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Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law

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The article addresses the question of whether the metaphor of the "legal pyramid" as the structural representation of the relationships between international and domestic law should be deconstructed on account of the internationalization of constitutional law. On a theoretical level, it argues that the pyramid is a concept, linked to Kelsenian monism, which has outlived its usefulness. But dualism should also be overtaken by a theory of legal pluralism. On a doctrinal level, the linkage of the orders by the doctrine of self-executing international norms should be reconstructed and understood as the balancing of constitutional principles. A third thesis refers to the value judgments implicit in the question, holding that it should be answered within the domestic constitutional process, according to the experience, expectations, and convictions of the various constitutional constituencies. Given the state of international law, it would be preferable to have the capacity legally to limit the effect within the domestic legal order of a norm or an act under international law if that norm or act conflicts sharply with constitutional principles

1. The issue and three theses

Should the legal pyramid be deconstructed on account of the internationalization of constitutional law?[1] This paper develops three different answers according to three different theses.

Thesis one is of a conceptual, even theoretical nature: "Pyramid" is a notion linked to Kelsenian monism as a general conception of the relationship between international law and domestic law. Yet, monism is, basically, a moribund notion and should be put to rest. In this sense, I give an affirmative answer: the

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[1] This question was the theme of a panel, at which this paper was presented, at I•CON's fifth-anniversary conference, "Rethinking Constitutionalism in an Era of Globalization and Privatization," held at the Sorbonne, Paris, Oct. 25–26, 2007.

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pyramid should be deconstructed. At the same time, dualism also should be overcome, and developed into a theory of legal pluralism. Only a theory of legal pluralism can account, descriptively and normatively, for the diversity within the legal realm, in general, and the links between domestic constitutions and international legal phenomena, in particular. Rather than a "pyramid," "coupling" might be a more fitting general concept.

Thesis two develops the first thesis in doctrinal terms. The coupling (or system of linkages) can operate through political and judicial institutions. With respect to the latter, there are two main doctrines to accomplish the coupling: the doctrine of direct effect, or self-executing international norms, and the doctrine of consistent interpretation (the so-called "Charming Betsy" doctrine).[2] My thesis is that both are often misunderstood as technical rather than constitutional doctrines. Both should—so goes my argument—be reconstructed and understood as implementing a balancing of constitutional principles such as international cooperation, democratic government, or subsidiarity. To answer the question, then, I would say: The deconstruction of the pyramid should go hand in hand with a new construction of these two doctrines in light of their constitutional role. This response will be illustrated by debating direct effect and the alleged constitutional nature of World Trade Organization (WTO) law under European Union constitutional law.

The third thesis concerns a value judgment regarding the legal pyramid: The symposium organizers asked "Should it be deconstructed?" in the sense of "What is the proper role for domestic constitutional law?" My thesis is that this should be answered within the domestic constitutional process according to the experience, expectations, and convictions of the various and diverse constitutional communities/constituencies. My preference is that, given the state of development of international law, there should be the possibility, at least in liberal democracies, of placing legal limits on the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles. This approach also serves the gradual unfolding of the international legal realm as it unburdens that realm of requirements it might not always fulfill. Reading the leading question on the deconstruction of the pyramid in this light, my answer is: it should not be deconstructed. This is also the reason why the *Yusuf* decision of the European Court of First Instance is not convincing.[3]

[2] In *Murray v. The Schooner Charming Betsy* 6 U.S. (2 Cranch) 64 (1804), the U.S. Supreme Court held that an act of Congress ought never to be construed to violate the law of nations if other possible constructions were availble. In other words, an American statute should not be interpreted to conflict with international law where "fairly possible" to avoid it, *see* Restatement (Third) of Foreign Relations Law § 114 (1987).

[3] Case T–306/01, Yusuf v. Council, 2005 E.C.R. II–3533 (where the Court refused to place legal limits on the effect of the Security Council regime, which it held to take precedence over the European Community legal order, although this severely conflicted with fundamental rights as protected by the latter, thereby denying the determination of the Community's constitutional role through its own processes).

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This paper will develop these theses in more detail. For the sake of clarity, please note that for this question, the paper treats the legal order of the European Union as a domestic or internal legal order. The reasons for doing so are several, given that the EU is based on the principle of vertical and horizontal constitutional compatibility;[4] and given its essentially unitary political system, which is rooted in its territory and citizens; its judiciary, which is endowed with strong competences; and its largely parliamentary legislative. All this—in short, a federal unity—cannot be found outside the Union.[5]

2. Overcoming monism for legal pluralism

The relationship between the norms of international law and those of domestic law is still understood in terms of concepts developed one hundred years ago: monism and dualism.[6] These concepts are, perhaps, the proudest achievements of the epoch when legal scholarship put enormous effort into becoming an autonomous science in step with the general development of the sciences in the nineteenth century. They reveal the greatness and flaws of that classical paradigm in legal scholarship usually, but misguidedly, called legal positivism; a better term would be "juridical constructivism." As often happens with its constructions, the context of their origins has largely been forgotten. Yet, if one compares the contemporary situation with that of one hundred years past, almost every relevant element has changed: the nation-state's evolution in

[4] Treaty on European Union, art. 6, July 29, 1992, O.J. (C 224) 1 (1992), *as amended by* Treaty of Nice, Mar. 10, 2001, O.J. (C 80) 1 (2001) which introduces an additional constitutional dimension / layer of scrutiny by allowing fundamental rights to enter into the EU legal bloodstream as general principles thereof.

[5] *See* J.H.H. Weiler, The Constitution of Europe 221, 295–298 (Cambridge Univ. Press 1999); Stefan Oeter, *Federalism and Democracy*, *in* Principles of European Constitutional Law 53, 59–72 (Armin von Bogdandy & Jürgen Bast eds., 2005); Christoph Möllers, *Pouvoir Constituant-Constitution-Constitutionalisation*, *in* Principles of European Constitutional Law, at 183, 196–220.

[6] For seminal contributions to dualism see Heinrich Triepel, Völkerrecht und Landesrecht [International Law and National Law] 12–22 (Hirschfeldt 1899); Heinrich Triepel, *Les rapports entre le droit interne et le droit international* [*The relationship between domestic law and international law*], 1 Recueil des Cours 77 (1923); Dionisio Anzilotti, Corso di Diritto Internazionale [Textbook on International Law] 50–51 (Athenaeum 1928); Lassa Oppenheim, International Law: A Treatise § 20 (Hersch Lauterpacht ed., 1937) (view not shared by the editor). As to prominent expositions of monism, see, for example, 4 William Blackstone, Commentaries on The Laws of England *67; Hans Kelsen, Reine Rechtslehre [Pure Theory of Law] 129–154 (Deuticke 1934); Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts [The Problem of Sovereignty and the Theory of International Law] § 30–51 (Mohr 1920); Georges Scelle, Précis de Droit des Gens [Synopsis of International Law] 31–32 (Recueil Sirey 1932); Alfred Verdross, Die Verfassung der Völkerrechtsgemeinschaft [The Constitution of the International Law Community] 34–42 (Springer 1926). For a general overview, see Christine Amrhein-Hofmann, Monismus und Dualismus in den Völkerrechtslehren [Monism and Dualism in International Law Scholarship] (Duncker & Humblot 2003).

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tandem with the process of globalization; the gradual elaboration of international law; the emergence of general constitutional adjudication; and, above all, positive constitutional provisions on the role of international law within domestic systems.[7] As theories, monism and dualism are today unsatisfactory. Their arguments are rather hermetic, the core assertions are little developed, opposing views are simply dismissed as "illogical," and they are not linked with the contemporary theoretical debate. As doctrines, they are likewise unsatisfactory since they do not help in solving legal issues.[8]

Monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. Perhaps they can continue to be useful in depicting a more open or more hesitant political disposition toward international law.[9] But from a scholarly perspective, they are intellectual zombies of another time and should be laid to rest, or "deconstructed." The general understanding of the relationship between international law and domestic law should be placed on another conceptual basis.

Nonetheless, it is dualism that leads the way beyond this dichotomy. A convincing theoretical account of how to "reconstruct" the pyramid will probably be based on a theory of legal pluralism.[10] Such a theory is more likely to produce concepts that may shed light on how lawyers, politicians, and citizens understand and operate in this field. As for lawyers: when he or she considers the validity, the legality, the interpretation, or the legitimacy of a norm, the first step is generally to classify it as international, pertaining to the Union, or domestic. The relevant legal reasoning rests on the pluralist assumption of diverse orders, even in so-called monist countries, such as France (or the United

[7] *See* Anne Peters, *The Globalization of State Constitutions*, *in* New Perspectives on the Divide Between National and International Law 260–266, 293–305 (Oxford Univ. Press 2007) (for a panoramic overview of national constitutions' reaction to international law and the techniques employed); Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law* 38 N.Y.U. J. Int'l L. & Pol. 707 (2006) (on international commitment as a function of domestic constitutional design).

[8] Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 Recueil des Cours 9, 363 (1999).

[9] *See, e.g.*, Erika de Wet, *The Reception Process in Belgium and the Netherlands*, *in* The Reception of the ECHR in Europe 11, 25 (Helen Keller & Alec Stone-Sweet eds., Oxford Univ. Press 2008).

[10] *Cf.* William Burke-White, *International Legal Pluralism*, 25 Mich. J. Int'l L. 963 (2004); Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. Legal Pluralism & Unofficial L. 37 (2002); Keebet von Benda-Beckmann, *Globalisation and Legal Pluralism*, 4 Int'l L. F. 19 (2002); Theo Öhlinger, *Unity of the Legal System or Legal Pluralism: The Stufenbau Doctrine in Present-Day Europe*, *in* National Constitutions in the Era of Integration 163–174 (Antero Jyränki ed., Kluwer Law Int'l. 1999); Christian Joerges, "Incorporating Norms into Private Constitutional Orderings," presented at I•CON's fifth-anniversary conference "Rethinking Constitutionalism in an Era of Globalization and Privatization," at Cardozo School of Law, New York, Nov. 4–5, 2007 (manuscript on file with author); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal. L. Rev. 1155 (2007); Andreas Fischer-Lescano & Gunther Teubner, Regime-Kollisionen [Regime Collisions] 163–169 (Suhrkamp 2006).

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States), even in the Netherlands, the most monist of all.[11] Moreover, notions of a pyramidal order of things, insights, or norms can hardly respond to the experience of diversity and of limited order only. Contemporary notions of global law, although echoing monism, would not challenge this assumption.[12]

The concept of legal pluralism does not imply a strict separation between legal regimes. Rather, it promotes the insight that there is an interaction among the different legal orders. This concept has far-reaching consequences for the understanding of constitutional law: any given constitution does not set up a normative *universum* anymore but is, rather, an element in a normative *pluriversum*.[13] How to position constitutional law in this *pluriversum*? A fitting concept might be that of a "coupling."[14] How should one conceive of this "coupling"? That brings us to the second thesis, which develops the issue in doctrinal terms.

3. The constitutional dimension of direct effect in the pluralist setting

The second thesis is as follows: the deconstruction of the pyramid should go hand in hand with a new construction of the doctrines of direct effect and consistent interpretation in light of the two doctrines' constitutional roles. Dualism started with the premise that international norms and domestic norms, in principle, deal with different issues.[15] Yet today, many international norms address domestic issues, which are also addressed, often, by domestic norms.[16] Except in situations of international administration (Kosovo, Bosnia), any such effect is mediated. The mediation, or "coupling," can be done by political institutions, on the one side, or by administrative and judicial institutions, on the other. In the latter case, the domestic effect of such international norms is usually

[11] de Wet, *supra* note 9 , at 18.

[12] For a discussion of a global administrative law, see Sabino Cassese, *Global Administrative Law: An Introduction* (2005), *available at* http://www.iilj.org/global_adlaw/documents/Cassesepaper.pdf; Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005), *available at* http://www.iilj.org/papers/2004/2004.1.htm.

[13] Not in the Schmittian sense, compare Carl Schmitt, Der Begriff des Politischen [Concept of the Political] 54 (Duncker & Humblot 1963); *cf.* Jürgen Bast, Totalitärer Pluralismus [Totalitarian Pluralism] 88–91 (Mohr Siebeck 1999).

[14] Ralf Poscher, *Internationales Verwaltungsrecht* [*International Administrative Law*], 67 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (forthcoming, 2008).

[15] Triepel, *supra* note 6 , at 11–15.; *cf.* Ulrich Gassner, Heinrich Triepel: Leben und Werk [Heinrich Triepel: Life and Work] 446–451 (Duncker & Humblot 1999). Kelsen's monism springs from the insight into the weakness of this premise.

[16] Tomuschat, *supra* note 7, at 63 (on international law as a "comprehensive blueprint for social life").

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dependent on the doctrine of direct effect and the doctrine of consistent interpretation. It is, therefore, safe to say that the deconstruction of the pyramid by way of "coupling" should lead to the exploration and even more elaborate construction of those two doctrines. The coupling of international law and domestic law by means of administrative and judicial institutions rests, to a large extent, on these two doctrines; they decide how "loose" or "tight" or "structural"—to use a term central to systems theory—the coupling will be.[17]

Although venerable, the pertinent doctrinal *acquis* do not seem to be fully satisfactory. Often, it is not even clear if they are doctrines of international law or of domestic law.[18] In my view, the doctrines rest on domestic constitutional law. This can be argued doctrinally, comparatively, and in light of legitimacy issues.

There are few international norms or decisions that clearly claim to be directly effective.[19] The grand exception is European Community law. Since the *Van Gend & Loos* decision, the European legal order—through the European Court of Justice (ECJ)—claims to determine the domestic position of European law, a claim that the domestic legal systems have largely, though

[17] *See* Robert Glassman, *Persistence and Loose Coupling in Living Systems*, 18 BEHAV. SCI. 83–98 (1973) (on the origins of the concept); Karl Weick, *Educational Organizations as Loosely Coupled Systems*, 21 ADMIN. SCI. 1–19 (1976).

[18] For the former see Waldemar Hummer, *Reichweite und Grenzen unmittelbarer Anwendbarkeit der Freihandelsabkommen* [*Reach and Limits of the Direct Application of Free Trade Agreements*], *in* RECHTSFRAGEN DER FREIHANDELSABKOMMEN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT MIT DEN EFTA-STAATEN [LEGAL ISSUES CONCERNING THE FREE TRADE AGREEMENTS BETWEEN THE EUROPEAN ECONOMIC COMMUNITY AND THE EFTA STATES] 43–83, 67 (Orac 1987); ARNOLD KOLLER, DIE UNMITTELBARE ANDWENDBARKEIT VÖLKERRECHTLICHER VERTRÄGE UND DES EWG-VERTRAGS IM INNERSTAATLICHEN BEREICH [DIRECT APPLICABILITY OF PUBLIC INTERNATIONAL LAW TREATIES AND THE EEC TREATY IN THE DOMESTIC SPHERE] 121, 146 (Staempfli 1971); Manfred Zuleeg, *Die innerstaatliche Anwendbarkeit völkerrechtlicher Verträge am Beispiel des GATT und der europäischen Sozialcharta* [*Domestic Applicability of International Treaties, Taking GATT and the European Social Charter as Examples*], ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [hereinafter Z.A.Ö.R.V.] 341–363, 350 (1975). For the latter, see, for example, ALBERT BLECKMANN, BEGRIFF UND KRITERIEN DER INNERSTAATLICHEN ANWENDBARKEIT VÖLKERRECHTLICHER VERTRÄGE [CONCEPT AND CRITERIA OF DOMESTIC APPLICABILITY OF INTERNATIONAL TREATIES] 125–130 (Duncker & Humblot 1970); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VIRG. J. INT'L L. 627, 650 (1986); JOHN ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 77 (Ashgate 1999). Some authors distinguish between direct effect as a doctrine of international law and the doctrine of self-executing norms as one of national law; see, for example, Thomas Buergenthal, *Self-executing and Non-self-executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 322 (1992).

[19] The leading case is Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3). For more recent decisions, see LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27); Prosecutor v. Tadic, Case No. IT–94-1, Opinion and Judgment (May 7, 1997); *cf.* Christine Amrhein-Hofmann, *supra* note 5, at 41–43 (on the invasiveness of modern international law); J.H.H. Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37(2) HARV. INT'L L.J. (1996) 411.

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not completely, accepted.[20] The exception posed by Community law confirms the rule that it is up to the domestic legal order to decide on the position and the effect of an international norm within its territory.

Legitimacy considerations support conceiving of direct effect and consistent interpretation as issues to be decided on the basis of domestic constitutional law. The positioning of a domestic legal order within the wider world necessarily affects fundamental issues such as democracy, self-determination, and the self-understanding of the citizenry. For that reason, the positioning should happen on the basis of those norms that enjoy highest legitimacy for that group, that is—at least in most liberal democracies—the norms established by the domestic constitution. This is, at least with respect to liberal democracies, the solution most consistent with constitutionalism as a normative theory.[21]

A reconceptualization of the two doctrines would do more than just lead to their firm grounding in domestic constitutional law. Thus far, the two doctrines of direct effect and consistent interpretation are often framed as technical or methodological issues. Such an understanding is not fully convincing. With respect to consistent interpretation, I rather share the approach of the German federal Court in its widely criticized *Görgülü* decision: consistent interpretation needs to be grounded in the domestic constitution's overall interpretative context.[22] Even more important is the doctrine of direct effect. Many authors argue that direct effect hinges largely on the determinedness of the international provision in question. This understanding is not convincing, either. First, determinedness is a most undetermined criterion. More important in our context, the approach does not do justice to the coupling role and the constitutional function of the doctrine of direct effect. The doctrine's constitutional dimension rests on the fact that it affects various constitutional issues, such as the separation of powers between the domestic institutions, the role of the political institutions as gatekeepers and their relationship to administrative bodies and the judiciary, and the self-positioning of a citizenry in the wider world.

Both doctrines should develop categories that rest on the balancing of constitutional principles—such as international cooperation, on the one hand, and democratic government or subsidiarity, on the other. Given this grounding in

[20] For further detail, see Peter M. Huber, *Offene Staatlichkeit: Vergleich [Open Statehood: Comparison]*, *in* Ius Publicum Europaeum II §26 Rn.34–36 (Armin von Bogdandy et al. eds., C.F. Müller 2008).

[21] Norman Dorsen et al., Comparative Constitutionalism 10 (West 2003).

[22] BVerfG, Oct. 14, 2004, docket number 2 BvR 1481/04, *available at* juris online/Rechtsprechung. English translation *at* http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html. The Court stated that not only a failure to take international law into account, but also the application of international legal material in a schematic way in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law. In every case the domestic constitution's overall interpretative context has to be considered, since the commitment to international law takes effect only within the democratic and constitutional system of the German Basic Law.

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domestic constitutional law, it is likely and consistent that the doctrines will take on different shades of meaning in different constitutional orders.

This approach is not meant to hamper the development of international law; quite the contrary. It serves, rather, the evolution of the international legal realm; due to various features of the international legal process, international norms and acts cannot always fully live up to the requirements of constitutionalism. Direct effect, therefore, would put an enormous potential strain on the development of international law. For similar reasons, it is important for the development of international law that the consequences of a breach be circumscribed.[23] This is best explained by an example.

4. Direct effect and the constitutional question: WTO law as an example

This rather abstract argument will be illustrated with what is, perhaps, the most debated issue regarding direct effect in Europe: the World Trade Organization (WTO).[24] Direct effect of WTO law is, arguably, the most relevant legal feature of its alleged constitutional function because it stipulates the supremacy of international treaties over EC legislation;[25] if attributed with direct effect, WTO law will have a constitutional function for the EC legislator. The ECJ does not exclude *any* effect of WTO law, but it denies direct effect when it comes to forcing the legislative institutions of the Union to comply with WTO law. [26] This decision has been widely criticized as "political"; a core argument of the critics concerns the determinedness of the relevant WTO provisions, either as formulated in the agreement or in their concretization by the WTO dispute-settlement procedure.[27] It is submitted here that the issue of direct

[23] As attempted by the Articles on Responsibility of States for Internationally Wrongful Acts, *reprinted in* James Crawford, The International Law Commission's Articles on State Responsibility (Cambridge Univ. Press 2002).

[24] *See, e.g.*. Antonis Antoniadis, *The European Union and WTO Law*, 6 World Trade Rev. 45 (2007); Robert Uerpmann-Wittzack, *The Constitutional Role of Multilateral Treaty Systems*, *in* Principles of European Constitutional Law, *supra* note 5, at 145–181; Deborah Cass, The Constitutionalization of the World Trade Organization (Oxford Univ. Press 2005); Francis Snyder, *The Gatekeepers: The European Courts and WTO Law*, 40 Common Mkt. L. Rev. 313 (2003); Stefan Griller, *Judicial Enforceability of WTO Law in the European Union,* 3 J. Int'l Econ. L. 441 (2000).

[25] Article 300, para. 5 EC,

[26] Case C–149/96, Portugal v. Council, 1999 E.C.R. I-8395; Case C-377/02, Léon Van Parys NV v. Belgische Interventie- en Restitutiebureau, 2005 E.C.R. I–1465 (no direct effect granted to DSB decisions); Piet Eeckhout, *Judicial Enforcement of WTO Law in the European Union*, 5 J. Int'l Econ. L. 91 (2002).

[27] *See* Griller, *supra* note24 , at 451, 461. *See also* J.O. Berkey, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, 9 E.J.I.L. 626 (1998) (for similar criticism regarding the denial of direct effect for the earlier GATT regime).

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effect is not to be decided on the criterion of determinedness but on constitutional criteria such as democratic government, legal certainty and legal equality, as well as the norms of international cooperation enshrined in the constitutional law of the European Union.[28]

This argument can be based on the safe assertion that the constitutional principle of international cooperation is important to the European Union, which gives more effect to international provisions than most national constitutional orders.[29] The denial of direct effect, then, for WTO law is rather the exception for the European approach to international law;[30] that is why the case is so revealing.

One of the consequences of direct effect is an increasing pressure to harmonize different national regulatory schemes; with direct effect, it will be much more difficult to maintain independent and divergent domestic laws. The principle of self-determination, often characterized as one of subsidiarity, is similarly affected. The creation of structural pressure is due to the need to avoid reverse discrimination.

Reverse discrimination, in this respect, means that a transnational economic operator must be treated more favorably than a national operator because the direct effect of transnational law requires that domestic institutions treat the transnational operator more liberally than the national one.[31] Since such a situation is politically difficult to maintain, direct effect develops a dynamic that would bring domestic law in line with the more liberal transnational one.

A general thrust toward harmonization is justified within the EU because the Union has integration at its heart (art. 2 EU, art. 2 EC), which implies important inroads into domestic regulatory autonomy. By contrast, WTO law does not have economic integration or harmonization as goals. Moreover, direct effect might require secondary law instruments. To a great extent, European integration has validated the functionalist assumption that so-called negative integration through the direct effect of transnational provisions will lead to transnational political processes.[32] Direct effect of WTO law would thus

[28] *Cf.* Armin von Bogdandy, *Constitutional Principles*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, *supra* note 5, at 3–52 (on the underlying principles of European constitutional law).

[29] Case C–162/96, A. Racke GmbH & Co v. Hauptzollamt Mainz, 1998 E.C.R. I–3655 (EC must respect international law in the exercise of its powers); Case C–540/03, Parliament v. Council, 2006 E.C.R. I–5769 (legality of Council Directive reviewed by reference to ECHR, two international conventions, and the Charter of Fundamental Rights of the EU).

[30] *See supra* notes 28–29.

[31] The deregulatory thrust within the EU has been contained because the Union institutions could reregulate the issue at the supranational level. That possibility does not exist within the WTO.

[32] FRITZ W. SCHARPF, REGIEREN IN EUROPA. EFFEKTIV UND DEMOKRATISCH? [GOVERNING IN EUROPE. EFFECTIVE AND DEMOCRATIC?] 50, 96 (Campus 1999).

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dramatically increase the need for transnational legislation, whether in the form of international treaties or through other instruments. Such a development might be critical in two respects; first, because it is unlikely that an efficient and legitimate lawmaking mechanism can be created at the global level,[33] and, second, any such global lawmaking mechanism would imperil democratic self-government and subsidiarity to a still greater extent than lawmaking within the European Union. Therefore, these constitutional principles militate against direct effect of WTO law.

A further relevant constitutional principle is legal certainty. The WTO does not possess the requisite institutions to legislate in situations of legal uncertainty. At first glance, this appears acceptable in the case of direct effect of WTO law since its impact would tend to be deregulatory. Yet, it would be naïve to assume that the interests of economic operators are best served through deregulation. Rather, many industries rely on legal certainty and specific regulatory schemes; huge investments are made in machines built to produce legally required features of products, and marketing and distribution practices rely on specific legal frameworks.[34] In the case of direct effect of WTO law, a national producer would be uncertain to what extent the law that it must follow applies equally to foreign competitors in the domestic market. Such uncertainty regarding the legal basis of competition within a domestic market is critical in light of the principle of legal certainty.

Another important principle is legal equality. The debate regarding the direct effect of EU law reveals that any provision may be handled differently by the various courts and bureaucracies of the twenty-seven EU member states; this could seriously imperil legal equality. In order to meet this objection, the Union has a number of specific mechanisms to guarantee a sufficiently homogeneous application, above all, the preliminary-rulings procedure of art. 234 EC.[35] The ECJ is responsible for the legal equality of all persons under its jurisdiction, and on this principle rests a great part of its impressive jurisprudence. However, none of these instruments exists in order to guarantee legal equality in applying WTO law to competitors from different jurisdictions. There is no WTO obligation to apply WTO law directly in the first place. Furthermore,

[33] *See* Armin von Bogdandy, *Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship*, *in* 5 Max Planck Yearbook of United Nations Law 609 (2001) (for a more detailed analysis).

[34] Charles Goodhart, *Economics and the Law: Too Much One-Way Traffic?*, 60 Mod. L. Rev. 1, 4 (1997) (with extensive references to Ronald Coase and Mancur Olson).

[35] The ECJ has jurisdiction under art.234 EC to give an interpretation of Community law as a step in proceedings before national courts. After the ECJ has ruled on the issues referred it remits the case back to the national court. This cooperative mechanism is in "the interest of the proper application and uniform interpretation of Community law throughout all the Member States"; *see* Case 244/80 Pasquale Foglia v Mariella Novello (No 2) 1981 E.C.R. 03045, at para. 17.

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there is no institutionalized link between the domestic judge and the WTO dispute-settlement organs. Within the WTO, there are no mechanisms that in the case of direct application would safeguard legal equality among economic operators acting under different domestic legal orders. Legal equality, therefore, would be seriously endangered. The ECJ also stresses the possibility of "disuniform application of the WTO rules"[36] as a reason for excluding direct applicability.

However, the question emerges: Is legal equality in the form of the uniform application of WTO law really necessary for direct effect? One might argue that this principle does not impede the direct application of important international legal instruments, such as the European Convention on Human Rights[37] and other international human rights regimes.[38] The argument of missing equality under the law, therefore, would be less important if WTO law or at least some core WTO provisions were understood as granting human rights. This has been forcefully asserted.[39] And yet, nowhere is it stated that such a quality is to be found in WTO law. Ordinary meaning, systematic analysis, and state practice militate against any such understanding of WTO law. A comparative look at European Union law also discourages the qualification of WTO law as human rights law. If WTO provisions granted rights, these would correspond to the basic freedoms of the EC Treaty. These basic EC freedoms to trade goods and services do not, however, provide *fundamental* or *human* rights, but only *individual* rights.[40] This distinction is confirmed by the Charter of Fundamental Rights of the European Union.[41] In recital 3, it distinguishes clearly between common values and human rights, on the one hand, and the freedoms of the EC treaty, on the other.

This distinction is not only semantic and symbolic but also substantive. The most important difference between the ECJ's human rights jurisprudence and its basic freedoms jurisprudence on goods and services (and not the free movement of persons) is an often overlooked reservation the ECJ makes: the Court applies

[36] Portugal v. Council, at para. 45.

[37] *See* The Reception of the ECHR in the Member States, *supra* note 8 (on the many different ways the ECHR is applied in domestic legal orders).

[38] Parliament v. Council, *supra* note 28.

[39] *See* Ernst-Ulrich Petersmann, *From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?*, 37 Common Mkt. L. Rev. 1361, 1375 (2000).

[40] *See, e.g.*, Joined Cases C–46/93 & C–48/93, Brasserie du Pêcheur, 1996 E.C.R. I–1029, at para. 54.

[41] Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1.

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the basic freedoms only if there is no secondary legislation.[42] This signifies that European citizens can—through the Union's institutions—regulate the issue differently from the way it was decided by the Court. Any decision of the Court that a national obstacle, in these situations, is illegal because it violates a basic freedom is not written in stone because it can be overturned through a later regulation or directive. The core function of the basic freedoms is to create a common market, not to limit the supranational political process. Therefore—and this is a crucial distinction for a human rights decision either by the ECJ or the ECtHR or a national constitutional court—a decision on the basis of the freedoms to trade does not place the issue out of the reach of the normal political process. For that reason the freedoms to trade are not to be considered human rights since they do not have the countermajoritarian function that is the core feature of human rights.[43] It would be inconsistent if European institutions granted human rights status to international provisions if the corresponding provisions in the EU constitution did not enjoy that status. Hence, the issue of legal equality remains crucial.

If WTO law cannot be construed as containing *human* rights guarantees, it could still be directly applicable if qualified as comprising *individual* (economic) rights, which, similar to the freedoms of the EC treaty, would constrain domestic political and administrative systems from infringing international obligations. Such a step fundamentally alters the relationship between the legal and the political realm. Except for the special case of constitutional law, courts operate according to the constitutional premise that the law they apply can be modified by a democratically responsible legislature, at any given moment. Direct effect of WTO law is, therefore, a case that needs particular justification.

On the issue of whether to qualify WTO provisions in terms of individual economic rights, the European legal order will look at the arguments that support the direct effect of EC treaty provisions. In *Van Gend & Loos*, it is the objective of *establishing a common market* that opens the door to all arguments

[42] Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon"), 1979 E.C.R. 649, at para. 8; Case C–51/94, Commission v. Germany ("Sauce Hollandaise"), 1995 E.C.R. I–3599, at para. 29; Case C–470/93, Verein gegen Unwesen in Handel und Gewerbe Köln eV v. Mars GmbH ("Mars"), 1995 E.C.R. I–1923, at para. 12; Case C–217/99, Commission v. Belgium, 2000 E.C.R. I–10251, at para. 16. This also explains why primary law is interpreted in light of secondary law, which may, at first glance, seem puzzling if not downright astonishing as a method of interpretation; *cf.* Case C–9/93, IHT Internationale Heiztechnik GmbH and Uwe Danzinger v Ideal-Standard GmbH and Wabco Standard GmbH ("Ideal Standard"), 1994 E.C.R. I–2789, at paras. 56–60. The situation in the United States under the "dormant commerce clause" is similar; *see* Alexander Graser, *Do Hard Cases Make Bad Law?*, 60(2) Z.a.ö.R.V. (Heidelberg J. Int'l L.) 366, 382 (2000).

[43] Günter Frankenberg, Die Verfassung der Republik [The Constitution of the Republic], 127 (Suhrkamp 1997).

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supportive of direct applicability.[44] Also in *Kupferberg*, the ECJ's reasoning is based on the idea of a "system of free trade"[45] and, therefore, on the normative aim of a *market*. These transnational economic freedoms are closely connected to the idea of establishing a market. Such a market, however, is not only a factual, spontaneous socioeconomic event but also an activity within a legal framework.[46] As long as such a legal framework is not present, there is legally no market. Accordingly, direct effect of WTO law could be argued if there existed the normative aim of a global market to be realized through WTO law or as an objective of the EC treaty. However, neither WTO law nor European Union law (such as art. 131 EC)[47] provide for a global market as a normative aim. From a public law perspective, there is no global market legally, only a number of domestic markets, and WTO law can be best understood as an instrument for coordinating the interdependence between them. Since the creation of a market is not a normative aim of the WTO, there are no normative grounds for interpreting WTO provisions as having such a function. Hence, the entire argument that supports the direct effect of market-oriented provisions in the EC treaty or in many EU agreements does not justify an analogous step with respect to WTO law.

Actually, it is the principle of legal equality that provides, perhaps, the most convincing ground for concluding that there is no global market envisaged either in WTO law or in European Union law; namely, such a market could not live up to the requirement of legal equality. Whereas the core of the human rights relation is bipolar (the public authority and the aggrieved individual), individual economic rights in a market economy are always situated in multipolar relationships (the public authority, at least two competitors, and the consumer). In the constellation of competition between private economic operators, the equal application of the law is far more important than in the human rights

[44] Case 26/62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1 (holding that, according to the spirit, general scheme and wording of the EEC treaty—described as a "new order of international law"—the clear and unconditional prohibition on taxation contained in art.12 EEC gives rise to individual rights that the courts must protect in order to safeguard the objective of a functioning common market).

[45] Case 104/81, Hauptzollamt Mainz v. CA Kupferberg & Cie KG, 1982 E.C.R. 3641, at para. 24-26 (holding that the immediate consequence of the desired system of free trade was an unconditional rule against discriminatory taxation, having direct effect throughout the Community).

[46] Goodhart, *supra* note 34 ; Hans-Peter Ipsen, Europäisches Gemeinschaftsrecht [European Community Law] 550 (Mohr 1972).

[47] Arts. 131-134 EC set out the Community's Common Commercial Policy (CCP). While its rather imprecise ambit includes the harmonious development of, and abolition of restrictions on, world trade, the CCP is nevertheless parasitic on the establishment of a customs union between the member states and mainly seeks to coordinate uniform conduct of trade vis-à-vis third countries and to protect the Community market.

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constellation because, here, the application or nonapplication directly affect competitive relationships. For that reason the preliminary-ruling procedure (and perhaps even supremacy) is essential for the direct effect of EC law.

Up to this point, my argument has been that it is difficult to develop a legal argument that, in fact, supports a decision of the ECJ to grant direct effect to WTO law within the legal order of the European Union. Now, I will present a constitutional argument that outright opposes direct applicability. Advocates of unilateral direct effect argue that this would benefit the national economy (the so-called "unilateral disarmament argument").[48] This argument, although appealing at first sight, encounters numerous objections.[49] Legally, the most important objection is based on the principle of equality. If the European legal order unilaterally introduced direct applicability, it would entail reverse discrimination, that is, the discrimination against domestic producers.

In cases of unilateral direct effect, the European legal order would often find itself in the position of unilaterally applying the more liberal WTO provisions to an imported product while the equivalent domestic product was subject to more stringent national rules. The *Hormones* case between the United States and Canada as complainants and the European Communities as respondent might serve as an example.[50] If the Sanitary and Phytosanitary Agreement between WTO members (designed to harmonize scientifically-based measures protecting human, animal, or plant life or health and prevent arbitrary discrimination and disguised restrictions of trade on such grounds) were directly applicable, meat grown abroad with added hormones could be commercially marketed and sold whereas an equivalent domestic product could not because WTO law applies only to foreign products.[51] Domestic producers and their

[48] That is to say, it is for the economic benefit of all citizens if WTO law is unilaterally directly applicable. *See, e.g.*, Daniel Ikenson, US Trade Policy in the Wake of Doha: Why Unilateral Liberlization Makes Sense, Cato Hill Briefing (July 20, 2006), *available at*: http://www.freetrade.org/node/706. The argument that unilateral liberalization is advantageous for an economy can be traced back to Adam Smith. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 2–3 (Routledge 2005),

[49] STEFAN LANGER, GRUNDLAGEN EINER INTERNATIONALEN WIRTSCHAFTSVERFASSUNG [BASIC PRINCIPLES OF AN INTERNATIONAL ECONOMIC CONSTITUTION] 18 (Beck 1995); Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, *in* EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227 (Brookings Inst. Press 2001).

[50] Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997) [hereinafter WTO Hormones], and Appellate Body Reports, WTO Hormones WT/DS26/AB/R and WT/DS48/AB/R (Jan. 16, 1998), *available at*: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm.

[51] *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (TRIPs) art. I(3); General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (GATT) art. III.

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marketers and sales agents would be at a disadvantage with respect to foreign counterparts.[52] Such discrimination is prohibited by domestic constitutions because it infringes the principle of equality.[53] Differentiating between competitors simply because one markets and sells products from another country does not meet the requirements of constitutional differentiation; the mere fact the goods are produced in different locals does not justify more favorable treatment,[54] with the possible exception that *domestic* products might be favored, which is not our present problem.[55]

One might reply that such discrimination happens quite often and legally within the European Union. This is true. However, this accepted form of reverse discrimination is not due to the fact that *one* legal order discriminates but results from divergences among *different* legal orders. Here, the domestic order has a certain rule for a given factual situation, whereas the legal order of the Union, whose applicability is imposed by the supranational legal order itself, has a different and more favorable rule for the plaintiff who acts transnationally. In that situation—when reverse discrimination is the result of the collision of *two* autonomous legal orders—such discrimination is usually considered justified because the principle of equality only applies within *one* legal order.[56] That justification would not apply if the Union decided, autonomously, on

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[52] The economic operators within a definite market form one group in the sense of the equality principle. *See* Case C–280/93, Germany v. Council ('Bananas'), 1994 E.C.R. I–4973, at paras. 67–75.

[53] Gareth Davies, Nationality Discrimination in the European Internal Market 126–127, 143 (Kluwer 2003); Miguel P. Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, *in* The Future of Remedies in Europe 117, 137–140 (Kilpatrick et al. eds, Hart 2000) (arguing that national courts, keeping in mind national values, should decide whether such reverse discrimination is acceptable and abolish it if necessary); Christoph Hammerl, Inländerdiskriminierung [Discrimination of Native Citizens] 103, 159 (Duncker & Humblot 1997); Astrid Epiney, Umgekehrte Diskriminierungen [Reverse Discrimination] 427 (Heymann 1995).

[54] For the requirements to differentiate legally in the European legal order, see Joined Cases 117/76 and 16/77, Albert Ruckdeschel & Co et Hansa-Lagerhaus Ströh & Co v. Hauptzollamt Hamburg-St. Annen / Diamalt AG v. Hauptzollamt Itzehoe, 1977 E.C.R. 1753, at para. 7; Case C–15/95, EARL de Kerlast v. Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux, 1997 E.C.R. I–1961, at para. 35; Case C–292/97, Kjell Karlsson and Others, 2000 E.C.R. I–2737, at para. 39; *cf.* Charter of Fundamental Rights of the European Union art. 20, *supra* note 41.

[55] *See* Case 112/80, Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen, 1981 E.C.R. 1095, at paras. 51–56 (protection of domestic producers for which the Union is responsible under art. 33 EC); Germany v. Council, *supra* note 52, at para. 74.

[56] Case 223/86, Pesca Valentia Limited v. Ministry for Fisheries and Forestry, Ireland and the Attorney General, 1988 E.C.R. 83, at para. 18; Case C–448/98, Criminal proceedings against Jean-Pierre Guimont, 2000 E.C.R. I–10663, at para. 15. Some constitutions even consider reverse discrimination to be prohibited in this case and apply the more liberal European rule. *See, e.g.*, Austria: Verfassungsgerichtshof [VfGH] Oct. 7, 1997, V 76/97, V 92/97, *reprinted in* 26(2) Österreichische Zeitschrift für Wirtschaftsrecht 51 (1999).

direct effect of WTO law. The only possible solution for the Union to apply WTO law, autonomously and directly, and to avoid reverse discrimination would be to decide that the WTO provision were also applicable to domestic products. Such a step would, however, amount to a wholesale deregulation, in one stroke, with unforeseeable consequences.[57] Such a move could hardly come within the competence of a court under any constitution, and certainly not within that of the ECJ, where the constitutional consensus is far more limited than in most constitutional states. If a political community wants to liberalize an economic sector, it is free to do so within the limits of the constitution, though not in such a way that the national competitors are discriminated against, that is, not through direct effect of WTO law.

Summing up: the issue of direct effect should not be argued on the criterion of determinedness and should not be regarded as technical. At least from the perspective of constitutionalism, it appears preferable to devise an answer based on the balancing of constitutional principles such as international cooperation, self-determination, subsidiarity, legal certainty, and legal equality. In this sense, the deconstruction of the pyramid should go hand in hand with a new construction of the doctrine of direct effect.

5. The ultimate say

My third thesis is merely a further conclusion from this reasoning. The symposium has been asked for a value judgment: "Should it [the pyramid] be deconstructed?" My answer is "no." There should always be the possibility, at least in liberal democracies, to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law and the sometimes debatable legitimacy of international legal acts—just recall the listing of suspected terrorists by the UN Security Council.[58]

[57] *See* Jürgen Basedow, *Deregulierungspolitik und Deregulierungspflichten—Vom Zwang zur Marktöffnung in der EG* [*Politics and Obligations of Deregulation—On the Pressures to Open Markets in the EC*], *in* Staatswissenschaften und Staatspraxis [Public Governance and State Practice] 151, 159 (1991).

[58] By S.C. Res. 1267 (1999), 1333 (2000), 1390 (2002), as reiterated in S.C. Res. 1455 (2003), 1526 (2004), 1617 (2005) and 1735 (2006), the UN Security Council obliged all states to subject all individuals and entities listed in the Al-Qaida and Taliban Sanctions Committee's "consolidated list" to restrictive measures, such as a global freeze on their assets, save for basic living expenses, and a travel ban outside their country of residence (*available at* http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf). These measures have recently come under fire from an opinion by ECJ Advocate General Miguel Poiares Maduro, who suggested to the ECJ that the Council regulation giving effect to these resolutions infringes fundamental rights guaranteed by Community law. *See* Case C-402/05 P, Yassin Abdullah Kadi v Council and Commission (Opinion of Advocate General Maduro).

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To read the initial question regarding the deconstruction of the pyramid in this manner, my answer, again, is that it should not be deconstructed. Or, to put it concretely: the European Court of First Instance has taken the wrong road by finding that acts of the Security Council can only be judged against *jus cogens*.[59] If the court does not want to question the ECJ's jurisprudence that European law is an autonomous legal order with constitutional features, then the relevant norms are those of the European legal order. Conceptually, the court was trapped by monism, a further reason why this thinking should be put to rest. My answer is not to be understood as monism with the constitution at the apex; the normative independence of international law is not put into question, and the pluralism of the legal order is the basis on which the entire argument rests.

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[59] Case T-306/01, *supra* note 3, at para. 276, 338–346; Piet Eeckhout, *Community Terrorism Listings, Fundamental Rights and UN Security Council Resolutions,* 3 Eur. Const. L. Rev. 183 (2007); Jochen A. Frowein, *The UN Anti-Terrorism Administration and the Rule of Law, in* Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat [Common Values in International Law: Essays in Honor of Christian Tomuschat] 785–795 (Engel 2006).