NORTH AMERICAN
DEEP INTEGRATION SERIES

CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

Volume 1, Number 1 • September 2007

More Than Jellybeans:
The SPP Regulatory Framework Agreement and Its Impact on Chemicals Regulation

By Bruce Campbell

The August Montebello Summit on the Security and Prosperity Partnership (SPP) was high on platitudes and low on substance. Among the few deliverables outlined in the SPP's final communiqué, was the little noticed *Regulatory Cooperation Framework Agreement*. It is a slim four-page document—hard to believe that this was the full result of two years of negotiation—that will serve as a template for the many sectoral regulatory harmonization initiatives underway.

This Agreement seems innocuous enough—certainly not something to arouse the passions around the loss of Canadian sovereignty. Disparaging the critics' opposition to regulatory harmonization, Harper quipped: "Is the sovereignty of Canada going to fall apart if we standardize the jellybean. I don't think so."

Is that all this is about—jellybeans? It was certainly a clever PR ploy designed to trivialize and divert attention from what lies beneath. There is definitely more than meets the eye here.

Its significance comes into greater focus when viewed as part of a broad deregulation/harmonization initiative—driven by business and supported by governments—the long term goal of which is to create a single unified business-friendly regulatory regime for North America, though not along the European model of supranational regulatory bodies to protect the public.

This Agreement is a small step—one of many. It represents a consensus around key business friendly principles that will shape the course of regulatory harmonization throughout the continent. Although progress has been slow, it represents significant movement toward the long-term goal.

But before exploring the context more closely, let's have a look at the regulatory framework agreement itself and how it relates to business demands.

The SPP business council (it's called the North American Competitiveness Council, or NACC) gives big business a hand on the steering wheel driving this initiative. Regulatory harmonization—let's not be lulled by soft terms 'cooperation' and 'compatibility'—was one of three sets of priorities identified by the NACC in its February 2007 report to the nine SPP ministers.[1]

A central NACC demand for immediate action was the conclusion of a regulatory agreement that would ensure that "new regulations in all three countries are as compatible as possible and reduces the number of unnecessary differences between existing standards and rules. Wherever possible regulators should make every effort to reflect prevailing North American or international standards…including private sector standards." It also urged regulators in the three countries to take into consideration the trade effect of regulations that differ from the North American standard.

Using the example of food standards, the NACC called for the development (with industry participation) of "overarching principles and objectives that would lead to clear and concise hazard or risk management practices." Business, it should be noted, has fought for years to substitute the risk management regulatory principle (which it interprets as giving equal weight to business cost considerations) for the precautionary principle (which puts health and environmental protection first).

In a few areas the NACC recommended specific changes. One involved the harmonization of lists of hazardous industrial chemicals: "The lists contained in the Canadian Domestic Substances List (DSL) and the US Toxic Substances Control Act (TSCA) differ and prevent some US products from being sold in Canada." More on this later…

The NACC report did not say explicitly that it wanted to relax Canadian regulations. That would be a red flag to critics, confirming their suspicions of a regulatory race to the bottom. But remember, Canadian and US business (half of Canadian manufacturing is foreign owned) have fought long and hard to weaken existing regulations and prevent stricter regulations in North America.

How were business priorities reflected in the Regulatory Cooperation Framework Agreement? Though deliberately vague and tentative, the resemblance is unmistakable.

With virtually identical goals, the Agreement commits governments to conduct pilot projects "in joint regulatory impact analysis including cost-benefit analysis and/or risk assessment;" pilot projects to "develop a compatible approach to rules and regulations" in specific sectors; and pilot projects to "eliminate redundant testing and certification requirements." Eliminating redundant drug testing, an approving former senior Canadian trade negotiator told a government conference, could well mean replacing the bureaucracy at Health Canada with a few people in a Costa Rican-style agency who simply surf the net in search of which countries' research and test results to adopt.

Finally, the agreement accepts the business demand that governments promote the adoption of "relevant international standards as well as domestic voluntary consensus standards" and work toward a single voice for their representatives in international standards setting bodies. Given North American power realities, this means an American voice. It also means the erosion of an independent Canadian position in these forums, and by extension, the erosion of an independent Canadian regulatory capacity. (These international standard setting bodies are hybrid public-private entities that tend to be heavily influenced by multinational corporations.)

The Agreement will give big business ample opportunity to push for downward harmonization and to frustrate domestic implementation of regulations they oppose.

How does the SPP Regulatory Cooperation Agreement fit into recent deregulation initiatives?

Business representatives on both sides of the border have long pushed for deregulation—though it is usually framed as "streamlined regulation" or "efficient regulation," or "cutting red tape"—and governments have responded sympathetically.

In Canada, the deregulation drive was repackaged as "smart regulation" under the Chretien government, and gained momentum under the Martin and Harper governments. The Conservatives are, if anything, more ideologically committed to deregulation than previous governments.

A central part of the "smart regulation" agenda is to shift the basic regulatory philosophy from a precautionary principle to a risk management approach. The former approach says, 'err on the side of caution' and, 'protection has primacy over other considerations.' The latter elevates consideration of business costs and competitiveness to the same level as protection. It mandates various competitiveness and trade impact assessments of new and existing regulations. The precautionary approach places the burden of proof for a product's safety on the company, whereas the risk management approach puts the burden of proof on the regulator to show that it is unsafe, and favours voluntary compliance and so-called self-regulation options.

"Smart regulation" has made major headway in Canada. And by allying with the Bush Administration, which is dominated by fervent deregulation hawks, the Harper government is reinforcing deregulation here at home by the back door of continental regulatory harmonization. The battle, however, is by no means won. "Smart regulation" has encountered fierce resistance from within the Canadian regulatory community, from scientists, from the political opposition, and from health and environmental advocates.

The Harper government advanced the "smart regulation" agenda with the introduction on April 1, 2007 of its new regulatory policy, which sets the ground rules that will apply to all agencies. The Cabinet Directive on Streamlining Regulation (CDSR), pays lip service to the precautionary principle, but in fact weakens it in a number of ways. It implements tests for new regulation that put the burden of proof on the regulators. It expands the number of barriers that must be overcome for a department to pass a new regulation, and subjects existing regulations to review and sunset clauses. It mandates that regulations impose the least possible cost on business and not more trade restrictive than necessary.

Regulatory harmonization of toxic chemicals

The level of industrial chemicals in our environment and in our bodies is alarming, with potentially grave consequences for human health. These chemicals have been linked to birth defects, respiratory ailments, neurological disorders, and cancer. They have been minimally regulated because until relatively recently they were presumed by governments to be harmless unless proven otherwise. Consequently, the vast majority of the chemicals in use in North America lack even basic data concerning their safety.

As noted earlier, the SPP business committee report recommended that industrial chemicals contained in the Canadian Domestic Substances List (DSL) and the US Toxic Substances Control Act (TSCA) should be harmonized so that they no longer prevent some US goods from being sold in Canada. It is safe to assume that, given past practice, the chemical industry is not carrying the flag for stricter regulations.

Interestingly, the NAFTA trade ministers meeting in Vancouver as the *NAFTA Commission* two months before Montebello, singled out chemicals as one of four priority sectors for deeper integration. Their joint statement reads in part: "…Ministers also agreed to explore work that will assist current efforts towards common standards and requirements for the labeling and transportation of hazardous chemicals."

The summit leaders' final communiqué at Montebello also specifically addressed chemicals regulation, committing to "undertaking trilateral cooperation to accelerate and strengthen our national and regional risk-based chemical assessment and management efforts."

But that's not all. Although not publicized at Montebello, and not on the Canadian government site, but available on the US government web site, is a separate two-page framework sub-agreement entitled, "*Regulatory Cooperation in the Area of Chemicals*."[2] A major purpose of the agreement is "enhanced coordination of chemical assessment and management programs across North America."

The agreement envisages the sharing of scientific information used by regulators including in the expansion of programs such as Canada's *Chemical's Management Plan* and the US *High Volume Production (HPV) Challenge program*. It also includes exchange of "best practices" for the assessment and management of chemicals among policy makers and regulators, and the conveying of coordinated North American approaches to the development and adoption of international standards that support continental (read U.S.) priorities.

The agreement commits the three countries by 2012 to "enhance appropriate coordination in areas including testing, research, information gathering, assessment and risk management actions."

* * *

Given the Conservative government's commitment under the SPP to harmonizing industrial chemicals regulation, an obvious question is, what are we harmonizing to?

The Bush Administration has waged a concerted assault on the US regulatory system. It has put corporate lobbyists and anti-regulation extremists in charge

of regulatory agencies, centralized the regulatory control in the White House, stacked scientific advisory bodies with non-scientists or pro-industry scientists, suppressed or edited agency reports, manipulated regulatory tools, obstructed regulatory processes and slashed enforcement budgets.

In May 2006, representatives of 9000 EPA scientists publicly criticized the EPA management for moving to approve a group of controversial pesticides despite scientific evidence of their harm to the nervous systems of fetuses and babies. Their letter charged: "Our colleagues in the Pesticide Program feel besieged by political pressure exerted by Agency officials perceived to be too closely aligned with the pesticide industry, and former EPA officials now representing the pesticide and agricultural community."[3]

Several months later three scientists resigned from the EPA advisory panel reviewing the management of toxic chemicals under the Toxic Substances Control Act (TSCA), charging that the Committee was slanted toward the chemical industry and was failing to deal with the systemic problems impeding EPA's management of toxic chemicals.

In December 2006, the US Environmental Protection Agency (EPA), under chemical industry pressure, relaxed reporting requirements for the Toxics Release Inventory (TRI), the country's main database on toxic pollution behaviour of corporations. This is first time that the EPA has permitted reduced reporting for the most dangerous category of toxic chemicals, persistent bio-accumulative toxins.[4]

A major target of the US chemical industry's recent lobbying efforts was against the European Union's REACH program for assessing and managing chemicals, which after many years in the making, finally came into force on June 1, 2007.

Though not without flaws, REACH (Registration, Evaluation, Authorization and Restrictions of Chemicals) is landmark safety program that will test and regulate some 30,000 until now largely unregulated chemicals. Its scope is vast, its procedures are stringent and it covers domestic as well as imported chemicals.

Its central feature is that it applies the precautionary principle, which is anathema to the industry. It shifts the burden of establishing that chemicals can be used safely from public authorities to industry, thereby embedding the principle of "producer's responsibility" as chemicals make their way down through the production chain to finished goods. It also snuffs out the safe-until-proven-otherwise status that chemicals have long enjoyed. This approach also runs contrary to the direction the Canadian government has been pushing under smart regulation.

Nevertheless, because of the sheer size of the European chemicals market and because of the sheer volume of new scientific information it will generate, REACH will likely have a positive effect on chemicals regulation in Canada. For example, Canada and the EU signed a regulatory agreement in June that may eventually give our regulators access to REACH's chemical assessment and management data.

The Bush Administration attacked REACH, teaming up with the chemical industry to launch an aggressive lobbying campaign to water down the program. The U.S. State and Commerce departments, the Environmental Protection Agency and the U.S. Trade Representative all got behind the chemical industry. Trade officials claimed the policy is an illegal "barrier to trade" impeding the free flow of chemicals across borders. US Trade Representative, Robert Zoellick argued that REACH "reflects a growing trend in Europe of overreaching regulations that appear to reflect unfounded concerns than actual scientific evidence," and also threatened to lodge a complaint at the WTO if it wasn't changed.[5]

Let's look more closely at the *US High Production Volume Chemical Challenge* (HPV) program identified in the SPP chemical regulatory framework agreement. The program was launched by the Environmental Protection Agency in 1998. The goal of the HPV Challenge was to enlist chemical companies to *voluntarily* develop and make public a base set of hazard information on chemicals, which they agreed to sponsor. The EPA identified a core HPV list of 2800 chemicals. (Since then 600 new chemicals have qualified for the list.) The program was seen by its proponents as a way to circumvent the onerous regulatory test that effectively prevented the EPA from compelling companies to provide this information.

However, since the program is voluntary, EPA has limited ability to ensure full participation by manufacturers, to ensure the quality of the data, and

to ensure its timely submission. The deadline for the companies to have submitted all final data sets was 2004 and for the EPA to make this information publicly accessible was 2005. These deadlines have still not been met.

A July 2007 study by the environmental organization *Environmental Defense*, found huge gaps in the data that chemical companies had committed to providing, and major problems with the quality of data that was provided.[6] (The EPA has also expressed concerns about data quality.)

Despite these problems, chemical industry lobbyists at the American Chemical Council claim, astonishingly, that the data gap has now been closed and the Challenge has reached its goals. They say that there is now sufficient information available not only for HPV chemicals but for all chemicals in commerce today, and that it has sufficient knowledge of all of its chemicals to assert that they are safe!

* * *

The Canadian regime for regulating industrial chemicals falls somewhere in between the United States framework (the weakest) and the European REACH system, which is the strongest.

Dr. Richard Dennison, a senior scientist at *Environmental Defense,* compared US Canadian, U.S. and European Union policies on industrial chemicals in an April 2007 report entitled *Not That Innocent.* The following examples are drawn from his report.

- The US does not have clearly articulated criteria for identifying and prioritizing chemicals of concern. Canada makes much greater use of hazard and exposure criteria, especially in the DSL categorization process. REACH also makes extensive use of hazard criteria.
- The US—except in a limited number of cases—has virtually no ability to track new chemicals at all stages from their production through to their use in consumer products. Both Canada and Europe have this ability.
- In both the US and Canada, government must have sufficient evidence of an existing chemical's potential risk or toxicity to require industry to generate new information. However, the dearth of information available to governments in order to make the case for potential risk, puts them in a catch-22 situation. Thus, for the great majority of existing chemicals there is no information. REACH requires all manufacturers to generate new risk information it deems appropriate.
- The US and Canada have few if any criteria for mitigating risk for new chemicals with the result that they are done on a case by case basis, infrequently and in a non transparent manner. REACH is establishing such criteria.
- Under REACH, decisions about whether an *existing* chemical is of sufficient concern to warrant risk mitigation controls is based *solely* on hazard or exposure risk considerations. In the US, commercial factors play a central role in influencing these decisions. In Canada, the role commercial factors play is murky, according to Dennison.

* * *

Will Canada move toward the European model of regulating chemicals, or will it move towards the US model? The evidence, thus far, indicates that Canada is moving deeper into the US camp.

As referred to earlier, the Harper government's new regulatory policy and its SPP agreement on chemicals harmonization signal that it is moving ahead with the business friendly "smart regulation" initiative.[7] This is another blow for advocates of the precautionary principle.

The concrete information we have about regulatory harmonization initiatives under the SPP, though sparse, suggests that the direction is not upward, but rather is toward the lowest common denominator. An investigative journalist uncovered that an SPP committee is working to harmonize pesticide maximum residue limits on fruits and vegetables; that some 40% of the pesticides Canada regulates have stricter limits than U.S. regulations; and that the Canadian government is planning to relax its requirements on pesticide residues on U.S. fruits and vegetable imports.[8] This is particularly disturbing since the Pest Control Products Act—unlike the Canadian Environmental Protection Act (CEPA under which industrial chemicals are administered)—has a stronger precautionary bias, and unlike CEPA, places the burden of proof on the industry to demonstrate safety. Is the government planning, through its new regulatory policy, to circumvent this legislation?

On the other hand, in December 2006 the Conservative government announced its *Chemicals Management Plan* to curb the use of toxic chemicals. Several months earlier, Health and Environment Canada scientists had completed a massive seven year review of some 23,000 so-called legacy chemicals and identified 4300 of these as requiring further scrutiny based on their suspected toxicity. (Legacy chemicals are those that were in use and exempted from review when more stringent chemical regulation measures were introduced in 1988.)

Under the Plan, the government has identified 200 of these as high priority chemicals and is requiring companies to provide safety information on them over a three-year timeline. The government has moved immediately to ban some chemicals known to be particularly toxic. With respect to the rest, regulators will work with the companies to provide information on how they are managing and using these chemicals, and government will then evaluate this information and decide on further action.

This plan, unlike the widely discredited Conservative framework for regulating greenhouse gases, is seen by several environmental organizations as a positive step. On paper, it appears much stronger than the US HPV Chemicals Challenge program.

However, it has come under sharp criticism by others including a group of nearly 800 scientists and medical doctors led by University of Alberta ecology professor David Schindler. The group, in a letter to Prime Minister Harper, criticized CEPA, which administers the Chemicals Management Plan, as being too weak to run it effectively. Most importantly it does not apply the precautionary principle and, unlike REACH, does not shift the burden of responsibility to the companies to demonstrate their products are safe—the so-called reverse onus principle. George Enei from Environment Canada described the approach as 'shared responsibility' between government and industry.[9] Schindler also believes that Environment Canada has neither the budget nor the scientific resources to properly evaluate these chemicals.

The House of Commons Environment Committee recently completed its review of the *Canadian Environmental Protection Act* (CEPA). The Committee report calls for more stringent timelines to deal with toxic chemicals. It recommends moving toward the European REACH program and placing greater onus on industry for the safety of its chemicals, strengthening the application of the precautionary principle, and more resources for research and enforcement. The government was supposed to respond to the Committee's report by the end of August.

What does this SPP harmonization initiative—driven by US-owned chemical multinationals and supported by governments with deregulation agendas—portend for the future of Canada's chemicals regulatory regime? To say the least, it does not inspire confidence in the Canada's New Government's resolve to really take on this pervasive toxic brew that threatens our health and environment.

* * *

Much of what will occur in the coming years under the SPP falls under the category of regulatory harmonization. Regulation is a contested policy arena in Canada—one of action and reaction, ebb and flow. Under normal democratic process, we can expect current deregulation initiatives to generate strong resistance and potentially result in the emergence of new political alliances—less sympathetic to the business-friendly regulatory model—that would reverse this deregulation experiment.

The SPP, like NAFTA, seeks to constrain such democratic processes. It consciously tilts the balance in favour of the deregulation model—by locking in hundreds of continental regulatory agreements and protocols—which then are much harder to reverse. SPP regulatory harmonization is a policy straightjacket that tightens with each new agreement, narrowing Canadian regulatory policy flexibility as it conforms to the dominant US regime.

The United States—the bigger partner—is not bound by this straightjacket and can simply ignore or unilaterally change the rules (which by and large it set), with little consequence if important national interests are deemed to be at stake. The smaller partners do not have the same leeway to disregard the rules because the consequences of doing so are much greater. Regulatory integration seriously compromises their national sovereignty and democracy. It represents a *de facto* form of political integration in North America, but—unlike the European Union—without supranational institutions and political representation.

Don't expect the regulatory harmonization process to be dramatic. It is taking place stealthily in the sub-basement of bilateral relations: small technical steps—some inconsequential others significant—largely invisible to the public. The cumulative effect, however, is hugely significant as we move closer to the endpoint: a single continental regulatory regime whose shape is determined informally by the large partner.

Perhaps at some future point, in the wake of a major health crisis, people will ask, why did our government fail to protect us? And maybe some politician will point to an obscure SPP deal and say, 'our hands were tied. We were compelled to harmonize our regulations in an integrated North American market to secure our prosperity and ensure North American competitiveness with the China.'

This is not an inevitable future, but preserving essential policy flexibility to act in accordance with national priorities requires constant vigilance from an engaged citizenry. And, our prime minister to the contrary, there's a lot more at stake here than jellybeans!

Bruce Campbell *is the Executive Director of the Canadian Centre for Policy Alternatives.*

Notes

1 "Enhancing competitiveness in Canada, Mexico and the United States; initial recommendations," North American Competitiveness Council, February 2007

2 As of the time of writing, the author could not locate this agreement on the Canadian government SPP web site.

3 Cited in "Scientists Rise Up at EPA," *PEER Review*, Public Employees for Environmental Responsibility, Summer, 2006

4 Against the Public Will, OMB Watch, Washington, December 2006

5 USTR, letter to Senator Frank Lautenberg, January 7, 2005. For a comprehensive account of the US lobbying effort against REACH, see Joseph DiGangi*, US Intervention in EU Chemical Policy*, Environmental Health Fund, September 2003

6 *High Hopes Low Marks: A Final Report Card on the High Production Volume Chemical Challenge*, Environmental Defense, Washington July 2007

7 The Conservative government in its *Advantage Canada* economic plan of December 2006, endorsed the smart regulation initiative, but the communications spin has tended to de-emphasize "smart regulation" in favour of "real regulation."

8 Kelly Patterson, *Canada lowers standards on pesticide use on fruits, vegetables, to match US limits,* Ottawa Citizen, May 9 2007

9 Cited in *Canada's New Toxic Hit list Called Inadequate*, Canadian Medical Association Journal, February 13, 2007, 431