmatic terms. Mutual respect and cooperation are needed in the relationship between the various organs of international judicial dispute settlement. The notorious 'relationship of cooperation' sets into motion a dialogue of international courts and tribunals. The experiences of the last years demonstrate that the preconditions for such a path are not unattainable. Most organs of international judicial dispute settlement are aware of the problems and try to avoid contradictory judgments. Some of the examples referred to in the usual scenarios of conflict are more an expression of 'constructive dialogue' on legal questions than expression of a conflicting decisional practice. Such a 'constructive dialogue' mirrors the decentralised character of the international legal order, with its fragmented network of 'island solutions'. The fragmentation is useful to a certain degree, since it secures margins of experimentation and evolution necessary to achieve concrete legal solutions adapted to the requirements of the individual situation.