Did Copenhagen Give Climate Change Legislation Any "Bounce" in the Senate?

by Tom Mounteer

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If President Barack Obama expected to get any "bounce" from December's international climate change talks in Copenhagen in terms of gaining U.S. Senate acceptance of comprehensive climate change legislation, he must have been sorely disappointed. Of course, after his recent State of the Union address—with its focus on domestic jobs—perhaps the president's climate change ambitions are diminished.

During the State of the Union address, the president did laud the U.S. House of Representatives' passage of the Waxman-Markey cap-and-trade bill.[1] Certain passages in his address were defiant in their refusal to scale back his ambition despite the trying times.

The fundamental problem the president confronts with respect to cap-and-trade legislation, however, is that the biggest political "knocks" against it go right to the heart of his domestic jobs agenda. Opponents of cap-and-trade legislation deride it as disastrous for the economy and as incentivizing the export of U.S. jobs.

Copenhagen offered little to overcome these vulnerabilities.

If not an outright flop, the so-called Copenhagen Accord was certainly no blockbuster. Not a legally binding agreement, the delegates settled on a "note."

Even if the Obama Administration had realistic expectations for the talks, one presumes the Administration would like to have gotten some sort of "bounce" from the talks to persuade an increasingly reluctant Senate to support cap-and-trade legislation. The media were certainly stirred up by the prospects of 119 heads of state gathering. President Obama not only made the trip, but he also promised that the United States would achieve greenhouse gas (GHG) emissions reductions equivalent to those contained in the Waxman-Markey Bill. He pledged to cut U.S. emissions "in the range of" 17% by 2020 from 2005 levels.

It seems unlikely that Copenhagen will provide any "bounce" at all. There are a number of reasons for that. First, there is little in the Copenhagen Accord likely to appease those Democratic senators who have opposed cap-and-trade legislation because of its effects on the U.S. economy and jobs. Second, senators may be skeptical of the integrity of the promises that developing countries, especially China, made under the Accord. Third, in this sour economy, there may be little Senate appetite to fund the adoption of GHG-reducing technologies overseas.

Beyond the overall costs that cap-and-trade legislation is projected to impose on the troubled economy, senatorial reticence stems from a concern that capping domestic GHG emissions will cause industry to relocate overseas where they would not face such caps (or the costs of acquiring allowances)—taking U.S. jobs with them. Before President Obama left for Copenhagen, 10 Democratic senators expressed concerns along these lines in two letters to the president. The senators warned that any international climate agreement must ensure a level playing field for U.S. companies and workers. They cautioned against shifting GHG emissions—and underlying jobs—to countries that refuse to take actions similar to the United States.

The most frequently touted mechanism to prevent emissions and job leakage abroad is the so-called border adjustment mechanism—essentially a tariff on imports from countries not enforcing GHG caps. The Waxman-Markey Bill includes a border adjustment mechanism, i.e., the "international reserve allowance" program, beginning in 2020 if energy-intensive, trade-sensitive sectors in the United States are still impacted by international competitiveness issues.[2]

The mechanism is controversial. Experts call its legality under international free trade agreements into question. It risks triggering retaliation from affected countries. China, for example, has railed against the border adjustment concept.

In addition to international trade and competitiveness concerns, senators remain skeptical about the promises developing countries made under the Copenhagen Accord. Prior to Copenhagen, China pledged to reduce its "carbon intensity"—not its absolute GHG emissions—by 40 to 45% below 2005 levels. In other words, China plans to continue to grow its economy but to do so in a more energy-efficient manner.

Of course, those with a long-term perspective point to the progress that *any* commitment from developing countries to reducing carbon emissions represents. As recently as three years ago, developing countries would not even have considered making such a pledge.

The fuzziness of the Copenhagen Accord with respect to verifying such national commitments is likely to leave senators wanting more. Before Copenhagen, China did not want to subject its promise to international verification but promised the international community that it would assure the accountability of the system domestically. In one letter to the president, the Democratic senators said such an approach would be unacceptable. They want verification by the international community.

Under the Copenhagen Accord, China agreed to "domestic measurement, reporting and verification" of its promises "through national communications, with international consultations and analysis" to "ensure that national sovereignty is respected."[3] This is still much less than what developed countries signed up for. It seems unlikely to appease skeptical senators.

Finally, one of the most tangible commitments from the Copenhagen Accord is the creation of the Copenhagen Green Climate Fund. The Fund would set aside $30 billion to assist developing countries with adaptation, technology transfer, and deforestation issues. Additionally, developed countries committed to jointly raise $100 billion per year for the Fund by 2020. The Copenhagen Accord states that "funding will come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources of finance."[4]

In these days of ballooning deficits, how willing the Senate is to have the United States contribute such funds likely depends on the answer to two questions: Where is the money going to come from? And, what is the United States getting in return?

If Congress enacts comprehensive cap-and-trade legislation that includes auctioning some substantial portion of allowances—thereby raising substantial funds—that could answer the first question. Of course, the House-passed Waxman-Markey Bill gave away 80% of allowances initially for no cost. Yet, it has clearly been the vision of many to use allowance auction proceeds to fund endeavors such as this.

In return, the Senate will want measurable and verifiable emission reductions from the beneficiary countries. The Copenhagen Accord may have accomplished too little in this regard to achieve widespread Senate support for the Green Climate Fund. The Accord only required developing countries—including China and India—to commit to "mitigation actions" that are subject to domestic *verification* and international *consultation and analysis*.[5] Again, those promises may simply not be enough to sway Senate skeptics.

Since his return, President Obama acknowledged that he understood why people would be disappointed with the outcome of Copenhagen. Implicit in that acknowledgement is probably recognition that the Accord gives cap-and-trade legislation no "bounce" in the Senate.

The next international climate talks are set for November in Cancun, Mexico. For now, momentum for comprehensive cap-and-trade legislation in the United States will have to proceed with little help from the Copenhagen talks. After the State of the Union address, it will be interesting to see how much talk the president continues to give it.

(Endnotes)

1. Tom Mounteer, *Comprehensive Federal Legislation to Regulate Greenhouse Gas Emissions*, 39 ELR 11068 (Nov. 2009).
2. *Id*. at 11089.
3. U.N. Framework Convention on Climate Change, Draft Decision, CP.15, Copenhagen Accord ¶ 15 (Dec. 18, 2009).
4. *Id*. ¶ 8.
5. *Id*. ¶ 3.