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The Winter of Our Discontent: The Impact of Copenhagen's Failure

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The Winter of Our Discontent

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"Now is the winter of our discontent."
"Made glorious summer by this son of York."
"And all the clouds that low’r’d upon our house."
"In the deep bosom of the ocean buried."

–William Shakespeare, “Richard III,” Act 1, Scene 1

As a witness to the recent United Nations Climate Change Conference in Copenhagen, I exchanged my bar card for a press pass and chronicled the daily efforts of “developing” nations to persuade their “developed” brethren to redistribute the wealth of the industrialized world.

Despite all the hype, these efforts had little to do with climate change or the reversal of global warming. Instead, they were at best thinly disguised attempts to manipulate comparatively wealthy nations, such as the United States, into providing massive funding to poorer countries, without any meaningful verification of their ultimate use or accountability for their misuse.

Far from treating climate change as a “universal” problem that transcends national boundaries, the conference devolved into a frustrating exercise in nationalism, where individual nations, or groups of nations, tried to satisfy their particular needs, as opposed to redressing global climate problems. Now that Copenhagen’s uproar has faded, it is appropriate to evaluate the consequences of the conference’s failure for American industry.

For companies operating internationally, particularly manufacturers and other industries with large energy appetites, the uncertainties have multiplied. Although carbon trading has been underway for years in the European Union, the World Bank recognized in Copenhagen that after the Kyoto Protocol expires in 2012, the price of carbon will be anyone’s guess. Even before the conference, the market price for carbon was declining precipitously despite significant increases in trading volume. In 2009, according to a recent Point Carbon study, trading increased 68 percent from the prior year, but world carbon prices fell about 40 percent. Presently, the value of carbon permits stand at $17.77 —
less than half their 2008 value, when prices crested at $45.25. The conference's failure has further depressed carbon prices, and long-term recovery is doubtful without a truly international agreement.

The carbon market’s collapse is a serious blow to those promoting the virtues of a low-carbon economy buoyed by a thriving “cap and trade” system. This unstable landscape creates disincentives for businesses that might otherwise invest in carbon-reduction strategies. According to International Energy Agency forecasts, cumulative incremental investments of $10.5 trillion in low-carbon energy technologies and energy efficiency are needed by 2030.

To make those technologies work economically, the IEA projects that carbon prices must reach $50 per ton of carbon dioxide in 2020 and $110 in 2030. Reaching these goals is increasingly unlikely without a global agreement that equitably encompasses all emitters, including the United States and China. So long as those nations remain disengaged, the economic and environmental benefits of carbon trading will remain illusory. Without such a universal commitment, “wait and see” seems a better option for investors and expanding businesses, especially given the difficulty of present economic conditions.

In the United States, the Copenhagen debacle should sound the death knell for any unilateral climate change measures. Without an international treaty that applies universally to all nations, and especially to major emitters such as China and India, imposing unilateral regulations or statutory frameworks on American industry will grant foreign industries grossly unfair competitive advantages. If developing nations are allowed to emit freely while American businesses are restricted and forced to implement major capital improvements, jobs and profits will suffer, while the global climate remains unchanged. One doubts that this nation’s wage earners are willing to compromise their paychecks for a purely “exemplary” display.

Although Congress is mulling the idea of “carbon tariffs” to protect American industries from foreign competition, the wisdom of such drastic measures is questionable. One need only recall that Herbert Hoover sealed the demise of his presidency by securing the passage of the disastrous Smoot-Hawley tariffs in 1930, resulting in trade wars that disastrously deepened the Great Depression. Given this historical lesson, policies that close foreign markets, while increasing domestic prices during times of economic crisis, seem remarkably unwise.

Certainly, the Environmental Protection Agency can attempt to regulate greenhouse gas emissions without congressional intervention. Indeed, a panel at the Copenhagen conference plainly advocated that approach if Congress fails to enact climate change legislation. But, as EPA Administrator Lisa Jackson stressed in Copenhagen, the agency clearly disfavors a broad “command and control” approach. She insisted that legislation would be necessary to remove uncertainties that stand in the way of business investment, and underlined that the agency would take “meaningful, commonsense steps” to cut emissions — a limited strategy that, although unspecified, falls far short of wholesale unilateral regulation of the American economy. Even if a broader strategy is contemplated, another vast expansion of executive authority so soon after the unpopular health care efforts, carries huge political risks.

Given these international and national standoffs, it is tempting to forecast a standstill in climate change activism and regulation, but it would be wrong to do so. Historically, executive and legislative gridlock has caused litigation to spike, and climate change is proving to be no exception. Time after time, opportunistic trial lawyers have seized upon legislative and regulatory vacuums to launch mass-tort litigation against American industry. The climate-change-litigation model comes in several versions, but its collective effect seeks to push industry closer to accepting the “lesser evils” of international or congressional “solutions.”

Already, the trial bar is celebrating signal victories in two federal appellate courts — victories that overturned the dismissal of massive public nuisance cases against industries that allegedly contributed to global warming. These cases can be added to several smaller but important victories in which lawyers have challenged the issuance of essential permits to coal-fired power plants because their emissions unacceptably contributed to climate change. The trial lawyers undoubtedly are encouraged by the EPA’s recent “endangerment” finding, in which greenhouse gas emissions were declared a danger to human “health and welfare.” It is surely premature to forecast massive recoveries based on these theories, but it is not unreasonable to foresee significant and burdensome transaction costs and interference with ongoing operations.

Rushing into the arms of the United Nations or Congress may not solve these litigation problems.
Unless climate change litigation is pre-empted or otherwise precluded by legislation, businesses throughout the world could subscribe to a universal treaty and still face massive litigation in the United States for contributing to global warming. This extraordinary “litigation tax,” which is largely unique to the United States, confounds any rational approach to redressing climate change problems. Even if all other problems are resolved, our legal system may yet find ways to inhibit foreign investment and American enterprise.

A comprehensive solution to this dilemma is surely needed but remains elusive and unvoiced. Certainly, the United Nations and the U.S. Congress are silent on measures needed to protect industries from predatory litigation. Moreover, the Obama administration’s professed hostility to pre-empting common-law litigation suggests that unprompted relief is not forthcoming. Public awareness and strong political action are essential to securing these important safeguards. Without them, concerns over global warming may be transformed into “the winter of our discontent” — a lasting chill not graced by the promise of summer.