



EUROPEAN SOCIETY OF INTERNATIONAL LAW

Conference Paper Series

Conference Paper No. 8/2012

5th Biennial Conference, Valencia (Spain), 13-15 Sept 2012

New Regionalism and Global Constitutionalism: Allies, Not Rivals

José Manuel Pureza

Editors:

Nico Krisch (Hertie School of Governance)
Anne van Aaken (University of St. Gallen)
Mario Prost (Keele University)

NEW REGIONALISM AND GLOBAL CONSTITUTIONALISM: ALLIES, NOT RIVALS

José Manuel Pureza

Abstract:

The boom of regional intergovernmental institutions since the nineties – a reality usually known as “new regionalism” – raises several crucial questions about the nature of the current international system and about the role that international law plays in it. In this article, I will only deal with two of them. The first is the nature of the relations between the apparently contradictory processes of globalization and regionalism. The second interrogates the type of connections – both formal and substantial – between two allegedly opposite trends taking place in the contemporary international legal order: global constitutionalism on one side and the regional fragmentation of international law on the other.

Author Information:

University of Coimbra

The boom of regional intergovernmental institutions since the nineties – a reality usually known as “new regionalism” – raises several crucial questions about the nature of the current international system and about the role that international law plays in it. In this article, I will only deal with two of them. The first is the nature of the relations between the apparently contradictory processes of globalization and regionalism. The second interrogates the type of connections – both formal and substantial – between two allegedly opposite trends taking place in the contemporary international legal order: global constitutionalism on one side and the regional fragmentation of international law on the other.

1. We need to go beyond superficial, common-sensical definitions to catch the disputable contents of both globalization and international regionalism.

On one side, globalization is far from being a neutral process. The prevalent belief according to which globalization is a linear, homogeneous and undisputed dynamic masks extremely important elements, namely the close connection between globalization, power and hegemony. From this point of view, it should be underlined that globalization tends to reproduce, in each of the concrete fields it operates, the hierarchies of the world system and the asymmetries between core and peripheral societies. Therefore, standardization of lifestyles or shortening of time-space are descriptions of globalization that tend to diminish the real importance of disputes of different agendas and of relations of hegemony. Therefore, I follow Santos’ admonition:

“it becomes clear that what we term globalization is, in fact, a set of different processes of globalization and, in the last instance, of different and sometimes contradictory globalizations. What we generally call globalization is, in fact, different sets of social relationships which give rise to different phenomena of globalization. In these terms there is not, strictly speaking, one sole entity called globalization, instead there are globalizations; to be precise, this term should only be used in the plural. As they are sets of social relationships, globalizations involve conflicts and, therefore, winners and losers. The dominant discourse on globalization is the history of the winners, told by the winners.”¹.

This focus on the conflictive essence of globalization processes allows us to read critically the concrete meaning and scope of globalization from a simultaneously economic and institutional point of view. That critical reading clarifies that the current hegemony of the neoliberal ideology places at the center of real globalization taking place nowadays robust strategies of emptying national regulations and replacing them by institutional and regulatory mechanisms aimed at enforcing an uneven implementation of the principle of mobility: applied to capital much more than to labor, applied to Northern goods but not so much to Southern ones. In the words of Philip

¹ Santos, “Globalizations”, *23 Theory Culture and Society* (2006) 393, at 395.

Cerny², “a growing tension between economic globalization and embedded state/society practices increasingly constitutes the principal terrain of political conflict within, among, and across competition states”. And the dominant result of that political conflict is diminishing the central position of the nation-state as a political institution, as a regulatory actor and as a key reference – a sort of “natural scale” – for social sciences. Therefore, within the context of globalization, a reshaping of both the theoretical and the political dimensions of the centrality of the nation-state is occurring, with remarkable impacts in political action and in political thought.

2. This is the framework in which the question concerning the concrete role of regional organizations must be read. Having this conflictive notion of globalization in mind, the crucial question to be analyzed is not an abstract opposition between universalism versus particularism or between the whole versus the fragment. In fact, one of the most relevant dimensions of globalization is its work as a process of political structuration, this meaning that it “involves reshaping political practices and institutional structures in order to adjust and adapt to the growing deficiencies of nation-states as perceived and experienced by such [state] actors”³. Within this context, the really important question concerns the relevance of regional international organizations as institutional structures that are reshaped – in their mandate and in their decision process – by the dynamics of globalization. That relevance is fundamentally revealed by the role given to regional normative and institutional structures in enabling and enforcing the ideological background of hegemonic globalization and its expressions in the different areas: political, economic, financial, cultural, etc. Are they instruments of enforcement of that program or are they instruments of resistance against that program? Or, to use the words of James Mittelman⁴, “is regionalism merely a way station toward neoliberal globalization, or a means toward a more pluralistic world order in which distinct patterns of socioeconomic organization coexist and compete for popular support?”

Regionalism has been a continuous trend of the international order since the beginning of the 20th century. However, it has gained specific features across time. This is why Telò⁵ talks about “three waves of regionalism during the twentieth century”: the “malevolent regionalism of the thirties and beginning of the forties, the “hegemonic regionalism” of the late forties and fifties, and the “post-hegemonic regionalism” of the nineties. In turn, Mittelman⁶ analyses the differences between the “auto centric regionalism” of the thirties and the contemporary “neoliberal regionalism” underlining extroversion, the aim of diminishing the ability of states to control trade and monetary relations and its defensive nature against further social disintegration (“degenerative regionalism”) as its main features.

² Cerny, “Paradoxes of the competition state: the dynamics of political globalization”, 32 *Government and Opposition* (1997) 2, at 251.

³ *Ibid.*, at 253.

⁴ J. Mittelman, *The globalization syndrome* (2000), at 111.

⁵ M. Telò, *European Union and new regionalism. Regional actors and global governance in a post-hegemonic era* (2007), at 2.

⁶ Mittelman, *supra* note 3, at 112.

The third wave of regional international organizations - the so-called 'new regionalism', typical of the phase that started with the end of the cold war - differs from the two former waves (1945-65 and 1965-90) since its main feature is its instrumental function to the neoliberal globalization dynamics. In fact, the main role actually played by the most relevant regional organizations of our time (APEC, MERCOSUR, Organization of Cooperation of Shanghai or the redefined European Union) is above all to integrate their member states in a (also juridical) global neoliberal order.

This is a crucial change in the purposes of regionalism: while the traditional forms of regionalism have been associated with protectionist strategies, the new regionalism is a privileged instrument of openness and of adoption of the liberal creed. Why is that so? What has occurred that determined this important change? Following the neo-Gramscian approach suggested by Spindler⁷, I take the replacement of "embedded liberalism"⁸ as the ideological background of the world order as the crucial factor in the changing nature of regionalism. And, since theory is always for someone and for some purpose, it must be stressed that this change is the goal of specific social actors, namely global business actors. It is in their interest that the logic of the market is being infused into traditional regionalism, therefore creating both regionalized and globalised patterns of economic transactions, of political standards and of institutional formulae⁹.

According to John Gerard Ruggie, the international order developed after World War II has mostly been concentrated on reaching a new balance between economics and politics, different from both economic nationalism and laissez-faire capitalism. For that purpose, it assumed the constraint of market forces through legal-political intervention as a top priority, embedding liberalism in a state and interstate order based upon the acceptance of a large space for public interventionism, bringing together state regulation at the domestic scale and an opening up towards the international. In the words of Ruggie, "this was the essence of the embedded liberalism compromise: unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism"¹⁰. Through this reconciliation between liberalization in the external field and interventionism in the internal order, this compromise sought a solution in-between economic nationalism of the thirties and liberal capitalism – the "middle way capitalism", according to Kirchner¹¹ – which would enable nation-states to both benefit from the free flow of goods and guarantee national social policies. In fact, embedded liberalism meant not only the safeguard of the adoption of public health or full employment as national goals, or the implementation of social policies as a crucial part of the social contract, but also the protection of national strategic industries or the establishment of controls on transboundary speculative movements of capital. In fact, as Helleiner duly stresses, "the overriding principle was restriction:

⁷ M. Spindler, *New regionalism and the construction of global order* (2002).

⁸ Ruggie, "International regimes, transactions and change: embedded liberalism in the postwar economic order", 36 *Int Org* (1982) 379.

⁹ Spindler, *supra* note 7, at 4.

¹⁰ Ruggie, *supra* note 8, at 393.

¹¹ Kirchner, "Keynes, capital mobility and the crisis of embedded liberalism", 6 *Review of International Political Economy* (1999), at 314.

states were given the explicit right to control all capital movements”¹², contrasting with the liberalization of trade.

The role played by intergovernmental institutions at that moment, and especially the mandate given to regional international organizations, was precisely that of agreeing on limits to the market dynamics and therefore enabling the viability of robust and large social contracts within welfare states at the nation-state scale, complemented at the international level with intergovernmental regulation adopted by those organizations and intergovernmental platforms. “The region of embedded liberalism is a protectionist region”, in the synthesis of Manuela Spindler¹³.

Now, what we are witnessing with this emergence of a third wave of regional organizations is a sort of Karl Polanyi’s second move at a global scale. The return of the hegemony of an unlimited market and therefore a deep change in the former balance of forces led by the *nébuleuse* – that is, the loose elite of local and global business actors, states and opinion makers that produces the current canon of political and economic governance¹⁴ – has put embedded liberalism in a dramatic crisis. According to Lacher, this reversal of the former regulation is mostly due to the fact that it has never truly challenged “the ultimate basis of the market as a disembedded institution itself: the commodification of human labor”¹⁵. The welfare state model has given place to the actual standard of the competitive state whose strategic goal is to strengthen the international and transnational competitiveness of national economic activities. At the core of this paradigmatic shift lies the replacement of the use of the state to keep certain areas out of the market by the use of the state to increase the marketization of more and more areas of economic activity, allegedly to improve the international competitiveness of national economies, following what Cerny calls the “embedded financial orthodoxy”¹⁶. The relation between this replacement of the former welfare state model by the competitive state paradigm is a two-way process: “the consolidation and expansion of the competition state is itself driving a process of political globalization which is increasingly relativizing the sovereignty of states and, indeed, forcing the pace of globalization in economic, social and cultural spheres too”¹⁷. Therefore, the neoliberal turn is far from being limited to the economic sphere. It involves a whole redefinition of governance and a redesign of the state itself. Apart from the adoption of strict financial discipline as a sort of *ultima ratio*, these changes include the adoption of an entrepreneurial culture within the state, namely through the implementation of market-based systems of incentives and through a new

¹² E. Helleiner, *States and the re-emergence of global finance: from Bretton Woods to the 1990's* (1994), at 49.

¹³ Spindler, *supra* note 7, at 12.

¹⁴ Cox, “Democracy in hard times: economic globalisation and the limits to liberal democracy”, in A. McGrew (ed.), *The Transformation of Democracy? Globalisation and Territorial Democracy* (1997) 49, at 58.

¹⁵ Lacher, “Embedded liberalism, disembedded markets: reconceptualizing the Pax Americana”, 4 *New Political Economy* (1999) 343, at 345.

¹⁶ P. Cerny, “The infrastructure of the infrastructure? Toward ‘embedded financial orthodoxy’ in the international political economy”, in R. Palan, and B. Gills (eds), *Transcending the state-global divide: a neostructuralist agenda in International Relations* (1994).

¹⁷ Cerny, *supra* note 2, at 252.

culture of competition between state agencies and the private sector for the supply of basic public goods.

Spindler argues that, within this changing context, regionalism itself has become “part of the move towards the competition state, with market actors infusing old regionalism with a new logic, thus globalizing and marketizing regionalism”¹⁸. This reinforces the understanding according to which regional organizations have become instruments of the global neoliberal hegemony or, at least, intermediation mechanisms between the global neoliberal economic order and nation states and markets.

The ‘new’ in the new regionalism is made of a crucial difference in envisioning the nature of the global space. To explore this topic, I follow Wendy Larner and William Walters’ contrast between two contemporary political rationalities concerning the conceptualization of economic spaces¹⁹. The first is developmentalism. It conceptualizes the global space as an inter-national system of discrete self-contained units, separate parts of an international division of labor and each one of them endowed with singular attributes expressed through the concept of comparative advantages. Against this aggregate notion of the global space, neoliberalism reads national and regional entities as sectors of a global space understood as a space of investment flows and trade fluxes that cross all traditional delimitations. There is, therefore, a clear similarity and a clear difference between those two political rationalities in what concerns the connection between states and the global space: the two conceptualize states as specific positions within the global space, but whereas developmentalism sees the state as an autonomous bounded unit and regionalism as the aggregate result of a transfer of parts of that autonomy by different neighbor states, neoliberalism faces states as subordinate, non-autonomous units, whose only function is to facilitate at the local level the implementation of standardized policies for the whole global space. In these neoliberal terms, regionalism’s role is not anymore that of establishing protectionism. “Regionalism presupposes a global economy” – Larner and Walters state²⁰, emphasizing the continuity between the two levels and the hierarchical relation between them: regions (and their organizations) are not a compensatory mechanism for weakened nation states but rather an aid for the liberalization of the national economic space.²¹

3. The current Euro crisis gives us extremely clear signs of this new instrumental role of regional international organizations. Starting with the institutional partnership inaugurated for the enforcement of structural adjustment policies in highly indebted countries: the so-called “troika” is no more than an assemblage of the European Commission with the European Central Bank and the International Monetary Fund. But more than this institutional dimension, it is the nature of the policies implemented by the troika that evidences the self-representation of the European Union

¹⁸ Spindler, *supra* note 7, at 16.

¹⁹ Larner and Walters, “The political rationality of ‘new regionalism’: toward a genealogy of the region”, 31 *Theory and Society* (2002) 391.

²⁰ *Ibid.*, at 408.

²¹ Donegan, “Governmental regionalism: power/knowledge and neoliberal regional integration in Asia and Latin America”, 35 *Millennium – Journal of International Studies* (2006) 23, at. 34.

as an intermediary body between its member states and a global economic and financial order whose contents are clearly contrary to the “European social model” based for a long time on indirect salaries, universal public services and social rights. The standard contents of austerity measures implemented in Greece, in Ireland, in Portugal, in Spain and all over the Euro zone follow an ideological script synthesized by Gill in five major components: sound policy, debt sustainability, surveillance and normalization, attenuation of democracy and prioritization of market efficiency over equity and social solidarity²².

As Rodrigues and Reis²³ underline, this script materializes the neoliberal hegemony in the European context, as expression of the power of the dominant transnational fraction of capital which has been pushing for an integration process based upon the expansion of market forces and of the inherent subsumption of both the social democratic and the neomercantilist traditions within a neoliberal understanding of European integration which has been inscribed in the institutional arrangements of the Economic and Monetary Union. This dramatic changing process expresses the agency of what Gill calls “a neoliberal transnational historic bloc”²⁴ – that is, “a political synthesis of interests and identities drawn from across social classes and nations that mediates and seeks to coordinate national, regional and global dimensions of accumulation and legitimation” – whose agenda is focused on a restructuring of state policies so that they become interpreters of the priorities of the dominant forces of contemporary capitalism.

In clear contrast with the former political and institutional design of the European Communities, the model adopted since the 1990s turned the European Union into a major example of what van Apeldoorn names “embedded neoliberalism”²⁵. On one side, the core of the European Union treaties enhances a free market orientation, namely through the constitutional status of the primacy of the principle of free flow of capital, goods and services over social protections at the national level, or through the statutes of the European Central Bank, which excludes from its mandate all forms of direct funding of states and imposes supply-side policies to be adopted by member states. On the other side, this trend is not object of any kind of balance through any sort of either market correcting mechanisms or of economic crises management tools at the European scale, namely the EU budget²⁶. The reshaping of the political mandate of the European Union embodies the contemporary coexistence and functional articulation between the transnational integration of capital and the regional varieties of capitalism²⁷. To be more precise, the turn of the 1990s has meant a shift of the European Union from a social market or social-democratic model of capitalism into a neoliberal and financial-oriented one and this shift reflects a strategy of reconciling regional integration with globalizing forces²⁸.

²² Gill, “European governance and new constitutionalism: Economic Monetary Union and alternatives to disciplinary neoliberalism in Europe”, 3 *New Political Economy* (1998) 5, at 15.

²³ Rodrigues and Reis, “The Asymmetries of European Integration and the Crisis of Capitalism in Portugal”, 16 *Competition and Change* (2012) 188, at 189.

²⁴ Gill, *supra* note 22, at 11.

²⁵ B. van Apeldoorn, *Transnational Capitalism and the Struggle over European Integration* (2002).

²⁶ Rodrigues and Reis, *supra* note 23, at 190-191.

²⁷ Georgiou, “The Euro Crisis and the Future of European Integration”, 128 *International Socialism* (2010) (available at: <www.isj.org.uk/?id=682> [accessed 2 July 2012]).

²⁸ Gill, *supra* note 22, at 9-10.

4. This leads us to the second question of this article. In a context of articulation between global and regional platforms, both serving the same hegemonic orientation, the traditional opposition between global constitutionalism and the regional fragmentation of international law has ceased to make sense. It is no more a true opposition.

The concept of global constitutionalism has emerged in the last two decades, as a sort of upgrade, both normative and institutional, of the discourse on the role of international law within the globalization process. Together with the mainstream discourse on global governance – that emphasizes the failures and insufficiencies of traditional institutions and norms and takes that diagnosis as the basis for an exercise of institutional engineering which tries to answer the regulatory challenges of that dominant agenda of globalization – the narrative about global constitutionalism suggests that the international system is experiencing a crucial transformation that is conducting it from the childhood of the Westphalian order to an adult order with mechanisms of differentiation, hierarchy and centralization.

From a normative perspective, the discourse of global constitutionalism is a form of overcoming the fragilities of traditional international law, namely its nature of contractual bric-a-brac²⁹. The threefold indifferenciation of that traditional international legal order – concerning both its sources, state obligations and mechanisms of international responsibility – has been subject to a hard process of conceptual critique which resulted in the emergence of legal categories like *jus cogens*, obligations *erga omnes* or international crimes. This is the conceptual framework within which the very idea of global constitutionalism has been able to emerge. It expresses the shared theorization of liberal international legal scholars, who became dominant references of the academic debate in the second half of the 20th century, for whom the growing density of international law and the growing regulatory competences of international institutions has enabled the emergence of a hierarchization within the international order that acquired a constitutional nature materialized in the superiority of a set of norms and principles and the binding effect of a growing type of deliberations of international organizations.

But these formal-legal and institutional understandings of global constitutionalism must be read within its political context. Danilo Zolo³⁰ identifies four normative theses that lie at the core of the construction of what he names “legal cosmopolitanism”: “first, that of the primacy of international law and the progressive reduction of the sovereignty of states (...); second, that of jurisdictional centralism: (...) the development of norms and centralized bodies for the verification and coercive application of the law; (...) third, that of legal pacifism; (...) and, finally, fourth, that of ‘global constitutionalism’ which (...) emphasizes the ability of centralized supranational institutions to safeguard the fundamental liberties of individuals which states have shown themselves incapable of protecting”. But the same author asks: “Is it reasonable to entrust the defence of human rights to illiberal power structures?”

²⁹ Combacau, “Le droit international: bric-a-brac ou système?”, *Annuaire de Philosophie du Droit* (1986).

³⁰ D. Zolo, *Cosmopolis. Prospects for world government* (1997), at 97.

Zolo's question – and the critical distance it implicitly vehicles against the global constitutionalism discourse – places at the core of the debate on global constitutionalism the political conditions and the political contents of those norms and institutions. This means that global constitutionalism is a contradictory and disputed field, which includes both universal protection of human rights and universal standardization of models of governance or the universal adoption of free markets and their (de)regulation. In more concrete terms, this means that Zolo's definition of global constitutionalism is not comprehensive enough since it should include not only the notion that the real constitution of globalization is unbalanced in terms of protection of human rights and liberties – giving absolute primacy to classical civil rights over social and economic rights – but also that there are other normative components of that constitution whose scope is the protection of the rights of the capital – v.g. OECD's Multilateral Agreement on Investment, the General Agreement on Trade-in-Services (GATS), the Uruguay Round's Trade-Related Intellectual Property Measures (TRIPS) and Trade-Related Investment Measures (TRIMS), minimalist regulation of the financial system, etc. It is in this sense that Stephen Gill³¹ uses the concept of “new constitutionalism”. Gill emphasizes that new constitutionalism means, most of all, a set of principles – both legal and political – which separate economic policies from broad political accountability in order to make governments more responsive to the discipline of the market forces and correspondingly less responsive to popular-democratic forces and processes. And he concludes: “[n]ew constitutionalism is the political-legal dimension of the wider discourse of disciplinary neoliberalism”. In Gill's view, the role ascribed to the most relevant contemporary regional organizations – including NAFTA, APEC or the European Economic and Monetary Union – within the emergence of this new constitutionalism, is that of “embedding neoliberal principles which remove important areas of economic policy from elected governments who may seek to reverse the neoliberal agenda in whole or in part.” This new global constitutionalism is therefore an evidence that Martti Koskenniemi is absolutely right in pointing that constitutionalism and empire go well together “as testified both by 19th century European experience and today's American one”³².

Under these circumstances, the traditional opposition between universal/global and particular/regional international law has lost great part of its original meaning. Koskenniemi's concept of “managerialism”³³ could be a useful tool to analyze the current articulation between regional and universal international law. Koskenniemi uses the notion of managerialism to refer to a fragmentation of international normative and institutional regimes, used *à la carte*, to submit subjects to their discipline: “the world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos”³⁴. Therefore the current international legal menu offers different closed boxes – international environmental law, international human rights law, international trade law, international security law, etc. – each with

³¹ Gill, *supra* note 22, at 5.

³² Koskenniemi, “The politics of international law – 20 years later”, 20 *EJIL* (2009) 7, at 17.

³³ *Ibid.*, at 14.

³⁴ *Ibid.*, at 9.

its specific institutions and norms, forming a sort of “kaleidoscopic reality”³⁵ supported by states aimed at, through that multiplicity of regimes, avoiding potential costs of a single binding regime.

This dynamic of fragmentation of international legal regimes and of enforcement mechanisms and institutions has been criticized as something that “generate[s] unwanted confusion” and “distort[s] the operation of justice”³⁶, since “the proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations”³⁷. It is not only a certain understanding of international law that is questioned by this fragmentation dynamics. More than that, it is a vision of the international sphere as a structure with a formal-legal hierarchy at the top of which the United Nations governs, through public international law norms, the world of sovereigns that is radically undermined by this flexible and decentralized development of the international legal order. Within that traditional vision, the international order tended to be understood with the lens of what Koskenniemi calls “a domestic analogy” which envisages treaties as playing the role of legislation, the rules and institutions that deal with the settlement of controversies as playing the role of adjudication and war and counter-measures as playing the role of enforcement³⁸.

Now, the thematic approach to managerialism can also be articulated with a regional one: European regulation, American regulation, etc. But, in contrast with Koskenniemi’s belief that “the proliferation of autonomous or semi-autonomous normative regimes is an unavoidable reflection of a ‘postmodern’ social condition and a beneficial prologue to a pluralistic community in which the degrees of homogeneity and fragmentation reflects shifts of political preference and the fluctuating successes of hegemonic pursuits”³⁹, I agree with Benvenisti that “while it is reasonable to argue that the proliferation of multilateral agreements has created an institutional environment that is less hierarchical than that which existed during the Cold War, it is not clear that the resulting order is any more pluralistic with respect to the range or even the number of interests that it represents”⁴⁰. The automatic correspondence between fragmentation and pluralism is a misleading one. The concrete reality of the contemporary international system is that fragmentation is promoted and used, most of all, by a handful of stronger states whose interest is

³⁵ Koskenniemi, “Fragmentation of international law? Postmodern anxieties”, 15 *Leiden JIL* (2002) 553, at 559.

³⁶ Speech by H. E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, 26 October 2000 (available at: < <http://www.icj-cij.org/icjwww/ipresscom/iprats/htm> > [accessed 26 June 2012]).

³⁷ Speech by H. E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, 30 October 2001. (available at: < <http://www.icj-cij.org/icjwww/ipresscom/iprats/htm> > [accessed 26 June 2012]). Martii Koskenniemi (*supra* note 23, at 560) quotes a preliminary survey conducted by the International Law Commission in 2000 which prioritized the impacts of the fragmentation of international law in terms of “endanger[ing] [international law’s] stability as well as the consistency of international law and its comprehensive nature”. In that survey, the absence of unity and hierarchy was interpreted as threatening the “credibility, reliability and, consequently, authority of international law”.

³⁸ Koskenniemi, *supra* note 35, at 558.

³⁹ Koskenniemi, “What is international law for?”, in Malcolm D. Evans, *International Law* (2003) 89, at 110.

⁴⁰ Benvenisti and Downs, “The empire’s new clothes: political economy and the fragmentation of international law”, 60 *Stanford Law Review* (2007) 595, at 603.

not an enlargement of democracy and participation at the international level but instead a narrowing of the democratic egalitarian space and a sophisticated form of enhanced control which does not explicitly assume an hierarchical form but which has that hierarchy as its final goal.

Within this context, I tend to acknowledge managerialism as a strategy of enforcement of the global hegemony of neoliberal politics. The deepening of the piecemeal approach is a deliberate strategy that favors the most powerful states, to the extent that, benefiting from such fragmented issue-specific legal system, those states use it as a form of preserving or even enlarging their bargaining positions. This strategic use of fragmentation by powerful states is based on a cost-benefit analysis, characterized by Charney in the following terms: “Hierarchy and coherence are laudable goals for any legal system, including international law, but at the moment they are impossible goals. The benefits of the alternative, multiple forums, are worth the possible adverse consequences that may contribute to less coherence. This risk is low and the potential for benefits to the peaceful settlement of international disputes is high”⁴¹. It is therefore undisputable that powerful states use a twofold strategy to foster their dominant position: on one side, they claim their hierarchical superiority within multilateral institutions and regulatory frameworks; on the other, they promote institutional and regulatory fragmentation whenever they serve their agendas.

This means that, in concrete situations and debates, the choice between regional and global legal-institutional constraints on national legal orders to legitimize the implementation of neoliberal standards and goals is precisely that: a choice, guided exclusively by a logic of maximum efficiency in binding local actors and convincing local public opinions. “Globalization has put a premium on efficiency, and decentralized processes are simply more efficient than more formal, centralized ones”⁴². Koskenniemi himself acknowledges this ideological nature of the choice between different legal approaches to a specific problem⁴³. In fact, those choices – between international human rights law or international trade law or between the European Convention on Human Rights and the EU Lisbon Treaty – reveal the true hierarchies that structure international law, well beyond the conceptual and jusnaturalist construction of *jus cogens*. Following traditional constitutional theory, it could be said that the formal global constitution does not coincide with the material global constitution, the latter having practical primacy over the former.

Take once again the actual Euro crisis and its normative dimension. Fiscal and budgetary limits imposed on the states of the Euro zone are justified in normative terms as a consequence of EU constitutional norms adopted since the Maastricht Treaty of 1992. But those rules are themselves justified as expressions, at this specific regional level, of global regimes like those embodied in the WTO or the Bretton Woods system. So, this cascade way of legitimizing neoliberal policies through either regional or global norms gives us a close view of the current instrumental role played, also at a normative production level, by regional organizations considering the global political and economic order.

⁴¹ J. Charney, “The implications of expanding international dispute settlement systems: the 1982 Convention on the Law of the Sea”, 90 *Am JIL* (1996) 69, at 75.

⁴² Benvenisti and Downs, *supra* note 40, at 600.

⁴³ Koskenniemi, *supra* note 32, at 11.

5. The contemporary global order – both institutional, economic and legal – is a regionalized one. Regional organizations are fabrics of the globally hegemonic codes of good governance and instruments for binding their member states to those codes. Within this context, international law is what it has always been: an ambivalent and disputed discourse that serves either as an instrument to enforce that hegemony or as an argument to resist it. That double nature of the international legal discourse (simultaneously apology and utopia) – and its corollary, the oscillation of dominant states between instrumentalization of international norms and regimes and withdrawal from them⁴⁴ – puts all the emphasis on the concrete forms of the mobilization of international norms, by whom and for what purposes. After all, as Alexander Wendt wrote about anarchy in international relations, international law is what states – and other social actors – make of it.

⁴⁴ Krisch, “International law in times of hegemony: unequal power and the shaping of the international legal order”, 16 *EJIL* (2005) 369, at 381.