Double Degree of Jurisdiction in International Adjudication

A Journey through the Side Roads of International Law

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Abstract

This review essay discusses Loris Marotti’s “Il doppio grado di giudizio nel processo internazionale”. The book represents an important contribution to the study not only of the specific topic of double degree of jurisdiction in the international legal order but also of international adjudication at large. The purpose of the present essay is to highlight some of the most valuable aspects of the book, namely, the conceptual model adopted, the “functional” approach chosen to compare a variety of mechanisms of double degree of jurisdiction and the unveiling of the multi-layered tensions stemming from their establishment. The essay will conclude with some reflections on the current and prospective relevance of the theorised conceptual framework.

Keywords


1 A Study of Double Degree of Jurisdiction in International Adjudication in a Time of Challenges and Crises

It is trite that a peculiar feature of the international legal order lies in the absence of a general system of legal remedies against incorrect or “unfair” judgments, given that the existence of “appellate” mechanisms is exceptional. It is also common knowledge that this lack is to be traced back to the roots of
international adjudication, which are to be found in the importance of maintaining peace and security. In this connection, the need to reach a final decision as fast as possible and to preserve its stability holds a peculiar value. The latter, coupled with the absence of a centralised, institutionalised and hierarchical judicial structure, prevented the emergence of a fully-fledged system of double degree of jurisdiction in the international legal order.

Nonetheless, the establishment and functioning of “appellate” mechanisms is by no means a marginal phenomenon in contemporary international law: not only can one witness their growing presence in the context of the so-called proliferation of international courts and tribunals, but those mechanisms also seem to have played a crucial part in the current dynamics characterising international adjudication, either because of their very role in several episodes of “crisis” of existing dispute settlement systems or because they were part of the discussions and proposals aimed at reforming the latter. Suffice it to mention the well-known recent paralysis of the World Trade Organization (WTO) Appellate Body because of the US’s critical stance towards its activity, as well as its uncertain fate, but other examples abound.

The time was therefore ripe for a study of the topic, which has been recently undertaken by Loris Marotti in his book, with the declared aim to “examine the functions and evolutionary dynamics of double degree of jurisdiction in international judicial proceedings, in the belief that they offer a fruitful, though still underexplored, key to interpreting certain trends characterising the judicial function in contemporary international law” (p. 5 – our translation).¹ In fact, Marotti’s keen interest in exploring off the beaten tracks is already apparent from the initial quote: borrowing a passage from Ludwig Wittgenstein, he appears to assume the guise of “a bad guide”, one who takes the reader through the side streets of international adjudication instead of the main thoroughfares.

The book is divided into two parts. The first one is devoted to isolating and analysing each of the functions to be attributed to a system of double degree of jurisdiction and exercised by second instance dispute settlement bodies, focusing in particular on how they manifest themselves in international adjudication. Namely, three functions are identified: the annulment of judgments or arbitral awards, their review and the broader function of ensuring the overall uniformity and consistency of the case law (“nomophylactic”). In the second part of the book, Marotti examines the way in which the said functions,

¹ “[…] esaminare le funzioni e le dinamiche di sviluppo del doppio grado di giudizio nel processo internazionale, muovendo dalla convinzione che esse forniscano una feconda, ancorché poco esplorata, chiave di lettura di talune tendenze caratterizzanti la funzione giurisdizionale nel diritto internazionale contemporaneo”.
which tend to be combined in hybrid mechanisms, interact with each other. In other words, the aim is to investigate those functions both from a static and a dynamic perspective or, borrowing from scientific terminology, both *in vitro* and *in vivo*.

The examination is mainly carried out concentrating on four case studies: inter-State arbitration, investment arbitration, the European Court of Human Rights (ECtHR) and the WTO dispute settlement system. This selection is made not on the grounds that those are the only examples of double degree mechanisms in international adjudication, but rather because in Marotti’s opinion they represent the most recent and telling expressions of the – basically – *unavoidable* tensions caused by their setting-up (p. 25). His ultimate purpose is in fact to demonstrate that the establishment of a system of double degree of jurisdiction in international adjudication is *inherently* divisive (p. 33).

The book under review is a dense analysis, which affords proof of Marotti’s ability to master with deep knowledge some profoundly different dispute settlement systems. It is extremely valuable under many aspects, some of which are highlighted in the following pages.

2 The Model and Functions of Double Degree of Jurisdiction: the Process of “Distillation”

The first significant contribution lies in the approach consisting in tackling, through a comparative method, a variety of second instance mechanisms which can be identified in significantly diverse dispute settlement systems. For this purpose, Marotti interestingly adopts an abstract and flexible model, termed “double degree of jurisdiction”, and defined on the light of three *structural* elements, that is a) the existence of a binding decision issued by an arbitral or judicial organ definitively settling the dispute at hand; b) the presence of a unilateral power for the parties to appeal the said decision; c) the existence of a different arbitral or judicial organ with a binding power to decide on the contested decision (pp. 6–10). Besides, the model is further defined by some *functional* features, which correspond to the abovementioned three functions potentially fulfilled by a double degree mechanism (pp. 11–17).

From a methodological point of view, Marotti adopts a “functional” approach so as to compare mechanisms that are *prima facie* rather different, and to overcome terminological issues. The said approach is particularly useful in the process of isolation – one might say, distillation – of the said functions. This process is in fact rather problematic, for those functions are seldom to be observed in a pure form in judicial reality. For instance, this occurs for
both the review and nomophylactic functions, which tend to be fulfilled in hybrid mechanisms where the other functions are jointly satisfied, as in the case of the double degree mechanisms envisaged in the European Convention on Human Rights (ECHR) and in the WTO system. In order to “extract” those functions, a variety of elements are therefore taken into account: the analysis is carried out not only on the basis of the actual wording of the regulatory framework but also by examining the travaux préparatoires and the case law of the second instance tribunal and its effects in the context of reference (pp. 33–34).

Besides, even when it seems possible to detect a function in a “pure” form, it can nonetheless manifest itself in rather different ways. This is the case of the annulment function: while it is generally absorbed into, and satisfied by, the two other functions whenever they are fulfilled within a double degree mechanism, a different situation is found in the context of inter-State arbitration and investment arbitration under the ICSID Convention, where the annulment function is basically the only one available. Yet, as said before, this function can be satisfied in different ways. As widely known, in the context of inter-State arbitration, the extremely limited venues for the opposing parties to unilaterally trigger a second instance mechanism in order to have an award examined on grounds of validity, and eventually annulled, is rather exceptional, being in practice limited to the possibility to have recourse to the International Court of Justice on the basis of the convergence of two unilateral declarations under Article 36, paragraph 2, of its Statute, which has occurred only once so far. On the contrary, the ICSID system provides for an autonomous, centralised and institutionalised annulment mechanism under Article 52 of the 1965 Washington Convention.

In this connection, the juxtaposition of those mechanisms is therefore rather fruitful, as it emphasizes that similar needs do not necessarily lead to similar outcomes: even though the necessity to safeguard the integrity of arbitral proceedings represents the common ground of both annulment mechanisms, the reasons explaining the different degree of institutionalisation are to be found elsewhere. As for the ICSID system, the concurrent need to provide for an autonomous and self-standing forum for settling disputes between States and foreign investors overcame the traditional reluctance of States towards a possible “contamination” or “judicialization” of arbitration, which instead – so

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2 But see the recent ICJ’s interpretation of Article IV(2) of the Geneva Agreement of 17 February 1966 between Venezuela and United Kingdom over the frontier between Venezuela and British Guiana in Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction, Judgment of 18 December 2020, variously criticised by Judges Abraham, Bennouna, Gaja and Gevorgian in their dissenting opinions.
far – prevented the emergence of an institutionalised double degree mechanism in inter-State arbitration (pp. 86–87).

3 The Unveiling of the Multi-layered Tensions Stemming from the Establishment of a Double Degree of Jurisdiction in International Adjudication

Still, the book is not confined to a “static” description of the functions possibly entrusted to double degree mechanisms in international adjudication. One of its further merits is in fact the assessment of the effects of the establishment and functioning of those mechanisms: Marotti demonstrates, through the examples taken from the four systems examined, that the deployment of a double degree mechanism is a potentially divisive factor, capable of giving rise to strong tensions between different poles and on multiple levels.

Firstly, the tension appears to be within a double degree mechanism itself, which is among the functions possibly attributed to it. Those functions safeguard in fact different interests, such as the private interest of the parties or that concerning the correct and uniform interpretation of the law, which often tend to diverge, or even collide.

Even though these dynamics are also seen in domestic legal systems, this situation is rather amplified at the international level because of some peculiar features that Marotti aptly emphasizes. Those traits involve both the nature and structure of double degree of jurisdiction, in that the “appellate” mechanism only consists in one further level of judgment that usually combines diverging functions, and of the second instance tribunal itself. In particular, the fact that the double degree mechanism is institutionalised, and even more that the task is possibly entrusted to a permanent court, affects the second instance body’s perception of its own role, enhancing its systemic dimension. In other words, those features can be conceived as boosting factors which, coupled with other aspects, such as the material law subject to interpretation, encourage the second instance body to lean “naturally” towards a nomophylactic approach in its case law, whose “symptoms” are also sharply detected by Marotti (p. 135 ff.).

Furthermore, this trend towards a fully-fledged nomophylactic role would seemingly occur regardless of the functions originally entrusted to the double degree mechanism in its constitutive instruments. As the book demonstrates, this evolution characterised both the Grand Chamber of the ECtHR, to which the ECHR originally attributed a predominant – yet not exclusive – nomophylactic function, and the WTO Appellate Body, even though in this case the
constitutive texts did not provide for – or even expressly excluded – such a role. Besides, in the latter case the “safety-valve” introduced in Article IX(2) of the WTO Agreement, the well-known joint interpretation clause (JIC) that gives State Parties the power to authoritatively interpret the Agreement, and which would also represent a means of control over the interpretative powers of the Appellate Body, has so far never been used. In other words, the practice analysed by Marotti would show that it is not uncommon for a second instance mechanism to slip through the fingers of its “creators”, almost nullifying their original intentions and expectations.

These dynamics are therefore likely to fuel tensions between States and international courts and tribunals on who has the ultimate control over the mechanism and the functions entrusted to it, and eventually between two conflicting conceptions of double degree of jurisdiction in international law. In fact, States would see it, at least at the outset, from a “top-down” perspective, as an instrument of control over courts and tribunals. Instead, in their activity, the latter would tend to protect values also in the interest of the system as a whole, according to a “bottom-up” perspective that not necessarily coincides – and therefore potentially conflicts – with that of States.

4 The Current and Prospective Relevance of the Theorised Conceptual Framework

The said multi-layered tensions are revealed by Marotti from a diachronic perspective, through the prism of the dynamics concerning the configuration and reconfiguration of double degree mechanisms and, more broadly, of dispute settlement systems. In other words, the analysis of these developments represents the “litmus test” so as to investigate the underlying tensions. Yet, at the same time, the proposed conceptual framework also represents an interesting key to interpreting some of the issues arising from contemporary international adjudication, as well as providing an explanation for some prima facie apparent contradictions.

In this sense, Marotti interprets both the paralysis of the WTO Appellate Body and the solution envisaged by some WTO Members to overcome it – relying on Article 25 of the Dispute Settlement Understanding and maintaining an “arbitral” appellate review of panel reports – inter alia as a reaction to the effects of the emerging nomophylactic role of the WTO Appellate Body (pp. 173–174 and passim). In other words, those developments would testify to the shared reluctance of WTO Members towards embracing a systemic role for the Appellate Body and the perceived need to return to a “private” dimension of
double degree of jurisdiction as was imagined during the Uruguay Round (p. 242). Still, it would seem that some mixed signals are coming from the most recent developments. A Multi-Party Interim Appeal Arbitration Arrangement (MPIA), introducing an “arbitral” appellate mechanism, came into effect on 30 April 2020 with the support of some twenty WTO Members. On the one hand, in the MPIA the participating Members declare an intent to consider it to be a temporary solution to the paralysis of the Appellate Body, and explicitly refer to the significant value of the principle of consistency in the interpretation of rights and obligations under the covered agreements, which should be promoted by arbitrators in their activity.³ On the other hand, the MPIA would seem to limit to a certain extent the nomophylactic potential of the mechanism, since it explicitly indicates that “[t]he arbitrators shall only address those issues that are necessary for the resolution of the dispute” and “only those issues that have been raised by the parties”.⁴

Conversely, in the context of the ECHR system, State Parties decided to normatively accommodate the evolution towards a fully-fledged nomophylactic role for the Grand Chamber, as the recent reforms introduced by Protocols No. 15 and 16 seem to demonstrate, despite the criticism manifested by some of them with regard to the “judicial activism” of the Strasbourg Court and its alleged intrusive approach in the domestic sphere. Marotti explains what would seem like a prima facie contradiction in light of the specificities of the ECHR system, where under the principle of subsidiarity a significant role in the implementation of the conventional rights and freedoms is attributed to national courts. In other words, the balance reached within the system, which ultimately leads to the loosening of the underlying tensions between the States Parties and the Court is due to the fact that the nomophylactic role of the Grand Chamber is, in this peculiar case, functional to the proper operation of the subsidiarity principle and of the margin of appreciation (pp. 225–226).

Besides, the theorised conceptual framework is also valuable in order to assess the potential systemic impact of changes affecting or involving a given double degree mechanism, therefore also providing further elements so as to examine their propriety and usefulness in light of the intended objectives. In particular, Marotti proposes some reflections with regard to the well-known reforms currently taking place within the investor-State dispute settlement system (ISDS), which he considers to be primarily aimed at ensuring the

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³ MPIA, respectively sixth recital and para. 5.
⁴ Ibid., Annex 1, para. 10. For further reflections, see for instance de Andrade, “Procedural Innovations in the MPIA: A Way to Strengthen the WTO Dispute Settlement Mechanism?”, Questions of International Law, 2019, p. 121 ff. (updated on 28 September 2020).
correctness of arbitral awards. As widely known, from an institutional perspective, those reforms involve the establishment of bilateral or multilateral appellate mechanisms, through the introduction of apposite clauses in investment agreements, or even permanent courts, such as the Multilateral Investment Court (MIC) whose establishment the EU is encouraging in the recent investment agreements negotiated or concluded, such as the Comprehensive Economic and Trade Agreement (CETA) with Canada.5 Yet, as Marotti argues, such a trend towards a greater institutionalisation of an appellate system would also inevitably influence the balance of power between States on the one hand and courts and tribunals on the other and lead the latter to perceive their function in systemic terms, and possibly leaning towards the fulfilment of consistency in their case-law (pp. 207–208).

At the same time, Marotti seems rather sceptical on the counterbalancing effect of jics, which are flourishing in the most recent investment treaties. While adopting a rather cautious approach, he ultimately seems to consider them as per se not sufficient in mitigating the “expansive force” of double degree of jurisdiction, and in any case deems their use problematic under many aspects, potentially fuelling further tensions between States on the one hand and courts and tribunals on the other (pp. 208–210). Yet, this finding is necessarily speculative, lacking in this regard any significant – or conclusive – practice both in the ISDS context and in other systems, such as the WTO and the North American Free Trade Agreement (NAFTA), and will have to be tested against further practice, if any.

In conclusion, the book represents a very useful addition in the traveller’s backpack, while venturing through the journey of international adjudication, and Marotti is definitely a skilled guide who conducts the reader along a fascinating path.

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5 On this topic, while at the same time pointing out that the main problem in contemporary international investment law rather lies in the quality and adequacy of substantive law applicable to the merits, see recently Marrella, “International Investment Arbitration and EU Reform Projects for Appellate Mechanisms: Some Critical Remarks”, Diritto del commercio internazionale, 2021, p. 563 ff.