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COMMENTS ON "AN INTERNATIONAL
REGIME FOR ENVIRONMENTAL
PROTECTION," BY RT HON PROFESSOR
SIR GEOFFREY PALMER

ALAN S. MILLER*

Former Prime Minister Palmer may be the most valuable export ever to leave New Zealand for the United States. His United Nations speech in 1989 brought badly needed attention to the question of institutional reform for addressing global environmental problems. This topic will assume center stage with the June 1992 United Nation Conference on Environment and Development. An international legislative body devoted to "decisions on sustainable policies for global development"¹ may not be imminent but, as Gareth Porter and Janet Brown observe, it is no longer "hopelessly idealistic."² If democracy can come to Eastern Europe, why not also the environment?

The saga of the Montreal Protocol recounted by former Prime Minister Palmer demonstrates the limits of even successful treaties: the process is cumbersome and time-consuming, and agreements are not easily policed. International regimes are emerging quickly measured by the timescales of international law and procedure, but perhaps not nearly fast enough to avoid environmental disaster:

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1. Geoffrey Palmer, *An International Regime for Environmental Protection*, 42 WASH. U. J. URB. & CONTEMP. L. 5, 18 (1992).

2. G. PORTER AND J. BROWN, GLOBAL ENVIRONMENTAL POLITICS 156 (1991).

And whether such consensus may be achieved in time to prevent serious impoverishment of the biosphere and severe diminution of environmental quality cannot be foreseen. Destructive and irreversible environmental effects such as significant change in the composition of the earth's atmosphere could occur before people and nations are prepared to transcend the barriers that limit their cooperation in mutual self-interest.³

My concern is whether the pursuit of an international legislative environmental body represents the most promising solution to this problem. The effort necessary to achieve such a sweeping reform would certainly be considerable and would compete with climate change and other pressing environmental problems for public attention and diplomatic resources. If we apply the principles of environmental assessment and compare the costs and benefits of former Prime Minister Palmer's proposal with other reasonably available alternatives, would we conclude that such action is justified?

Building a constituency for a supranational authority will not be easy. The environmental benefits of institutional reform proposals tend to be indirect and abstract; public support can be marshalled for protecting the ozone layer much more easily than for creating a new institution to do the job. One condition imposed by the wealthy industrialized nations in return for supporting the creation of a fund to assist developing countries to adopt substitutes for ozone depleting compounds was that it not involve any new institution.⁴

There also are some potentially serious drawbacks to an international environmental legislative body. One is a possible reduction in pressure for unilateral action, now often a precursor to international agreements. A small group of nations led by the United States played a critical role in pushing successfully for international action to protect the ozone layer after first adopting strong domestic policies.⁵ The economic interests opposed to action will be represented in any forum, but

3. LYNTON K. CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS* 304 (2d ed., 1990).

4. RICHARD E. BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* 152-57 (1991) (explaining that donor countries "stressed the difficult and time consuming process involved").

5. *Id.* at 205-06.

Preemptive actions can also support moral suasion in encouraging future participation by other countries. In addition, action by major countries can slow dangerous trends and hence buy time for future negotiations and for development of technological solutions.

Id. at 206.

would the same aggressive political leadership be as likely and effective in an international body?

International forums and negotiations have also not been as open to non-governmental organizations (NGOs) and the media as in most industrialized societies.⁶ The linkage between environment and trade has become an important issue for the General Agreement on Tariffs and Trade (GATT), but GATT procedure has no provisions for public involvement. Some negotiations have permitted NGOs considerable opportunity for observation, but it cannot be taken for granted that most governments (especially non-democratic developing countries) would be willing to include such rights in a new legislature.

The issue of immediate concern to Former Prime Minister Palmer, climate change, ironically illustrates some of the risks of a broad legislative approach to international environmental problems. The climate negotiations were initiated under the auspices of the United Nations General Assembly, in contrast with the ozone negotiations facilitated by the United Nations Environment Program. The basic reason for this was the desire of developing countries for the greater degree of control they hold in the General Assembly, whereas some governments felt they were ill-served by the United Nations Environment Program in the negotiation of the Montreal Protocol. Any other international legislative body dedicated to environment and development is likely to reflect similar concerns.

The negotiation of international agreements on a case-by-case basis is cumbersome, but it also has its advantages. First, only interested parties need be involved, reducing the size and complexity of negotiations. Second, the likelihood of parties participating primarily to achieve leverage on unrelated matters is also reduced.⁷ Finally, the negotiation process also offers a focus for educating the public and building political support.

These concerns lead me to question whether a new legislative body is likely to be necessarily more effective in responding to the sense of urgency former Prime Minister Palmer effectively communicates. The United States Congress offers proof that a representative body can be as unresponsive to social problems as any form of government. Indeed, other experts with concerns similar to those he expresses have drawn

6. See generally Wirth, *American Environmental Law and the International Legal System*, VA. J. INT'L L. (forthcoming, 1992).

7. Sebenius, *Negotiating a Regime to Control Global Warming*, in *GREENHOUSE WARMING: NEGOTIATING A GLOBAL REGIME* 69 (1991).

very different conclusions: "Given the urgency of the task, the most expedient and most economic course of action would be to activate and accelerate all available international machinery without waiting for new global institutions."⁸

Many of former Prime Minister Palmer's goals might be achieved by more effective utilization of the United Nations Environment Program and other existing international institutions. There are already numerous international agencies with powers that need to be redirected toward environmental protection. The United Nations Environment Program has very limited resources and authority, but the Food and Agriculture Organization has enormous resources relevant to forestry. The World Health Organization has considerable expertise in pollution, and there are agencies for a wide range of other environmental and development related topics.⁹

Existing institutions have too often contributed to environmental problems. The World Bank, for example, has been severely criticized for its inability to consider any approach to energy planning other than large-scale power plants.¹⁰ Reform efforts have already achieved some success; in the United States, legislation has been passed that requires the exercise of the American vote in the multilateral development banks to support more stringent environmental reviews of proposed projects.¹¹

We are also beginning to become much more clever about the "statecraft" associated with international environmental law, learning to make such agreements more quickly and effectively. The Montreal Protocol and other recent agreements illustrate a variety of more effective techniques for promoting compliance, accelerating amendments in response to new scientific information, and encouraging participation without resorting to a lowest-common denominator approach.¹²

Whatever one's view of proposals for a supranational authority, the

8. PETER H. SAND, *LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE* 35 (1990).

9. See *Developments in the Law - International Environmental Law*, 104 HARV. L. REV. 1484, 1580-90. "The number of IGOs [intergovernmental organizations] with competence in the environmental area is astounding." *Id.* at 1582.

10. M. PHILLIPS, *THE LEAST-COST ENERGY PATH FOR DEVELOPING COUNTRIES: ENERGY EFFICIENT INVESTMENTS FOR THE MULTILATERAL DEVELOPMENT BANKS* (1991).

11. 22 U.S.C. § 2621(a),(k) (1988).

12. See generally SAND, *supra* note 8. See also Chayes and Chayes, *Adjustment and Compliance Processes in International Regulatory Regimes*, in *PRESERVING THE*

global environment can only benefit from closer examination and discussion of former Prime Minister Palmer's noble vision. We can only hope that we identify effective solutions before encountering the potential catastrophe he describes so convincingly.

GLOBAL ENVIRONMENT: THE CHALLENGE OF SHARED LEADERSHIP 280 (J. Mathews ed., 1991).

