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Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies

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Globalization, Federalism and Regulation

R. Daniel Kelemen
Rutgers University
rkelemen@rci.rutgers.edu

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Abstract

This chapter examines the impact of globalization on social regulation in federal polities. Many states rights advocates fear that globalization will lead to a reduction in state regulatory autonomy. Are these fears justified, or, on the contrary, will the regulatory diversity within federal systems persist and dampen the effect of globalization? In other words, will globalization undermine federalism, or will federalism undermine globalization? I examine the impact of globalization on social regulations in federal polities in the context of NAFTA, the EU and the WTO. My findings suggest that international legal integration encourages the centralization of regulatory power within federal polities. However, the impact is modest and does not uniformly act to raise or lower standards. While supranational dispute resolution bodies have attacked sub−national social regulations in some cases, this downward pressure has been counterbalanced by international and regional commitments to increase regulatory standards.

KEYWORDS:

I. Introduction

Globalization has given rise to a number of conflicts that are familiar to students of federal systems.[1] It is no coincidence that terms used in the study of globalization, such as "race-to-the-bottom" and "California effect," stem from the study of a federal system. Processes of economic and legal integration within federal systems have generated both general tensions between promoting legal uniformity and protecting state autonomy and specific conflicts between free trade and social regulation. The conflicts between free trade requirements and social regulations that have emerged between states in the international arena have already been played out within the context of federal systems.[2]

Given these similarities, examining the experiences of federal systems may provide important insights into the dynamics of globalization. However, federal polities are not only models for globalization, they are also subject to it. State-level regulatory autonomy has been attacked by international trading partners, who claim that regulatory diversity within federal systems can constitute a non-tariff barrier to trade. For instance, the EU complains that the diversity of regulatory requirements in the U.S.'s 50 states often constitutes an unfair impediment to trade.[3] State-level social regulations have been attacked as trade violations in the context of the WTO, NAFTA and the EU.[4] State officials have begun to fear that globalization could endanger their regulatory autonomy. The North Dakotan Attorney General expressed the fears of many state officials in the US, stating, "NAFTA and other trade agreements present the greatest challenge to state sovereignty that we have."[5] In response to such perceived threats, state governments have fought to defend their interests in the face of globalization. From India, where three state governments sued the federal government for violating state's rights by signing the Uruguay Round Agreement,[6] to the US, where state governments demanded and won special exemptions to protect existing state laws from attack under NAFTA, state governments are pressing their federal governments to protect their regulatory autonomy.

This chapter examines the impact of globalization on social regulation in federal polities. Is globalization likely to lead to a reduction in state regulatory autonomy, as many states rights advocates fear? Or will the regulatory diversity within federal systems persist and dampen the effect of globalization on federal polities? In other words, will globalization undermine federalism, or will federalism undermine globalization? Finally, we must ask what impact globalization has had, and is likely to have, on regulatory standards within federal systems. Many supporters of social regulation in advanced industrialized societies fear that globalization will lead to a diminution of regulatory standards. Some critics contend that we are experiencing a battle of "Globalization vs. Nature" in which, "[the WTO's] victims include dolphins, sea turtles, clean water, clean air, safe food, family farms and democracy itself."[7] Are these fear justified, or do they misjudge the likely impact of globalization? Might globalization actually serve to enhance environmental standards?

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[1] Farber and Hudec 1994.
[2] Stewart 1992.
[3] See, for instance, European Commission 1999.
[4] See Section II below.
[5] Evelyn Iritani, "Trade Pacts accused of subverting U.S. Policies," *Los Angeles Times*, February 28, 1999.
[6] "Dilemma-of-Politics", Business India, AP *Worldstream*, April 5, 1998.
[7] "Globalization v. Nature," paid advertisement, *New York Times*, November 22, 1999.

For the purposes of this chapter, I view both regional trade blocs, such as NAFTA and the EU, and international trade institutions such as the GATT and WTO as manifestations of globalization. I divide globalization into two components, legal integration and economic integration. Legal integration refers to the establishment of common, international rules and legal institutions to govern trade and regulation. Economic integration refers to the integration of markets. In this chapter I focus primarily on legal integration, examining its impact on domestic social regulations, and on federal polities specifically.

I argue that international legal integration encourages the centralization of regulatory power within federal polities. However, the impact is modest, and may in some cases be overwhelmed by developments rooted the internal dynamics of particular federal systems that work in the opposite direction. The impact of legal integration on regulatory standards has also been mixed. Decisions made by supranational dispute resolution bodies have attacked social regulations set by national and sub-national governments in some cases; however, the impact of these decisions has been limited. Counterbalancing this downward pressure on standards, regulatory commitments made internationally (e.g. through multi-lateral environmental agreements) or regionally (e.g. in the context of the EU) have in many cases led to increases in regulatory standards.

The chapter proceeds as follows. Section II examines the dynamics of legal integration. Section III explores the dynamics of legal integration in the context of the WTO, NAFTA and the EU. Section IV briefly discusses the impact of economic integration. Section V concludes.

II. LEGAL INTEGRATION

Legal integration involves the establishment of common, international rules and legal institutions to govern trade and regulation. Legal integration can affect social regulation through two processes - negative integration and positive integration. Negative integration relies on the selective removal of national (or sub-national) regulations that impede trade in order to secure a "level regulatory playing field". Positive integration involves the harmonization of regulatory requirements through the enactment of common regulatory standards. To assess the net impact of legal integration on social regulation, we must consider the impact of both forms of legal integration and the interaction between the two of them.

Negative integration can occur in the context of international agreements, such as NAFTA, the GATT and the EU Treaties, in which states commit themselves to establishing free trade. Negative integration occurs when dispute resolution bodies attached to the international agreements rule that a particular domestic social regulation constitutes a non-tariff barrier that violates free trade rules and should be removed. Most critics of globalization focus exclusively on this aspect of legal integration, decrying the fact that "faceless bureaucrats" have the power to declare domestic regulations illegal violations of international trade law. Cases in which GATT and WTO panels have made such rulings have attracted intense criticism from consumer and environmental protection advocates, who voice fears that the WTO constitutes a grave threat to national social and environmental regulations. Such criticisms misjudge the likely impact of negative legal integration in two respects.

First, such criticisms ignore the fact that supranational courts and dispute resolution bodies, like all courts, have an interest in maintaining their legitimacy. To do so, they must avoid making decisions that will spark disobedience or political attacks. They understand that many social and environmental regulations are popular with important constituencies in powerful states. Accordingly, they recognize that if they consistently make decisions that antagonize these constituencies, governments may defy their decisions or launch a more aggressive political attack on their jurisdiction or overall legitimacy. The greater the political threat posed by a state's (or a group of states') potential defiance, the more likely the court will adjust its decision to suit the state's (the states') preferred outcome.[8] Certainly, we can expect dispute resolution bodies to continue declaring some domestic regulations invalid, and sub-national governments (i.e. states in federal systems) will generally pose less of a threat of political retaliation than national governments and, therefore, will be more susceptible to having their social regulations overturned.[9] While negative integration will occur, political considerations will prevent dispute resolution bodies and supranational courts from launching a wholesale attack on domestic social regulations.

Second, a narrow focus on negative integration obscures the fact that negative and positive legal integration are often closely linked, and that positive integration may serve to increase regulatory standards. Positive harmonization occurs when states make multi-lateral commitments to adopt social regulations. Negative and positive harmonization are often linked, because pressure for negative harmonization often sparks efforts at positive harmonization. Governments that see their strict regulations attacked as NTBs may respond by promoting international agreements that serve to pressure other states to adopt their standards. International agreements on matters of social regulation and the institutions established to monitor the implementation of such agreements place pressure on governments to raise their regulatory standards. Thus the net effect of legal integration on regulatory standards will depend on the balance of negative and positive integration. In contexts where the effects of negative integration are not counteracted by a process of positive integration, globalization will tend to decrease regulatory standards. However, where the effects of positive integration outweigh those of negative integration, globalization will encourage increases in standards.

Both forms of legal integration encourage the centralization of regulatory authority in federal systems. Because federal governments are held accountable for state-level violations of free trade agreements, they have an incentive to prevent state governments from adopting laws that are prone to be challenged as trade violations. Similarly, in the realm of positive harmonization, only national governments can participate in the negotiation of such agreements, and only they are held responsible to implement regulatory commitments. Therefore, an increase in treaty making activities by federal governments will tend to concentrate regulatory authority in the hands of federal governments at the expense of state governments.

III. Legal Integration in the GATT/WTO, NAFTA and the EU

GATT/WTO

[8] Kelemen 2001.

[9] Harvey Berkman, "As GATT Gains, Will States Wane?" National Law Journal, November 14, 1994.

Negative Integration. WTO dispute resolution panels and the WTO Appellate Body (and their predecessors, the GATT dispute resolution panels) have the power to declare national or sub-national social regulations illegal under the GATT.[10] While a number of cases have examined conflicts between free trade and national social regulations, to date GATT/WTO decisions have had a minimal impact on sub-national regulations. Only two GATT panels have directly considered sub-national regulations.

The first case, *Beer II*[11], arose in the context of an ongoing Beer War between the US and Canada. In 1991, Canada brought the case before the GATT, arguing that a tax break for micro-breweries that Minnesota had instituted discriminated against Canadian brewers and, therefore, violated the GATT. The law was not facially discriminatory, as both Canadian and Minnesotan microbreweries could benefit from the tax breaks. However, the Canadian government suggested that the law constituted indirect discrimination, in that it put Canada's large breweries at a disadvantage. The GATT panel ruled for Canada, holding that Minnesota should remove the tax credit or extend the same tax rates to all Canadian brewers. The USTR accepted the panel ruling and encouraged Minnesota and other states to comply.

The *Beer II* decision, and the USTR's reaction, increased concern among state government officials in the US regarding the impact that international trade regimes could have on state autonomy. These concerns surfaced in the debates over ratification of NAFTA and the Uruguay Round of the GATT. [12] State officials demanded and won assurances that the federal government would consult with state governments whenever state laws were attacked before the WTO. Legislation implementing the Uruguay Round Agreement in the US establishes detailed procedures to be followed in the event that legal proceedings are brought against a US state law. USTR must notify a state within 7 days after a WTO member requests consultation (or formal adjudication) on a state law alleged to violate the GATT. Moreover, the Uruguay round implementation legislation also requires the USTR to consult with Congress at least 30 days before it attempts to overrule a GATT-inconsistent state law.[13]

In September 1998, the EU and Japan brought a case before the WTO challenging a Massachusetts law that denied state contracts to firms that did business in Burma (Myanmar). The Massachusetts law applied equally to US and foreign firms. However, as more European and Japanese firms do business in Burma than America firms, the EU and Japan argued that the law indirectly discriminated against them and therefore violated a Government Procurement Agreement (GPA) signed as part of the Uruguay Round.[14] The WTO never had to decide this potentially explosive case. Before the WTO panel had ruled on the Massachusetts law, the National Foreign Trade Council brought and won a suit against the Massachusetts law before a federal District Court in Boston. The court declared the law to be an unconstitutional exercise of foreign affairs power by Massachusetts. In the wake of the District Court ruling, the EU and Japan suspended

[10] Hoekman and Kostecki 1995.
[11] United States - Measures affecting alcoholic and malt beverages, adopted 19 June 1992, DS23/R, BISD 395/206.
[12] Sager 1999.
[13] Uruguay Round Agreements Act, Pub. L. No. 103-465, 103 (codified at 19 U.S.C. 3512 (1994).
[14] Michael Lelyveld, "US may defend, oppose state's sanctions law," *Journal of Commerce*, February 3, 1999.

their case before the WTO. In June 1999, the US Court of Appeals - First Circuit, upheld the District Court's judgment on appeal.[15]

More cases against state laws are likely to arise in the future. The US's trading partners have identified numerous state regulations that violate GATT rules. For instance, in its 1994 report on US trade barriers, the EU highlighted many state laws that might violate GATT rules, including California's Proposition 65.[16] Proposition 65, placed on the ballot by an initiative process, established the Safe Drinking Water and Toxics Enforcement Act of 1986 requiring stricter labeling of products containing carcinogenic substances than is required under federal law. The law requires foreign manufacturers to apply special labels to any products sold in California containing substances that the state of California deems hazardous; manufacturers who fail to label products may be sued by private litigants on behalf of the state.[17] Proposition 65 is likely to be an early target of a WTO case. Recycling requirements are other likely targets. As part of the Beer War between the US and Canada mentioned above, the US objected to an Ontario recycling law that it claimed sought to protect Canadian beer makers from U.S. competitors.[18] Many states, including California, Wisconsin, Oregon and Connecticut have minimum recycled content requirements for glass containers and newsprint. Such requirements can be argued to advantage local suppliers of recycled content and may be challenged before the WTO. Also, state regulations, such as those in Idaho and Oregon, prohibiting the export of raw logs, are easy targets.

While there have been very few cases in which a national or state social regulations have been declared illegal under the GATT/WTO, many critics of the WTO suggest that the very potential for such rulings has a "*chilling effect*" on the enactment of new laws. Examples from the area of animal welfare illustrate this dynamic. A 1991 EU regulation[19] promised to ban the import of certain animal pelts from countries that used leg-hold traps. The ban was due to come into effect at the beginning of 1996. However, the US and Canada threatened to take the EU to the WTO if the ban was enforced.[20] The EU delayed implementing the ban and initiated negotiations with the US, Canada and Russia, in the hopes of convincing them to agree to a gradual phase out of the traps in exchange for the EU's not implementing the ban. In June 1997, the Commission reached an agreement with Canada and Russia, in which they agreed to phase out the use of steel-jawed leg-hold traps.[21] In November 1997, the Commission reached a similar, though non-binding, agreement with the US.[22] Animal rights advocates argued that the agreements reached with Canada, Russia and the US were inadequate and accused the EU of caving into the threat of a WTO suit.[23] However, viewing the leg-hold trap episode simply as an instance of the chilling of EU standards ignores the impact the dispute eventually had on the EU's trading partners.[24] The EU understood that the US and

[15] European Commission 1999.
[16] European Commission 1994.
[17] O'Reilly 1997.
[18] Vogel 1995:229-231.
[19] Council Regulation No. 1254/91.
[20] "EU urged to curb fur imports," *Financial Times*, March 3, 1997.
[21] "Brussels reaches pact on leg-hold traps," *Financial Times* May 29, 1997.
[22] "New offer by US on leg-hold traps." *Financial Times*, November 30, 1997.
[23] "Brussels under US pressure," *Financial Times*, February 16, 1999.
[24] Vogel 2001:338.

Canada preferred to avoid confrontation over an EU ban, because of the negative publicity a case concerning leg-hold traps could have generated for the WTO. Knowing this, the EU had leverage to pressure Canada and the US (along with Russia) to phase out the use of steel-jaw leg-hold traps in exchange for the EU's not instituting a ban on fur imports. Thus, while the EU was dissuaded from implementing its ban, its trading partners were pressured into raising their regulatory standards.

Subsequent developments concerning animal rights in the EU seem to support the view that the EU feels threatened by the potential for WTO suits. In May 1998, the European Commission issued a proposal for a law requiring labels on egg containers to indicate whether hens were free range or caged. Concern over a potential WTO challenge to the law in the wake of the conflict over leg-hold traps led the Commission to restrict its application to EU eggs. Imported eggs will not be required to use the labels.[25] Similarly, the Commission has resisted calls from animal welfare advocates to ban the use of ingredients tested on animals because of fear that the US could successfully challenge the law as a non-tariff barrier before the WTO.[26]

Finally, in the US, domestic pesticide regulations are beginning to include references to Codex standards, international standards that the GATT and NAFTA are guaranteed to uphold. For instance, amendments to the Federal Insecticide, Fungicide, and Rodenticide Act and the Federal Food Drug and Cosmetic Act passed in the summer of 1996 state require that the relevant administrator use the codex standard for maximum residue level, or, if not, offer a reasoned explanation for divergence from the international norm. Given that Codex standards are generally laxer than US standards, this too can be interpreted as an instance of the chilling effect.[27]

While these examples suggest that some "chilling" of new regulatory initiatives has occurred at the federal or EU level, it is important to note that governments continue to enact far-reaching environmental and social regulations. Thus far legal integration has not led to a roll-back of social regulation, rather, its primary impact has been to discourage the use of import bans as a means of pursuing the objectives of social regulation, as in the cases of free-range chickens and animal testing mentioned above. Moreover, as the ongoing EU ban on hormone treated beef demonstrates, where governments are willing to take a strong stand in defense of their social regulations, they remain in place despite even the greatest legal integration pressures.

Positive Integration. The WTO lacks any legislative body that could produce harmonized regulatory standards at the international level. However, outside the WTO framework, national governments have negotiated numerous multi-lateral agreements concerning issues of social regulation, most prominently environmental protection where approximately 120 international agreements have been signed.[28] While such agreements are not directly connected with the WTO, many are linked to trade disputes. Governments that see their social regulations attacked as non-tariff barriers sometimes respond by promoting multi-lateral agreements, as the US did in the wake of the Tuna-

[25] Keith Nuthall, "Trade rules harm animals," *The Independent*, May 24, 1998
[26] "Brussels under US pressure," *Financial Times*, February 16, 1999.
[27] General Accounting Office, International Food Safety: Comparison of U.S. Codex Pesticide Standards (Aug. 1991; "Harmonization Alert: International Harmonization of Social, Economic and Environmental Standards," Public Citizen, http://www.harmonizationalert.org/harmbk.htm#N_46_
[28] Vogel 2001:340.

Dolphin dispute with Mexico. Many multi-lateral environmental agreements (MEAs), such as CITES (the Convention on International Trade in Endangered Species) and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, establish common environmental standards for traded goods, thus averting trade disputes that might arise from unilateral measures. Finally, many MEAs use the threat of trade restrictions as an enforcement mechanism.

MEAs can have a significant impact on federal-state relations in federal polities. Australia provides the most striking example of how a federal government used commitments made in MEAs to strengthen its own powers vis-à-vis state governments. Section 51(xxix) of the Australian Constitution gives the Commonwealth Parliament the power to make laws with respect to external affairs. The Constitution does not indicate what should be done in cases where this power comes into conflict with policy areas reserved for state governments. The federal government in Australia has used its "external affairs" power as a constitutional justification for expanding into a number of new areas of policy-making, including worker rights, civil rights and environmental protection.[29]

The use of the external affairs power to justify federal policy-making came into the spotlight during the Tasmanian Dam crisis of 1982-83. The government of the state of Tasmania supported the construction of a dam in the Western Tasmanian Wilderness, an area that had been listed as a World Heritage Site under an international agreement (the World Heritage Convention). The Commonwealth government intervened to block the construction of the dam, arguing that it was obliged to do so in order to comply with the World Heritage Convention. The Tasmanian government challenged the Commonwealth's jurisdiction, arguing that the construction was a land use issue subject to state authority. In its *Franklin Dam*[30] decision, the High Court ruled that the Commonwealth was justified in acting to block the dam in order to fulfill Australia's obligations under an international agreement. The Franklin Dam ruling secured the use of the external affairs power as a justification for Commonwealth jurisdiction in environmental policy. This justification was also used as the constitutional basis for many other pieces of Commonwealth legislation, such as the National Parks and Wildlife Conservation Act 1975 (taken pursuant to the Convention on International Trade in Endangered Species), the Ozone Protection Act 1989 (taken pursuant to the Montreal Protocol), and Protection of the Sea (Prevention of Pollution from Ships) Act of 1983.

Federal treaty making power also has the potential to expand federal power vis-à-vis states in the U.S. In a 1920 case, *Missouri v. Holland,*[31] the U.S. Supreme Court established the principle that the 10th Amendment's protections of state powers against federal intrusion could not serve to limit the Federal government's treaty making powers. The case involved a conservation treaty signed between the US and Great Britain to protect birds migrating between the US and Canada.[32] Missouri argued that the Migratory Bird Treaty Act of 1918, which served to implement the treaty, intruded on an area of regulation reserved to the states and therefore violated the 10th Amendment. The Supreme Court held that the 10th Amendment did not protect states' rights in this case,

[29] Boardman 1990.
[30] *Commonwealth v. Tasmania (Franklin Dam Case)* (1983) 158 CLR.
[31] 252 U.S. 416 (1920)
[32] See Scheiber 1993 for a discussion of the case.

because the federal law in question had been passed pursuant to an international treaty, and therefore fell within the federal government's foreign affairs power. From the mid-1930s until the mid-1990s, while the Supreme Court interpreted the Commerce Clause to give Congress nearly plenary power in all areas of social regulation, the doctrine established in *Missouri v. Holland* did not have an impact on policy. The federal government did not need to rely on its treaty making authority to expand its regulatory powers, because it could simply rely on its power to regulate interstate commerce. However, since the mid-1990s, as the Supreme Court has resurrected the 10th Amendment and placed increasing limits on federal regulatory power, the federal government may need to rely on its treaty making powers to justify some federal legislation. For instance, in light of *Lopez*[33] some portions of the Endangered Species Act may be found to exceed the scope of federal power under the Commerce Clause. If so, the Act's constitutionality may depend on the fact that it serves to implement international treaties on wildlife preservation that the US has signed.[34]

NAFTA

Negative Integration. NAFTA provides greater protection for national and sub-national social regulations in some areas than does the GATT/WTO; however, because it allows private parties to bring suit against governments NAFTA also poses greater threats to social regulation. While NAFTA does call for the use of international regulatory standards as a guideline when judging trade disputes over national or sub-national standards, NAFTA stipulates that the international standard should only be applied if it would not reduce consumer or environmental protection compared to the disputed domestic standard.[35] NAFTA provides more protection for the standards set by sub-national governments than does the GATT/WTO, in that NAFTA includes a grandfather clause allowing state government regulations in force before NAFTA entered into force to remain in place.[36] Such protections for state government standards notwithstanding, NAFTA provides greater opportunities for negative integration than the WTO. Where the WTO permits only national governments to challenge social regulations as non-tariff barriers, NAFTA empowers both governments and private parties to bring legal challenges before arbitration panels. Under NAFTA's Chapter 11 investor protection provisions, investors may demand compensation from signatory governments for losses they suffer as a result of regulatory policies and actions that have the effect of "expropriating" their investment.

Direct confrontations between national governments before NAFTA panels have been rare.. Trucking safety regulation is one area where a national government (Mexico) has directly challenged the national (and state) regulations of another signatory (the U.S.) As part of NAFTA, the U.S. agreed to recognize Mexico's commercial driver's licenses, and to allow Mexican trucks open access to US highways, in border states by December 1995, and nationwide by January 1, 2000. After NAFTA went into effect, California continued to enforce its licensing requirements on Mexican vehicles. Not wanting to be

[33] *United States v. Lopez* 115 S. Ct. 1624 (1995).
[34] Bradley 1998; Villareal, 1998.
[35] Orbuch and Singer 1999.
[36] NAFTA Sec. 102(b)(1)(B)(i). See Sager 1999:11.

held responsible for California's violation of the agreement, the US federal government initially pressured California to accept the Mexican licenses.[37]

However, the US federal government soon took a different approach to Mexican trucking. As the December 1995 deadline for opening up trucking in border states approached, the US government backed out of its commitment, citing concerns over safety problems documented in the Mexican trucking fleet.[38] Thereafter, US states were able to enforce their trucking regulations on Mexican fleets. In 1998, the Mexican government requested the establishment of an arbitration panel under NAFTA in the hope of pressing the US to open its border to Mexican trucking.[39] As the second NAFTA deadline (January 1, 2000) for opening the US market passed, the US restated its refusal to open the US market to Mexican trucking, again citing continuing concerns over the safety of the Mexican trucking fleet and demanding that Mexico improve its safety record.[40] Finally in December 2001, after an arbitration panel had ruled that the US should open its market to Mexican trucking by January 1st 2001, the U.S. adopted legislation opening the entire U.S. market to Mexican trucking firms and establishing inspection systems and safety standards for Mexican trucks in the U.S.[41]

National governments are likely to limit the number of cases they bring before NAFTA panels challenging social and environmental regulations in neighboring countries. Such cases can easily generate political backlash from consumer and environmental advocates that may undermine free trade and, therefore, government representatives are likely to seek negotiated compromises where possible. However, individual firms are far less likely to consider the potential political repercussions of bringing cases. NAFTA's Chapter 11 enables investors to bring cases against governments to recover losses suffered due to government expropriations of their investments. This provision has provided grounds for lawsuits challenging regulatory acts as illegal "expropriations" and demanding compensation for them. The ability of firms to bring such cases has the potential to generate a host of challenges against national and sub-national regulations.

In the first such case, Ethyl Corporation, a US company with a Canadian subsidiary, has sued the government of Canada for $250 million under NAFTA Article 1110 on expropriation and compensation.[42] Ethyl charged that a Canadian ban on the import and transport of a gasoline additive that it produced, MMT, is not based on scientific evidence that the product is harmful. Ethyl had supplied MMT to the Canadian market until 1997 when Parliament banned its import and inter-provincial transport. Ethyl argued that the ban lacked any scientific basis and therefore constituted an unjustified, "expropriation" of their investment in manufacturing the product for the

[37] Ibid. Also see State Government News, "NAFTA Rewrites Status of States," 10, 13, May 1994.
[38] Kevin G. Hall, "Mexico-US Truck Talks to go Another Round," *Journal of Commerce*, Aug. 21, 1998; Mary Sutter, "Mexico Asks Arbitration to Force Open Border," *Journal of Commerce Special*, Sept. 24, 1998.
[39] Kevin G. Hall, "Clinton resists easing of rules," *Journal of Commerce*, Oct. 12, 1999.
[40] Esther Schrader, "U.S. move to ban Mexican trucks is causing rift," *Los Angeles Times*, October 19, 1999; Scott Bowles, "Loads of worry about open borders," *USA Today*, October 20, 1999; Robert Kuttner, "Globalization and U.S. Highway Safety," *San Diego Union-Tribune*, October 24, 1999
[41] "President Bush signs Mexican truck bill," Agence France Press, December 19, 2001.Also see, Lyzette Alvarez, " Senate Votes to Let Mexican Trucks in U.S," *New York Times*, December 4, 2001.
[42] Andrew Tellijohn, "Canadians Fear Sovereignty Loss as NAFTA Suit Progresses," Corporate Legal Times, July 1998.

Canadian market. Rather than risk losing the case, Canada chose to revoke its ban on MMT and settle with Ethyl, paying the company $13 million in compensation.[43]

Canada's reaction to the Ethyl case provides a clear example of the "chilling effect". Subsequently, other firms have followed Ethyl's lead. After U.S. firms threatened to challenge a Canadian ban on the exports of PCB-contaminated waste, Canada ended the ban. S.D. Meyers, a U.S. PCB treatment company, sued Canada under Chapter 11 for losses it suffered while the PCB export ban was in place.[44]

In a similar case, Metalclad Corporation, a U.S. firm, sued the Mexican government for losses it sustained due to a decision made by a Mexican state government. Metalclad had planned to build a hazardous waste treatment facility on a site approved for that purpose in the Mexican state of San Luis Potosi. Later, just before the site was to open, the state government blocked the project and declared some of the land in the area to be a nature preserve. Under NAFTA, firms can sue only national governments, not state or local governments, and in 1997 Metalclad sued the Mexican federal government, demanding $90 million to compensate it for losses it sustained on the project due to the actions of the state and local governments.[45] In 2000, a NAFTA arbitration panel ruled in favor of Metalclad, awarding the company $16.7 million. Mexico initially appealed the ruling in a Canadian court, but later settled with Metalclad for $16 million.[46]

In a fourth case, Methanex, a Canadian manufacturer of MTBE, has brought a suit for $970 million losses it would suffer as a result of California's announced phase-out of MTBE, which it argues constitutes an expropriation of its investment.[47] However, where Canada backed down in the Ethyl case and repealed its PCB ban when faced with subsequent threats, California is standing firm behind its planned phase out of MTBE.[48]

Canada, the US and Mexico have debated limiting the scope of Chapter 11 since 1999, but no action has been taken.[49] As of 2001, 17 Chapter 11 cases had been filed, ten of which involved attacks on environmental regulations.[50] The federal governments of the U.S., Canada and Mexico recognize that a proliferation of such suits could both severely undermine public support for NAFTA and cost governments billions. As it being invoked by private parties, NAFTA's chapter 11 constitutes a "regulatory takings" compensation measure that goes beyond any provisions the three governments have in place. If left unchecked, Chapter 11 could have a considerable "chilling effect" on new state and federal environmental and social regulations.

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[43] Evelyn Iritani, "Trade Pacts accused of subverting U.S. policies," *Los Angeles Times*, Feb. 28, 1999.
[44] Ibid.
[45] Joiel Millman, "Metalclad Suit is First Against Mexico Under NAFTA Foreign Investment Rules," *Wall Street Journa*l, October 14, 1997; John O'Dell, "O.C. firm files first Mexico NAFTA claim,"*Los Angeles Times*, October 15, 1997.
[46] Evelyn Iritani, "Ruling in Canada Strikes at Companies' NAFTA Trade Suits". *Los Angeles Times*, May 5, 2001; Danielle Knight, "Environmentalists urge pesticide fight," *Inter Press Service*, January 29, 2002.
[47] Robert W. Benson, "Constitution? Forget it! Nafta rules," *Los Angeles Times*, June 24, 1999; Terence Corcoran, "The Push to Gut Nafta," *The Ottawa Citizen*, June 24, 1999.
[48] See supra, note 46.
[49] Courtney Tower, "NAFTA considers curb on claim from "green" laws," *Journal of Commerce*, February 23, 1999; "Americas leaders to discuss free trade pact progress amid protests," *Agence France Press*, April 17, 2001.
[50] See supra, note 46. Also see Mann 2001.

Positive Integration. NAFTA's mechanisms for positive legal integration do not match its Chapter 11 mechanisms for negative integration. Unlike the EU, NAFTA does not establish the law-making institutions that would be necessary to craft an extensive body of social regulation to match that produced by the EU. In the NAFTA context, the institutions most likely to encourage positive harmonization were established in the context of the North American Agreement on Environmental Cooperation (NAAEC), more commonly known as the NAFTA environmental side agreement, came into force on January 1, 1994. The side agreement promised to complement NAFTA's free-trade focus by encouraging cooperative environmental protection efforts among the NAFTA signatories and by ensuring that they enforced their existing environmental laws.

The agreement established the North American Commission for Environmental Cooperation (CEC) to oversee implementation. The CEC can hear challenges regarding failures by NAFTA signatories, or their sub-national units, to enforce domestic environmental legislation. In addition, the CEC has the power to impose sanctions against states that systematically fail to enforce their own environmental laws. Thus, while NAFTA cannot create new laws for all of North America, it can pressure governments to apply their existing laws.

However, to date this body has not played a role in pushing for an "upward harmonization" of environmental policy enforcement. Mexican, American and Canadian environmental organizations have brought thirty-two cases before the CEC. [51] The CEC has dismissed most of these cases, while others are still pending. Only two cases have proceeded to the final stage of the CEC process, which involves the preparation of a "factual record" detailing the facts surrounding an alleged enforcement failure. The first was a complaint regarding construction of a pier at Cozumel, Mexico that threatened to destroy a coral reef.[52] Mexican environmental groups argued in their submission to the CEC that the Mexican government had failed to enforce its own environmental laws on environmental impact assessment in connection with the construction of the pier. In October 1997, the CEC issued a "final factual record," in which it agreed with the Mexican environmentalists that the Mexican government had failed to enforce its environmental laws. However, the CEC called for no censure of the Mexican government.[53]

In a second case, which is still pending, the CEC has moved to establish a factual record regarding a complaint brought by a Canadian environmental group, Friends of the Oldman River, that Canada has failed to enforce habitat protection provisions of the Fisheries Act and the Canadian Environmental Impact Assessment Act.[54] Friends of the Oldman River argues that the federal government of Canada has abdicated legal responsibility for enforcing these federal statutes to the provinces, which are not doing an adequate job. When Canada signed the environmental side agreement, it agreed only to be bound for matters that fell within federal jurisdiction. The federal government worried

[51] NAFTA Commission on Environmental Cooperation, Registry of Submissions on Enforcement Matters, Commission on Environmental Cooperation, site visited on Nov. 1, 1999. http://www.cec.org/templates/RegistryFront.cfm?&format=2&varlan=English

[52] SEM 96-001 Comité para la Protección de los Recursos Naturales, A.C.; Grupo de los Cien Internacional, A.C.; Centro Mexicano de Derecho Ambiental, A.C v. United Mexican States.

[53] Construction of the pier was complete by the time the CEC issued its report.

[54] SEM 97-006, Friends of the Oldman River v. Canada.

that it might be held responsible for an enforcement failure in one of the provinces.[55] The Friends of the Oldman River submission, may reveal whether these fears were warranted and whether the federal governments effort to shield itself from blame in such cases can be sustained.

While environmental organizations are increasingly making use of the CEC's citizen submission procedure, this procedure has proven far weaker than the Chapter 11 procedure. While other aspects of the economic integration process may encourage higher environmental standards, in terms of legal integration, NAFTA clearly produces more pressure for negative integration than it does for positive integration. Finally, both Chapter 11 and the CEC submission procedure hold federal governments accountable for the actions of their state governments, thus giving the central governments more incentive to centralize control over regulatory policy making.

The EU

Negative Integration. In contrast to NAFTA, legal integration in the EU has produced very little negative harmonization and a great deal of positive harmonization. In cases that pit free trade requirements against an EU Member State's strict environmental regulations, the ECJ has generally supported environmental concerns. The *Danish Bottles*[56] case marked the first time that the ECJ had been asked whether a Member State could justify a violation of Article 30 on environmental grounds. The case centered on a Danish law on the recycling and reuse of beer and soft drink containers. The European Commission viewed the Danish law as a violation of the Community's free trade principles. In December 1986, the Commission, with the support of the UK, brought a case against Denmark charging that the recycling law violated Treaty Article 30, in that it discriminated against producers in other Member States by making it more difficult for them to sell their beverages in the Danish market.

The ECJ's ruling upheld most aspects of the Danish recycling law, including the law's mandatory collection requirements. The Court ruled only one element of the law invalid, a quantitative restriction that the law placed on the volume of non-approved containers a manufacturer could sell. In upholding the recycling law, the Court established that environmental protection concerns could justify restrictions on intra-community trade. While restrictions on trade with a more direct bearing on human health had been upheld previously, this decision marked the first time that an environmental provision with less direct relevance to human health was upheld. Along with its decision the ECJ set out a list of conditions which such environmental barriers to trade must meet: they must not serve as disguised protectionism, must not discriminate against foreign goods or producers (nondiscrimination) and may only impede trade as much as is necessary to achieve the environmental objective in question (proportionality).

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[55] Subsequently, the federal government negotiated with the provinces to bring them under the NAAEC framework. The negotiations resulted in the Canadian Intergovernmental Agreement (CIA) on the NAAEC, which would allow signatory provinces to both benefit from and be subject to the NAAEC. By signing provinces could use NAFTA's Commission on Environmental Cooperation to challenge enforcement practices in the US and Mexico. However, provinces would also subject their own enforcement practices to scrutiny by the CEC. Only three provinces, Alberta, Québec and Manitoba, have signed the agreement thus far.

[56] C-302/86, *Commission v. Denmark*, ECR [1988] I-4607.

In 1992 the ECJ ruled on the *Walloon Waste*[57] case concerning a Wallonian decree dating from 1987 that banned the import of waste intended for disposal into the Belgian province of Wallonia. The Commission challenged the law as an unjustifiable violation of Article 30. Given that the law explicitly barred imports, the Commission's case seemed strong. The ECJ upheld the Walloon waste ban as it applied to non-hazardous waste.[58] The Court ruled that because of environmental principles such as the need to rectify environmental damage at its source, local waste had an inherently different character than foreign waste and could be subject to different regulatory requirements.[59] This decision continued the line of pro-environment case law established in Danish Bottles.

A 1994 case tested a state's ability to maintain higher national standards where harmonized Community standards were already in place.[60] The *PCP*[61] case concerned a German ban on the use PCP (pentachlorophenol), a chemical used as a wood, leather and textile preservative, releases cancer causing dioxins. The Community had enacted a regulation (91/173/EEC) limiting the use of PCP in 1991. At the time, German domestic law already provided for stricter limits on PCPs, which amounted practically to an outright ban. Germany and three other states advocated enacting such strict standards at the EU level as well, but were outvoted by states that favored less stringent restrictions. Germany notified the Commission of its intention to keep its existing national ban on PCPs in place and the Commission gave Germany its approval in December 1992.

France, supported by Belgium, Italy and Greece, brought a complaint before the ECJ against the Commission's decision to approve the German measure. France viewed the regulation as a disguised trade barrier, particularly against leather goods. France argued that the Commission had not provided sufficient scientific justification for the German ban and had not examined alternatives to a ban suggested by France.

In May 1994, the ECJ ruled that the Commission had failed to demand sufficient justification for the German rule and had failed to examine other, less trade-restrictive alternatives.[62] Germany might indeed be justified in maintaining a stricter law, in accord with the Article 100a(4) exemption for stricter national standards, but the Commission had failed to follow the procedures necessary to ensure that the German measure was justified. This decision established the precedent that strict procedural rules had to be followed, while at the same time leaving open the possibility that the German ban might eventually be approved. Subsequently, after conducting an investigation in adherence with the procedural requirements set out by the ECJ, the Commission re-approved the ban. The episode demonstrated that states could gain environmental exemptions under Article 100a(4) where they could provide adequate justification.

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[57] C-2/90, *Commission v. Belgium*, ECR [1992] I-4431.

[58] The Commission had also argued that the Belgian law violated a Community Directive (84/631) on transfrontier shipments of hazardous waste. The Court agreed with the Commission regarding hazardous waste, noting that the directive allowed states to stop hazardous waste shipments only on a case by case basis, rather than with an across the board ban as Wallonia had done.

[59] Jupille 1997.

[60] This practice was to be permitted under Art. 100a(4).

[61] C-41/93, *France v. Commission*, ECR [1994] I-1829.

[62] "Commission Wrong to Authorize German ban on PCPs" Reuter European Community Report, May 17, 1994.

In another recent trade-environment decision, the ECJ ruled once again to allow a green Member State to maintain an environmental regulation that impinged on free commerce. The *Danish Bees* case[63] concerned a Danish ban on the importation of yellow honey bees to the Danish Island of Laeso. The government had declared the remote island a protected endangered species habitat, as it was the home to a rare species of brown honey bee, that could disappear through cross breeding with yellow bees. The case arose after an immigrant from the mainland began raising yellow bees on the island, where they could take advantage of the island's abundant heather. The islander's were weary of competition and anxious to protect the brown bees that had made Laeso's honey famous across Denmark.[64] The ECJ upheld the Danish ban, saying that the protection of endangered species, which was the central aim of the measure, took precedence over incidental effects on trade. Again, as in most of the cases it has heard pitting free trade requirements against national environmental regulations, the ECJ has allowed national standards to remain in place.

Positive Integration. In addition to liberalizing trade and striking down Member States' non-tariff barriers, the EU has also adopted a wide-range of regulatory measures at the supranational level that create harmonized regulatory standards in areas including food and drug safety, workplace safety and environmental protection. EU social regulations have pressured laggard Member States to increase their standards. Moreover, in the case of EU Member States with federal systems, the EU has pressured federal governments to hold their state governments accountable for satisfying EU requirements. These developments are evident in the area of environmental regulation, where the EU has adopted a wide range of directives and regulations addressing all the major areas of environmental policy. EU environmental policy has driven up the regulatory standards of many laggard Member States. In states such as Spain, Portugal and Greece, national environmental policy consists of little more than application of EU directives. Where the EU has harmonized standards at the supranational level, it generally permits Member States to maintain stricter national standards if they chose to do so.

Article 130t of the 1986 Single European Act (SEA) allowed Member States to maintain or introduce more stringent regulations than those adopted at the EU level, as long as they do not constitute a disguised restriction on trade.[65] Similarly, Article 100a(4) allows states to maintain higher national standards when environmental harmonization measures relating to the functioning of the internal market are taken. These provisions were included in the SEA at the insistence of high standard states like Denmark. The safeguards provided by these "upward escape clauses" were important to winning the support of Denmark and other high standard states for the Treaty.

EU environmental policy has also pressured some of the greener Member States to adopt stricter regulations. In the case of federal polities within the EU, this has encouraged federal governments to centralize regulatory authority and has placed

[63] C-67/97, *Kriminalretten i Frederikshavn v. Denmark*, ECR [1998] I-8033.
[64] Patrick Smyth, "Flight of the bumble bees case to create quite a buzz in Luxembourg," Irish Times, October 24, 1997.
[65] Interestingly, the original Commission proposal did not contain an "escape clause" equivalent to Article 130t. This is understandable given the Commission's preference for harmonization. Community measures lose significance if strict Member States can ignore them and maintain national standards. (See Krämer 1990:93).

pressure on sub-national jurisdictions to increase their regulatory standards. The impact of EU environmental policy on the German federal system illustrates this dynamic.

Pressure from the EU has encouraged the shift of legislative competence to the federal level within Germany. Most EU laws are transposed into German law as federal regulations or guidelines.[66] Some EU directives, particularly those that focus on procedural issues, required the introduction of laws that took an approach far different from the traditional policy style in Germany.[67] The EU directives on environmental impact assessment[68] and freedom of information on the environment[69] are two prominent examples.

To transpose the EU's environmental impact assessment directive into national law, the German federal government enacted the Act on Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung - UVPG*) in 1990. In accord with the requirements of the EU directive, the Act establishes the procedures to be followed by state and local officials in conducting environmental impact assessments and establishes an extensive list of the types of projects for which assessments are required. The German government transposed the EU's directive on freedom of access to information on the environment into national law in 1994 by enacting the Environmental Information Act (*Umweltinformationsgesetz - UIG*). The Environmental Information Act required environmental authorities and regulated entities across Germany to release information that had previously been inaccessible to the public.

The German federal government, and a number of German states, have resisted implementing some of the procedural requirements of these directives, and the Commission has brought a series of legal actions against Germany as a result.[70] Beyond these two directives, the Commission has clashed with Germany regarding the use of non-binding administrative guidelines as a means of implementation. While the use of such guidelines by federal lawmakers to direct the implementation activities of state officials was long standard practice in Germany, the Commission maintains that such guidelines do not provide citizens with sufficient legal certainty. The Commission brought a case before the ECJ challenging the Germany's use of an administrative guideline (*TA Luft*) to implement an EU directive on air quality. The ECJ ruled for the Commission, holding that the administrative guideline did not provide the necessary legal certainty to constitute a sufficient means by which to implement EU law.[71]

EU directives have forced the German federal government to introduce stricter deadlines into its regulations and to introduce more detailed requirements in some areas. Traditionally, German regulations had not contained action-forcing deadlines. The presence of deadlines in EU directives has encouraged the federal government to centralize more authority, since such deadlines must be met nation-wide. Failure of any state to meet an EU directive's deadline could result in an infringement action being brought against the federal government. Some EU directives have introduced detailed requirements into areas of German law that had historically been subject to only loose

[66] In some areas, such as urban wastewater treatment, EU directives are transposed into German law by state level regulations. Interview, European Commission DG XI, March 1998.
[67] Héritier et al 1994; Knill 1998; Knill and Lenschow 2000:261.
[68] Dir. 85/337 [1985] OJ L175/40.
[69] Dir. 90/313 [1990] OJ L 158/56.
[70] Knill and Lenschow 2000; Kimber 2000; Wessels and Rometsch 1996.
[71] *Commission v. Germany*, C-361/88, [1991] ECR 2567.

controls. For instance, water pollution control had been one of the less detailed areas of German environmental law. However, German regulations concerning drinking water, nitrate levels in water and bathing water have all become far more detailed in light of EU requirements. Also the EU waste directive set out detailed requirements regarding the regulation of landfills, where state governments had previously enjoyed great discretion.[72]

EU enforcement actions have brought pressure to bear on German states. The German federal government traditionally relied on informal means to pressure states to implement federal laws effectively. By contrast, the Commission regularly employs a more formal, adversarial procedure, the Article 169 infringement procedure. The Commission can only bring cases against the German federal government. Nonetheless, it is clear to all parties involved when the implementation failure is actually attributable to one or more state governments. If the German federal government comes under pressure from Brussels, then it in turn pressures state government officials to redress the implementation problem. If such an infringement case comes before the ECJ, the German federal government makes it clear to the German public which state is to blame. Like national governments, German state governments prefer to avoid being marked as violators of EU law.[73]

IV. Economic integration

The second set of forces that may influence both regulatory standards and the allocation of regulatory authority in federal systems stem from economic integration. According to common wisdom and some scholarly observers, economic liberalization generates a regulatory race-to-the-bottom, while according to David Vogel and others economic liberalization has just the opposite effect, encouraging a regulatory race-to-the-top.[74] These dynamics are not mutually exclusive when social regulation is taken as a whole; they could be at work simultaneously in different areas of regulation. I do not attempt here to determine which of these dynamics is dominant. Rather, I focus on the ways in which either of these dynamics may have a distinctive impact on federal polities.

Within federal systems, sub-national jurisdictions compete with each other to attract and retain investment. Thus, there may be "race-to-the-bottom" pressures within a federal system, even in the absence of globalization. Nonetheless, sub-national jurisdictions have generally not engaged in "races-to-the-bottom" in social regulation.[75] Historically, there have been instances in which trade liberalization has impeded the establishment of social regulations, most famously in the case of US state child labor laws. In the field of environment, before the introduction of federal laws, US states with powerful coal industries tended to ignore the environmental consequences of coal mining.[76] Despite such examples, there is little empirical evidence in support of the race to-the-bottom hypothesis in the area of environmental or social regulation.[77] The primary reason is that such regulatory standards do not make up significant proportion of total

[72] Interview, German Permanent Representation to the EU April 3, 1998.
[73] Ibid.
[74] See Vogel 1995; Esty and Geradin 2001; Drezner 2001; Swire 1996; Stewart 1993; Porter 1999 for reviews of the literature on this subject.
[75] Revesz 1992.
[76] Rodden and Rose-Ackerman 1997. Also see Engel and Rose-Ackerman 2001.
[77] Esty 1994; Drezner 2001.

production costs for most industries. For instance, according to a number of studies, environmental compliance costs for most industries are minimal, rising to only approximately 3% for the heaviest polluting, most strictly regulated industries.[78] Both in the US and EU, where minimal standards (floors) that apply across the common market have been enacted, greener states continue to maintain stricter standards.

One would expect economic globalization to contribute to domestic competitive pressures between sub-national jurisdictions within federal systems. Will this lead sub-national units that had not previously engaged in a "race-to-the-bottom" to begin one? This seems highly unlikely. Market integration and inter-jurisdictional competition within federal systems generally far exceeds that at the international level. The competitive pressures added by globalization are minimal compared to those that already exist within the federal system. There is no reason to believe these added pressures will drive states within federal polities into a "race-to-the-bottom" competition with one another.

While there is little evidence to support the race-to-the-bottom hypothesis, there is some evidence that opponents of social regulatory initiatives have used global competitiveness concerns to successfully oppose new regulatory initiatives. Whether or not race-to-the-bottom pressures are an economic reality, they constitute a powerful rhetorical tool. Opponents of regulation can feed on fears of race-to-the-bottom pressures to argue that environmental and social regulations are simply untenable 'in the competitive global economy'.[79] Though it was not a regulatory initiative *per se*, Clinton's Btu tax proposal was a potentially significant environmental initiative that was shot down largely due to competitiveness concerns. Clinton proposed the energy tax in February 1993, promising that it would reduce pollution and increase energy conservation. However, the legislation was defeated in Congress with opponents citing the damage the tax would cause to the competitiveness of US industry.[80] A similar carbon tax proposal in Australia was also abandoned due to competitiveness concerns.[81] EU proposals for a carbon/btu tax have been stalled because of fears of the competitive disadvantages it could create vis-à-vis the US and Japan. Globalization need not generate domestic opposition to new regulatory initiatives. However, where opponents of regulation can successfully invoke the perceived demands of "global competition" to justify their position, this will aid their efforts to reduce regulatory standards.

As its name suggests, the "California" effect holds the promise that economic integration may allow a sub-national government to see its strict standards spread to other jurisdictions. Until recently, the scope for the California effect to occur internationally has been limited primarily to product standards.[82] Initial GATT jurisprudence on trade-environment disputes indicated that states could restrict imports only on the basis of product standards, not on the basis of how a product was produced (production process measures (PPMs).[83] However, more recent WTO case law has overturned this interpretation. In the Shrimp-Turtle case, the WTO ruled that, in principle, a state could

[78] Stewart 1993; Esty and Gentry 1997.
[79] Esty 1994:162-3.
[80] Zarsky 1997.
[81] Ibid.
[82] Swire 1996.
[83] United States - Restrictions on Imports of Tuna, circulated on 3 September 1991, BISD 39S/155.

restrict imports on the basis of PPMs.[84] To the extent that states can restrict trade on the basis of PPMs, they can create pressure amongst their trading partners to adopt strict process regulations. How far this principle will be stretched remains to be seen. If it is given a wide reading by future dispute panels, it could significantly increase the scope of the California effect.

V. Conclusions

Globalization will not undermine federalism. The evidence presented above indicates that globalization encourages the centralization of regulatory power in federal polities. As federal governments are accountable for violations of international trade or environmental agreements committed by sub-national jurisdictions, they have an incentive to restrict the autonomy of these jurisdictions. However, while globalization has an impact on the internal dynamics of federal systems, it does not determine their course. The domestic dynamics of federal systems may work in opposite directions. For instance, in the 1990s, while the U.S. has been imbedding itself in regional and global trade agreements that encourage the concentration of power in federal hands, the U.S. Supreme Court has been reinterpreting the Constitution to hand power back to state governments. Globalization has an impact on federal polities, but it clearly does not have an overwhelming effect.

The impact of globalization on regulatory standards is less clear. Supranational dispute resolution bodies have attacked some social regulations set by national or sub-national jurisdictions. While the immediate impact of these decisions has been limited, there is some evidence that they have inspired a more widespread "chilling effect". The impact of dispute resolution processes that rely on states suing one another (as in the WTO) is limited by the restrictions in the volume of litigation that such processes can handle.[85] A system that empowers private litigants to challenge states' social regulations and to recover damages for "regulatory takings", such as that which exists under NAFTA's Chapter 11, promises to generate far more litigation and a far greater chilling effect.

Positive regulatory commitments made in EU directives and international agreements, such as MEAs, have led to increases in federal and sub-national standards in a number of cases. In the EU, these positive commitments have certainly outweighed any downward pressure on standards that European integration has generated. By contrast, in the context of NAFTA positive integration through the channels established in the Commission for Environmental Cooperation (CEC) has thus far proven very weak.

[84] United States - Import Prohibition of Shrimp and Certain Shrimp Products, WT/DS58/AB/R, 12 October 1998

[85] "Constitutional Federalism," *State Legislatures*, February 1999, Vol. 25(2).

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