

International Law
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*An Analysis of the Strengths and
Weaknesses of the Kyoto Protocol*

Acronyms

CDM	=	Clean Development Mechanism
COP	=	Conference of Parties
EU	=	European Union
G77	=	Group of 77 developing nations (plus China)
ICJ	=	International Court of Justice
JI	=	Joint Implementation Strategy
NGO	=	Non-Governmental Organization
UN	=	United Nations
UNFCC	=	United Nations Framework Convention on Climate Change
WTO	=	World Trade Organization

George W. Bush declared in 2002 that he was not certain global warming exists.¹ Others in his administration believe that if it does exist, it may in fact benefit the United States.² In contrast, most Europeans take global warming as fact and believe human activity is the cause of it. Scientists have proven that climate change is happening, disagreement abounds over the extent that human activity is responsible for this phenomenon. Developed nations such as the Netherlands and the UK have built barriers which, to some extent, can protect them from rising ocean levels caused by global warming. Developing nations on the other hand, are most likely to be affected yet least able to cope with climate change even though developed nations have thus far been the biggest polluters. The effects of global warming will be far-reaching as increased temperatures will create resource scarcity. The effects of climate change, combined with a 40% increase in the world's population by 2050,³ will cause political instability across the globe as more people fight for fewer resources.

Fears of climate change contributed to the formation of an environmental regime,⁴ which led to the 1992 United Nations Framework Convention on Climate Change. The 1997 Kyoto Protocol is an addition to the Convention and attempts to reduce greenhouse gases to 5% below 1990 levels. The Protocol required ratification by 55 parties to the convention, accounting for 55% of 1990-level carbon dioxide emissions before it could enter into force, thus ensuring that no one state could veto it. These requirements proved

¹ Kahn, G. (2003) The Fate of the Kyoto Protocol Under the Bush Administration, Berkeley Journal of International Law, Vol. 21 Issue 3, pp568

² Kahn – Ibid pp.570

³ Unknown. (2005) *World population 'to rise by 40%'* [online]. London, BBC News. Available from: http://news.bbc.co.uk/2/hi/in_depth/4297169.stm [Accessed 21st March 2005].

⁴ Appendix A outlines the development of the climate control regime.

vital when the United States, one of the chief negotiators of the protocol,⁵ rejected it on the 27th March 2001. It was only with Russia's ratification on the 16th February 2005 that this treaty entered into force. The USA is the world's biggest polluter, 36.1% of 1990 emissions were from the USA, and its rejection of the Kyoto Protocol has made it more difficult for the remaining countries to meet their targets and also limited the treaty's scope and effectiveness.⁶

Climate change is a multigenerational and global issue as carbon dioxide remains in the atmosphere for decades and states are affected indiscriminately. Therefore a global response is required to combat it. The Kyoto Protocol is not ideal; its targets will not significantly slow climate change nor are developing nations bound by its requirements, however as stated by Robert Stavins, "it is the only game in town".⁷

What follows is an examination of the key provisions of the Kyoto Protocol, the political elements that influenced its content and successful ratification, and finally its effectiveness in combating climate change.

Provisions of the Kyoto Protocol

International law can be separated into two categories: traditional and modern. Traditional or functional law is concerned with practical issues such as diplomatic immunity which was common practice before being codified into law– it is inductive as it draws on norms and customary law. Modern law is normative or deductive where an objective is set and laws are created to change behavior to meet that objective. Human rights law and environmental law fall into the second category because they both try to

⁵ Grubb, M. Vrolijk, C & Brack, D (1999) *The Kyoto Protocol: A Guide and Assessment*, The Royal Institute of International Affairs, 1st ed. pp. xxxvi

⁶ Unknown. (2004) *Climate Change: The Big Emitters* [online]. London, BBC News. Available from: <http://news.bbc.co.uk/1/hi/sci/tech/3143798.stm> [Accessed 21st March 2005].

⁷ Stavins, R. (2005) Forging a More Effective Global Climate Treaty, Environment, Vol. 46 Issue 10, pp24

change state behavior rather than codify existing behavior, this helps explain why it has taken seven years to get reluctant states to ratify Kyoto.

It is common for treaties to be negotiated and have loopholes which allow for multiple interpretations of the text. This creates a dilemma for negotiators, they can either “water down” a treaty so that the maximum numbers of states are involved or be uncompromising in order to protect the integrity of the treaty. The negotiators at Kyoto watered it down to the extent that the protocol does little to combat climate change because the USA is not involved, developing nations are not held accountable and the target is only 5% below 1990 levels.

The Kyoto Protocol introduces three pioneering mechanisms that give it flexibility and make it less costly for states to reduce emissions. The first mechanism, defined in Article 6 is the “Joint Implementation” (JI) strategy; this allows emissions-reducing projects to be carried out in Annex 1 countries (industrialized states that have ratified the Kyoto Protocol) by other Annex 1 countries. The resulting reductions count towards the emissions target of the nation carrying out the project. Article 12 is a similar strategy, termed the “clean development mechanism” (CDM). The CDM allows emission-reducing projects by Annex 1 states in states that have not ratified the protocol. Both mechanisms give flexibility to parties of the treaty, in the hope that emissions can be reduced in the cheapest and quickest areas first. Although developing nations have managed to avoid being party to the protocol, the CDM allows for these projects to be undertaken in such countries.

Article 17 outlines the third and final flexibility mechanism allowing for emissions trading. Each state is given an allocation of emissions. If a state is going to

exceed its allocation, it can purchase emission units from a state which has not exceeded its allocation. This allows states to comply and raises money which can be used for environmental projects. Due in part to these flexibility mechanisms, Article 26 does not allow nations to sign on with any reservations.⁸

Article 18 gives authority to the Conference of Parties (COP) to “approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance”. The procedures created under this article monitor emissions trading outlined in Article 17 above. The seventh COP meeting created two branches of a compliance committee in 2001, “a Facilitative Branch and an Enforcement Branch”.⁹ The Facilitative Branch provides resources and assistance to countries that are in danger of breaching the Kyoto Protocol. The Enforcement Branch reviews the evidence and decides whether a state is complying with its requirements. If it breaches, the Enforcement Branch notifies the state and gives it 100 days to meet the reporting or emission requirements.¹⁰ If the state continues to fail it must make up the difference in the next period and undercut its target by 30%. In addition, states will be “shamed” as their breach of the Protocol is made public. The enforcement mechanism outlined above does make the Kyoto Protocol harder law; however, its effectiveness is questionable. Many states will not meet their emission targets; and if too many states breach the agreement, the protocol will be weakened as states will feel less pressure to comply.¹¹

⁸ Article 26 of the Kyoto Protocol simply states, “no reservations may be made to this protocol”

⁹ Unknown. (No Date) *Compliance Under the Kyoto Protocol* [online]. New York, United Nations Framework Convention on Climate Change. Available from: http://unfccc.int/kyoto_mechanisms/compliance/items/3024.php [Accessed 14th March 2005].

¹⁰ The emission target can be made up through emissions trading.

¹¹ Unknown. (2005) *UK could 'miss Kyoto Gas Target'* [online]. London, BBC News. Available from: <http://news.bbc.co.uk/1/hi/sci/tech/4399323.stm> [Accessed 1st April 2005]. Spain, Portugal and Ireland have made no progress and the UK may not hit its target.

Articles 7 and 8 enumerate the guidelines and reporting requirements of member states. These reports are essential for information-gathering and help evaluate compliance to the agreements. As stated earlier, the Kyoto Protocol is only one element in the larger regime of climate control. Since 1994 some states have been preparing emission reduction reports and all but one of the Annex 1 states had submitted at least one report by October 1997.¹² Articles 7 and 8 of the Kyoto Protocol have transformed the “soft” law of voluntary reporting and codified these norms into obligations and hence “hard” law.

The sovereignty of states has not been significantly weakened by the addition of an enforcement mechanism. Governments, not NGO’s, negotiated the protocol and created the emissions trading, CDM and JI mechanisms. The power of states frustrated environmental NGO’s who opposed the flexible mechanisms and believed that the reduction of 5% in emissions was not enough.¹³ It remains to be seen whether nations will cede more sovereignty and negotiate new treaties.

Three principles of international environmental law are used by proponents of the Kyoto Protocol to justify its existence. The first is that international environmental law is universal as it is based on scientific evidence, not culture, thus the ongoing debate in the human rights field over whether human rights are universal or culturally relative can be side-stepped. The second concerns “intergenerational equity” whereby the earth should

¹² Anderson.S. (1998) *The Development of the Climate Regime: Positions, Evaluation and Lessons* [online] University of Southern California, Center for International Studies. Available from: <http://www.ciaonet.org.ccny-proxy1.libr.ccny.cuny.edu/wps/ans01/ans01.html> [Accessed 18th March 2005]. pp.6

¹³ Grubb, M. Vrolijk, C & Brack, D (1999) *The Kyoto Protocol: A Guide and Assessment*, The Royal Institute of International Affairs, 1st ed. pp.257

be protected for present and future generations.¹⁴ People want to protect the earth in order to ensure the survival of their gene pool.¹⁵ The third and final relevant principle is termed the “Precautionary Principle” as espoused in the Rio Declaration (Principle 15): “In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.¹⁶ Ironically, the USA was one of the key states involved in fostering the precautionary principle yet has now abandoned it.¹⁷

Enforcement of international law comes via horizontal pressure from other states, as opposed to domestic law where enforcement comes from vertical pressure from an internal legal system where an enforcement mechanism is in place. It follows that states are not constrained by international law and thus act in their own self-interest. States are not compelled to make binding international agreements, nor are they compelled to abide by them when they do. Hence politics plays a pivotal role in the formation of international agreements.

Politics

The United States was one of the chief architects of the Kyoto Protocol yet decided to reject it.¹⁸ The rejection came in early 2001 when Condoleezza Rice stated,

¹⁴ International Law Association (2003) Searching for the Contours of International Law in the Field of Sustainable Development, IN: Ku & Diehl, *International Law*, 2nd ed. pp. 404

¹⁵ Weinstein, J. (2003) Why Protect the Environment for Others? *St. John's Law Review*, Vol. 77 Issue 2, pp217-225 Weinstein's other reasons for protecting the environment include aesthetics, unknown effects and theology.

¹⁶ Rio Declaration on Environment and Development

¹⁷ Ku & Diehl – Ibid. pp. 386

¹⁸ Grubb - Ibid pp.112

“Kyoto is dead”.¹⁹ George Bush claimed he did not support the Kyoto Protocol because, “it would have cost our economy \$400 billion and we would have lost 4.9 million jobs... [and the protocol]...exempts 80% of the world, including major population centers such as China and India from compliance”.²⁰ The Clinton administration signed the Kyoto Protocol, knowing there would be problems ratifying it. In response to Kyoto the US Senate passed the Byrd-Hagel resolution in 1997, which rejected the ratification of a treaty which developing nations are not obliged to comply with or if it will have a deleterious affect on the US economy. This resolution was passed 95-0.²¹ Therefore even if the environmentally-conscious Gore had won the presidency in 2001, it is unlikely the Senate would have ratified it.

In reality there are other reasons that the Kyoto Protocol was not a priority for George Bush. As stated above, Bush and his team said they were not certain global warming exists and even if it did it may prove beneficial. George Bush and many in the White House are former energy executives; the influence from and links to big business unquestionably still exist.

Europe in the form of the EU has taken the opportunity to be the global leader in environmental protection. The EU was well placed to do this when the USA rejected the treaty. Europe has a history of green political parties in local and national government. Germany sees “ecological modernization as an inherent part of maintaining economic competitiveness”.²² Similar to human rights, the EU has the strongest regional

¹⁹ Kahn – Ibid pp.551

²⁰ Murphy, S. (2002) Bush Administration Proposal for Reducing Greenhouse Gases, American Journal of International Law, Vol. 96 Issue 2, pp489

²¹ Kahn – Ibid. pp.550

²² Papadakis, E & Grant, R. (2004) Challenges for Global Environmental Diplomacy in Australia and the European Union, Australian Journal of International Affairs, Vol. 58 Issue 2, pp.11

environmental regime in the form of the European Environment Agency with its own Environment Action Programmes. Indeed before the summit in Kyoto, Europe argued that greenhouse emissions should be cut to 15% below than 1990 levels; 10% more than was finally agreed to.²³

If Bush had offered alternatives and been more tactful in his dissatisfaction with the treaty, then the international community may have reacted with less hostility and not published headlines such as “The Toxic Texan”.²⁴ Though Bush’s rejection of the Kyoto Protocol can be seen as practical in light of the Byrd-Hagel resolution, his policy choices have not been popular around the world.²⁵

The perceived arrogance of the Bush administration in snubbing the protocol may have spurred the Europeans into ensuring the protocol got ratified. Kahn asserts that the “EU ratified a treaty it knows is flawed because it casts the United States in a negative light”.²⁶ Another commentator believes that the “EU has used environmental issues to secure its own “legitimacy””.²⁷

The withdrawal of the USA meant that other states, such as Australia and Russia, had more influence over the negotiations and subsequently secured more favorable terms. Australia’s emissions target was raised and Russia’s chances of WTO membership improved.²⁸ It is believed that Vladimir Putin may have signed and ratified the Kyoto Protocol because he struck a deal with Europe that if Russia signed Kyoto, the EU would

²³ Unknown (1997) Sharing the greenhouse, The Economist, Vol. 354 Issue 8038, pp20

²⁴ Kahn – Ibid. pp.548

²⁵ Bush is seen as acting unilaterally. He invaded Iraq without involving the UN and the nominations of John Bolton and Paul Wolfowitz as US Ambassador to the UN and head of the World Bank respectively and drilling in Alaska has not endeared him to Europeans.

²⁶ Kahn – Ibid. pp563

²⁷ Papadakis – Ibid. pp.11

²⁸ Papadakis – Ibid. pp.3. Australia has yet to ratify the treaty however.

“give generous terms of entry into the World Trade Organization”.²⁹ In 2004, the EU made good on its promise and Russia signed and ratified Kyoto. Signing of the treaty also gives President Putin’s reputation a much-needed boost in the international arena.

Russia stands to gain from the emissions trading discussed above. The targets are linked to 1990 emission levels and because of the downturn of Russia’s economy in 1998, its volume of emissions is well below the target. This means that Russia is well placed to sell credits to countries that are exceeding their targets.

Since the end of World War II, Japan’s influence in the international arena has been hindered due to its lack of a standing army. The Kyoto Protocol may be the means by which it can exert more influence. Of course, the Protocol was born in the Japanese city of Kyoto and this may also have encouraged the Japanese to ratify it.

Though stereotypes of the USA include a gas-guzzling, SUV-obsessed culture, change is on the way. The United States is built on a Federalist system, thus each state can set emission restrictions independently of central government. California has led the way with the California Air Resource Board which is the “strictest regulatory body in the world”.³⁰ The Chicago Climate Exchange was created whereby 19 North American “entities have agreed to reduce their emissions by 1% over 4 years”. Massachusetts, New York, New Hampshire are creating an emission trading system as well.

The G77 of developing countries, plus China were prominent in the negotiations of Kyoto and are part of the Compliance Committee and have argued that developed nations should bear the burden of reducing emissions. Though there is limited involvement by developing nations, though the CDM mechanism outlined above, they

²⁹ Unknown. (2004) *Kyoto a-go-go* [online]. London, The Economist Global Agenda. Available from: http://www.economist.com/agenda/displayStory.cfm?story_id=3247221 [Accessed 14th March 2005].

³⁰ Browne, J. (2004) Beyond Kyoto, *Foreign Affairs*, Vol. 83 Issue 4, pp26

are not bound by Kyoto's requirements. This dilemma has been termed, "representation without taxation".³¹

Measuring the effectiveness of Kyoto

The Kyoto Protocol has not been tested; it has only recently entered into force and many of its key elements, such as the CDM, are new to international law. When discussing the effectiveness of Kyoto, it is important to establish *what* is being measured. Andreson describes three ways of evaluating international regimes which can be used to evaluate Kyoto.³²

The first method described by Andreson, which can be used to evaluate Kyoto, analyses the impact the treaty has had on the issue it set out to resolve. By this measurement, Kyoto is ineffective as it does not significantly reduce emissions. The omission of developing nations and some of the biggest polluters from the protocol means that the treaty cannot have the global reach the issue requires. This measurement can be misleading in instances where emissions are reduced due to unrelated factors, for example depletion of emissions can occur as a result of an economic slowdown as occurred in Russia in the late 1990's.³³

Andreson's second method is called outcome, whereby one looks for behavioral changes by states in direct response to the treaty. Andreson stresses that a causal link must be established. The CDM and the emissions trading are clear mechanisms introduced by the Protocol and states implementing them are doing so as a direct result of

³¹ Kahn – Ibid. pp.558

³² Andreson – Ibid. pp.16

³³ National Security Adviser et al. (unknown) *Policy Strategies to Address Global Climate Change* [online]. Available from: http://www.ciaonet.org/ccny-proxy1.lib/ccny.cuny.edu/book/vid01/vid01_01.pdf [Accessed 21st March 2005]. pp.4

the treaty. In addition, this method controls for the instance where emissions are reduced due to unrelated factors.

The third mechanism is “output produced by the regime”, and is the most important from an international law standpoint. This mechanism evaluates the cumulative body of law that the regime creates, including such instruments as treaties, enforcement mechanisms, and means of reporting and determines whether a regime is deemed hard or soft law. Kyoto is the strongest climate control treaty to date. It has codified reporting and introduced enforcement mechanisms. Therefore, Kyoto is an effective treaty under this measurement.

Under Andreson’s analysis, the Kyoto Protocol is effective despite the fact that it will not actually reduce emissions. Andreson believes that all international agreements should be in force for at least ten years before an accurate appraisal can be given.³⁴ Additionally, Kyoto is part of a larger, ongoing movement to address climate change and its effectiveness should not be judged in isolation.

Conclusion

Despite such comments as “Kyoto is dead”, or perhaps because of them, Kyoto was successfully ratified by the required number of states and is now part of international law. It is not “meaningless” as some have said, though its effectiveness varies depending on the method of analysis used. Climate change is not defined to any one territory and requires a global approach, thus a critical weakness of Kyoto lies not in the treaty itself, but by the rejection and exclusion of the USA and developing nations. The international community, however, has cause to be optimistic, as a global approach that includes the USA may soon be realized.

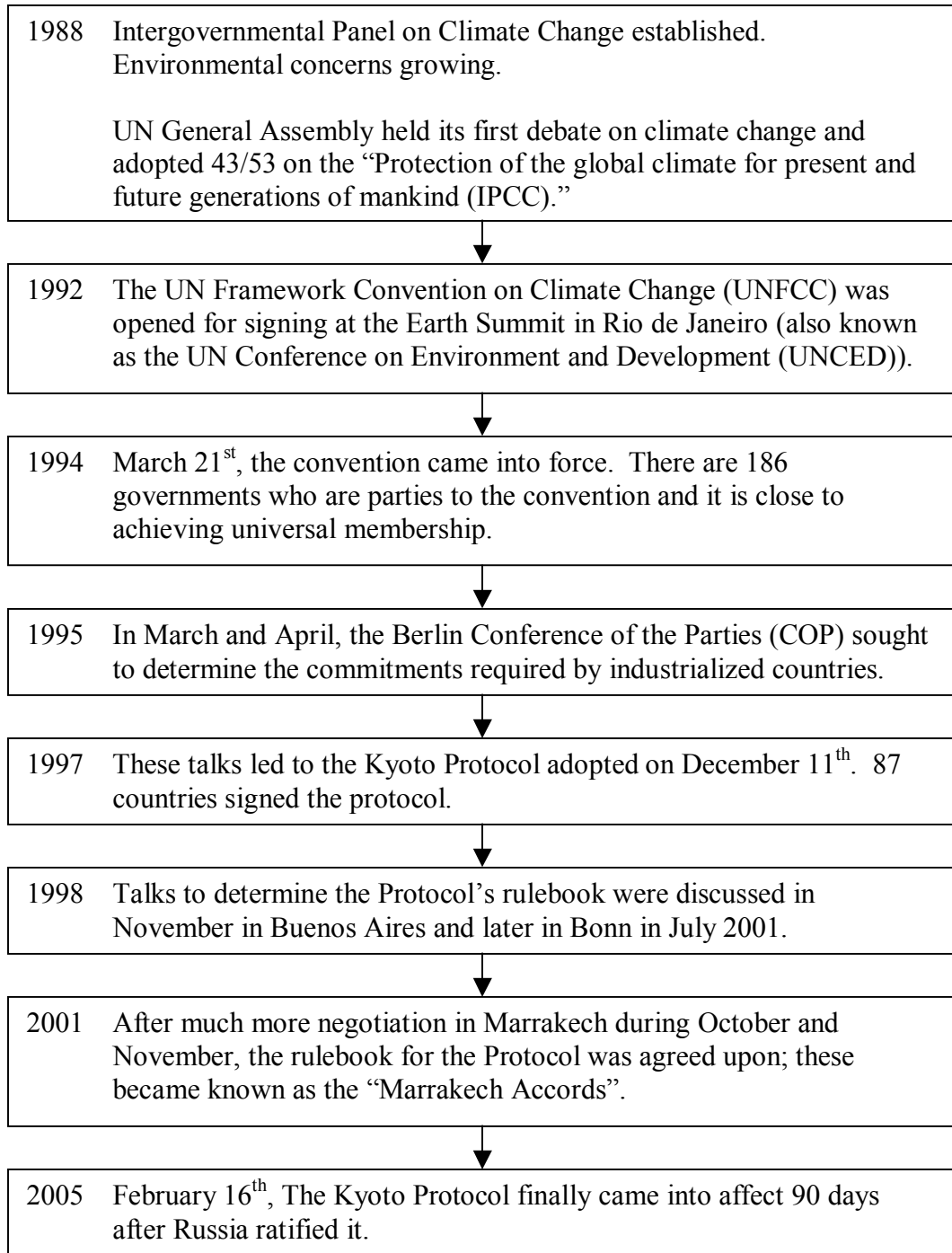
³⁴ Andreson – Ibid. pp.17

Since, the majority of industrialized states are party to the Protocol, the norms of Kyoto will become part of customary law and states will experience peer-pressure to conform. Moreover, the federalist system on which the USA is built allows any state to follow the principles laid down in Kyoto. California has introduced such legislation and many residents of that state are increasingly environmentally-conscious. This may represent a paradigm shift in the dominant SUV-culture of the USA. In addition, the current US administration has only a limited time in office. For these reasons, there is every possibility that a future leader of the world's biggest emitter may one day decide to re-join the rest of the developed world in efforts to control greenhouse emissions.

High oil prices due to increased demand from the USA and China will keep the issue of climate change on the agenda and encourage investment in alternative energy sources. The world is becoming increasingly interdependent and multinational corporations are keen to be identified as environmentally friendly. These pressures, combined with the continued growth of NGO's and horizontal pressure from other states, will continue to influence future policy choices.

Finally, the Kyoto Protocol should not be viewed in isolation; it is part of a wider effort to combat climate change. Similar to the evolution of other regimes, such as the trade regime, Kyoto is but one step in the road towards a stronger framework.

Appendix 1: The Legal Process Leading to the Kyoto Protocol³⁵



³⁵ Dale.R. (2002) *A Long Decade of Negotiations: The Difficult Birth of the Kyoto Protocol*. [online]. Washington, European Institute. Available from: http://www.europeanaffairs.org/archive/2002_summer/2002_summer_52.php4 [Accessed 11th March 2005].

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Treaty

Kyoto Protocol to the United Nations Framework Convention on Climate Change.

Rio Declaration on Environment and Development