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Analysis of the 2009 Copenhagen U.N. Climate Change Conference

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The "Kyoto II" Climate Change Treaty: Implications for American Sovereignty

Steven Groves

The upcoming United Nations Climate Change Conference in Copenhagen, Denmark, is supposed to produce a successor agreement to the 1997 Kyoto Protocol, a treaty signed by the Clinton Administration but never sent to the U.S. Senate for advice and consent.[1] The proposed "Kyoto II" successor agreement, if crafted along the lines of the current 181-page negotiating text, poses a clear threat to American sovereignty. This threat is primarily due to the nature of the proposed treaty—a complex, comprehensive, legally binding multilateral convention.

Three Types of Treaties

The United States arguably cedes some amount of sovereignty whenever it ratifies a treaty. The amount of sovereignty ceded depends on the nature of the treaty obligations as well as the reciprocal nature of the obligations of the other parties to the treaty. Such relinquishments of sovereignty are necessarily difficult to quantify.

It may be fairly argued, however, that different kinds of treaties pose different potential risks as to the amount of sovereignty at stake. In terms of the level of risk of ceding sovereignty, an argument may be made that, in general, bilateral treaties pose less of a risk than multilateral treaties, treaties that do not have legally binding obligations pose less of a risk than those that do, and treaties where the U.S. has the ability to make reservations pose less of a risk than those where reservations are not permitted.

The contemplated post-Kyoto climate treaty fails on all three of those counts.

Important Distinctions

As noted, the type of treaty that is the least threatening to American sovereignty is a bilateral treaty—one in which the U.S. and only one other nation make mutual (and usually equal) promises to one another. In such treaties, unlike Kyoto II, U.S. negotiators generally demand its treaty partner commit to reciprocal obligations identical to those that are expected of the U.S.

In bilateral negotiations, the U.S. has substantial control over the final terms of the treaty. With only one other nation participating in the negotiations, the likelihood that the U.S. would be compelled to accept an obligation that would compromise its sovereignty is minimized, if not eliminated. While the obligations

1. Recent press reports indicate that only a political "framework" agreement is now expected to be agreed to at the Copenhagen conference. See, for example, Reuters, "UN, Denmark Suggest 2010 Deadlines for Climate Deal," November 16, 2009, at *http://www.reuters.com/article/latestCrisis/idUSLG401631* (November 17, 2009).

undertaken in a bilateral treaty may be legally binding, the U.S. retains the greatest flexibility to derogate or withdraw from a bilateral treaty in the event of non-compliance or breach of the treaty's terms by its treaty partner.

In contrast, multilateral treaties, such as the proposed Kyoto II, pose greater challenges to the U.S. In general, the U.S. 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 U.S. 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 U.S. is in a much weaker bargaining position as compared to a bilateral treaty negotiation. Voting blocs such as the "Group of 77" developing countries and regional blocs such as the European Union, the African Union, and other organizations have the ability to pool their votes to effectively isolate the U.S. and weaken its bargaining position—as was the case during the negotiations of the Rome Statute of the International Criminal Court.[2]

Moreover, the U.S. has less latitude in a multilateral treaty regime to deviate from the terms of the agreement, even in the face of widespread derogation or even breach of the treaty by other parties. Even if dozens of parties to a multilateral treaty ignore its terms, the U.S. is generally still required to live up to its end of the deal. This occurrence is very common in international human rights treaties, the terms of which are regularly flouted by dozens of countries that are party to those treaties.

Despite these drawbacks, non-binding multilateral treaty regimes are still not nearly as onerous as the proposed Kyoto II treaty. Specifically, 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 harmony 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 sovereignty since the rights enumerated in that treaty were already safeguarded in the U.S. by the Constitution, the Bill of Rights, and existing federal and state law.

Furthermore, any inconsistencies that exist between U.S. domestic law and the terms of most multilateral treaties may generally be remedied at the time of ratification through the submission of conditional statements known as "reservations," "understandings," and "declarations." These qualifiers allow the U.S. to join a multilateral treaty regime and comply with its terms while comporting with the U.S. Constitution and existing U.S. law.

In contrast to bilateral and non-binding multilateral treaty regimes, treaties such as the Kyoto Protocol and agreements such as the proposed Kyoto II treaty arguably pose the greatest threat to American sovereignty.

The Greatest Threat to American Sovereignty

Negotiations for a Kyoto II treaty will be multilateral in nature, which will make it difficult if not impossible for the U.S. to control the outcome. Unlike bilateral treaty negotiations, the U.S. will be only one of 192 countries participating in the Copenhagen conference and will therefore have much less say over the final terms of the negotiated text. Voting blocs such as the EU, the AU, and the "G-77" will likely pool their votes and negotiating resources to isolate the U.S. As was the case during the negotiations for the Rome Statute and the Kyoto Protocol, those powerful voting blocs may not have the best interests of the U.S. as their primary concern, to say the least.

Unlike multilateral human rights covenants, the proposed Kyoto II treaty would likely attempt to impose legally binding obligations on the U.S. The international community will be vigilant in requiring the U.S. to meet its obligations, even if many other nations fall short of their own emissions targets and other treaty requirements. Opportunist national leaders and U.N. officials will likely appeal, as they have in the past, to America's leadership role in the world and expect the

2. Press release, "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court," United Nations, July 17, 1998, at *http://www.un.org/icc/pressrel/lrom22.htm* (November 17, 2009); Brett D. Schaefer and Steven Groves, "The U.S. Should Not Join the International Criminal Court," Heritage Foundation Backgrounder No. 2307, August 18, 2009, at *http://www.heritage.org/Research/InternationalOrganizations/bg2307.cfm#_ftn4.*

U.S. to meet its treaty obligations even in the face of widespread noncompliance by other nations.

Onerous Obligations

The obligations sought of the U.S. 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 U.S. to other countries, possibly without fair compensation for the developers of such technology.

In short, the U.S. would be required not only to overhaul its domestic energy policy but to assist other countries to develop their own 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 of a Kyoto II treaty onerous, but the manner in which the obligations would be enforced would submit the U.S. to an unprecedented monitoring and compliance regime. The U.S. would apparently be required to submit itself to an intrusive international review of both its energy policy and its compliance with obligations to transfer wealth and technology to "developing countries." 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."[3]

Furthermore, as conceived, the proposed Kyoto II treaty would require the U.S. and other parties to accept as binding the decisions and rulings of the international bureaucracy created to monitor compliance with the treaty. That is to say, the U.S. would not have the final authority on questions regarding its compliance. Instead, the Kyoto II treaty bureaucracy will decide:

- Whether the U.S. has reduced its GHG emissions to the proper level within the proper timeframe;
- Whether the U.S. has transferred sufficient amounts of money to develop the clean energy sector for a sufficient number countries in the developing world; and
- Whether the U.S., its private corporations, and its patent holders have surrendered (perhaps without compensation) a sufficient amount of clean energy technology to developing countries including, supposedly, China.

Due to the unprecedented obligations that the U.S. would be required to make to the international community and the intrusive compliance mechanisms proposed to enforce those obligations, the contemplated Kyoto II treaty would be unlike any treaty the U.S. has ratified in its history.

No Leeway

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 U.S., 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 object and purpose of such a treaty. Likewise, the U.S. would not be able to exclude itself through a reservation from the treaty's proposed compliance and enforcement mechanisms.

The proposed Kyoto II treaty would apparently allow no leeway from its terms—even if future circumstances compel the U.S. to deviate from its obligations regarding GHG emissions and financial transfers. A downturn in the American economy, for example, would not excuse the U.S. from its commitment to transfer billions of taxpayer dollars to support the advancement of clean energy in foreign countries. Ironically, the U.S. would continue to be bound by its obligations under Kyoto II even if future scientific research irrefutably debunks the theory of anthropogenic climate change.

3. United Nations, "Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention," Framework Convention on Climate Change, Seventh Session, September 15, 2009, at h*ttp://unfccc.int/resource/docs/2009/awglca7/eng/inf02.pdf* (November 17, 2009).

Obama Administration Should Protect American Sovereignty

The contemplated post-Kyoto treaty is a serious threat to American sovereignty due to its legally binding nature, its intrusive compliance and enforcement mechanisms, and an inability on the part of the U.S. to submit reservations, understandings, or declarations to its terms. The Obama Administration should not sign any agreement reached in Copenhagen or thereafter that would deprive the U.S. of its sovereign right to determine the nature and extent of its treaty obligations and whether it has complied with those obligations.

—Steven Groves is Bernard and Barbara Lomas Fellow in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation and a contributor to ConUNdrum: The Limits of the United Nations and the Search for Alternatives *(Rowman & Littlefield Publishers, 2009).*