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CONGRESSIONAL TESTIMONY

Copenhagen and Beyond: Is there a Successor to the Kyoto Protocol?

Testimony before
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Committee on Foreign Affairs

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The United States finds itself in an unenviable position as the United Nations Climate Change Conference in Copenhagen approaches. It has not yet achieved a true domestic consensus on the degree to which it is willing to obligate itself internationally. Several other major members of the international community—most notably China and India—have made strong statements in opposition to the contemplated terms of a post-Kyoto treaty. Unlike those countries, however, the United States is expected to exhibit "leadership" during the December negotiations.

As the Copenhagen meeting approaches, the United States must determine the definition and limits of American leadership within the context of post-Kyoto international climate change negotiations.

The United States must first establish the circumstances under which it would commit itself to making major changes to its domestic energy policy, and whether and to what extent it is surrendering its sovereignty in making international commitments to a post-Kyoto agreement.

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The December Copenhagen conference is slated to produce a successor agreement to the Kyoto Protocol. An agreement on the lines of the current 181-page negotiating text would potentially harm U.S. economic and energy interests. The nature of the agreement contemplated to take form in Copenhagen—a complex, comprehensive, legally binding multilateral convention—poses a threat to American sovereignty.

Different types of treaties carry different risks in terms of eroding American sovereignty. The least threatening is arguably a bilateral treaty, in which the United States and only one other nation make mutual obligations to one another. In bilateral negotiations, the United States has substantial control over the final terms of the treaty. With only one other nation participating in the negotiations, the likelihood that the United States would be compelled to accept a term against its best interests or compromise its sovereignty is minimized, if not eliminated. Moreover, in bilateral treaties the United States retains the greatest flexibility to derogate or withdraw from the treaty in the event of noncompliance or breach of the treaty's terms by its treaty partner.

In contrast, multilateral treaties pose greater challenges to the United States. In general, the United States has less control over the final terms of multilateral treaties and thus less control over what obligations it has to the other treaty parties. The less control the United States has over the final terms of a treaty, the greater the possibility that the terms of the treaty will not comport with U.S. national interests. In addition, the United States is placed in a weaker bargaining position compared to bilateral treaty negotiations. Voting blocs such as the "Group of 77" developing countries, and regional blocs such as the European Union, have the ability to pool their votes to isolate the United States and weaken its bargaining position. We saw this practice in action during the negotiations of the Rome Statute of the International Criminal Court.

Moreover, the United States has less latitude in a multilateral regime than in a bilateral treaty to derogate from the treaty, even in the face of widespread breach of the treaty by other parties. That is to say that even if dozens of parties to a multilateral treaty ignore its terms, the United States is generally still required to live up to its end of the deal. We see this most commonly in

international human rights treaties, the terms of which are regularly flaunted by dozens if not scores of countries.

Additionally, U.S. membership in multilateral human rights treaties is palatable in terms of safeguarding American sovereignty due to the fact that U.S. law is generally in full compliance with the terms of such treaties prior to ratification. For instance, U.S. ratification of the International Covenant on Civil and Political Rights posed a negligible threat to U.S. sovereignty because the rights enumerated in the treaty were already safeguarded by the U.S. Constitution, the Bill of Rights, and existing federal and state law.

Finally, inconsistencies between U.S. domestic law and the terms of most multilateral treaties may generally be remedied at the time of U.S. ratification by submitting conditional statements known as reservations, understandings, and declarations. These qualifiers allow the United States to join a multilateral treaty regime and comply with its terms while comporting with the U.S. Constitution and existing U.S. law.

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In contrast to bilateral and non-binding multilateral treaty regimes, treaties such as the Kyoto Protocol and agreements such as that being contemplated for the December meeting in Copenhagen arguably pose the greatest threat to American sovereignty.

First, the Copenhagen negotiations will be multilateral in nature, making it difficult if not impossible for the United States to control the outcome. Unlike bilateral treaty negotiations, the United States will be only one of 192 countries participating in the process and will therefore have much less say over the final terms of the negotiated text. Voting blocs such as the EU and G-77 will likely pool their votes and negotiating resources to effectively isolate the United States while simultaneously saddling our negotiators with the expectation of "American leadership."

Unlike international human rights covenants, the successor to the Kyoto Protocol will likely attempt to impose legally binding obligations on the United States. The international community will be vigilant in requiring the United States to meet its obligations, even if they fall short of their own emissions targets and other treaty obligations. Opportunist national leaders and United Nations officials will likely appeal, as they have in the past, to America's leadership position and expect the United States to meet its treaty obligations even in the face of widespread noncompliance by other nations.

The obligations sought of the United States in the post-Kyoto environment are onerous. They include requirements to cap greenhouse gas (GHG) emissions that could negatively affect America's economy; payment of American taxpayer dollars to countries for the purpose of developing their clean energy capacity; and transfers of clean energy technology from the United States to other countries, apparently without compensation for the developers of that technology. As such, the United States would not only be required to revamp its domestic energy policy, but also be required to assist other countries to develop their energy capacity with billions, if not tens or hundreds of billions, of U.S. taxpayer dollars over the course of many years.

Not only are the contemplated obligations onerous, the manner in which the obligations would be enforced would submit the United States to an unprecedented monitoring and compliance

regime. The United States would apparently be required to submit itself to an intrusive review of both its domestic energy policy and its compliance with obligations to transfer wealth and technology abroad. The current draft negotiating text is replete with references to "facilitative mechanisms," "monitoring, reporting and verification mechanisms," and requirements that financial commitments and transfers of technology be "legally binding."

That is, I believe, an unprecedented set of obligations for the United States to make to the international community. The contemplated post-Kyoto agreement would consequently be unlike any treaty the United States has ratified in its history.

Unlike other multilateral treaties, the obligations as set forth in the current draft negotiating text do not lend themselves to reservations, understandings, or declarations. The terms of any post-Kyoto agreement, if ratified by the United States, would likely obligate it to reduce its GHG emissions by a certain percentage within a certain period of time. No reservation may be taken from that requirement without violating the terms of such an agreement.

The proposed agreement would apparently allow no leeway from its terms in the event that future circumstances compel the United States to derogate from its GHG emission and financial obligations. A downturn in the American economy, for example, would not excuse the United States from its commitment to transfer taxpayer dollars to support the advancement of clean energy in foreign countries. Ironically, the United States would continue to be bound by its treaty obligations even if future scientific research irrefutably calls anthropomorphic climate change into question.

In sum, the contemplated post-Kyoto treaty is a serious threat to American sovereignty and other vital U.S. national interests because of its legally binding nature; its intrusive compliance and enforcement mechanisms; and the inability to submit reservations, understandings, or declarations to its terms.

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Despite all of these drawbacks, the United States may demonstrate genuine leadership in future climate change negotiations in Copenhagen and thereafter. Such leadership, however, should be demonstrated in a manner that protects U.S. interests while preserving American sovereignty.

To do so, the United States must first determine what the domestic consequences of ratifying a post-Kyoto agreement are, and then engage the international community on those terms. To do the reverse would be contrary to the government's primary responsibility—to act in the nation's best interests. Before making promises to the international community, the Obama Administration should first determine what is both economically and politically feasible in the United States generally and in Congress specifically. Neither determination has yet been made. The climate change issue is hotly debated in Congress and across the United States, and we are nowhere near political consensus, which is perhaps a reflection of the absence of scientific consensus on the seriousness of anthropomorphic climate change.

Before the United States can negotiate in good faith with the rest of the world, it must first reach a domestic consensus on what sacrifices the American people are willing to make in the name of global climate change. True consensus does not mean a sharply divided vote between the two

parties, such as the recent vote on cap-and-trade legislation. Instead, a bipartisan consensus must be reached on the obligations of a global climate change treaty for it to have lasting and meaningful results. Making a promise to the international community before reaching domestic consensus is a recipe for failure. Making that promise is, at best, premature at present.

If domestic consensus is not reached and the implementing legislation passes Congress on very narrow margins, it is possible that those in opposition to the contentious legislation will erode or even overturn the legislation when political power in the Congress shifts. Such an event would arguably cause the United States to breach its treaty obligations and would place the U.S. in a difficult position within the international community.

Making international promises that the United States is unable to keep—as was the case when the U.S. signed the Kyoto Protocol—does not demonstrate American leadership. Neither does capitulating to demands for wealth and technology transfers, regardless of the impact of such measures on the American economy. Reducing GHG emissions to an arbitrary number without first determining how such reductions would affect U.S. energy security and American jobs also does not constitute leadership.

- Instead, Congress, the White House, the American scientific community, and nongovernmental organizations should study the impact that a comprehensive climate change treaty and corresponding domestic implementing legislation would have on our economy, our energy security, our jobs, and our treasury. In short, we must determine the effect that a promise in Copenhagen would have on the American people.

- By knowing the consequences that a climate change treaty would have on American citizens, leaders in Congress and the White House would possess the necessary facts and data to work toward a true bipartisan consensus on domestic legislation.

- Only then may the Obama Administration sincerely promise internationally what it can achieve domestically in both the near term and the long term.

Such an approach would place the United States in a position to negotiate with the international community in good faith while protecting U.S. national interests and preserving American sovereignty.

That approach would demonstrate American leadership.

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