

The “Executive” Function in Global Environmental Governance

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Table of Contents

OVERVIEW	3
THE ORIGIN AND RATIONALE OF THE EXECUTIVE FUNCTION.....	5
EXPLORING THE DETAILS OF THE EXECUTIVE FUNCTION	6
<i>The Delegated Function.....</i>	<i>7</i>
<i>The Administrative Function.....</i>	<i>7</i>
<i>The Leadership Function</i>	<i>8</i>
CONCLUDING REMARKS	11

OVERVIEW

The temptation to draw analogies between domestic and global systems of governance is powerful. The bulk of what we know about effective political decision-making, drawn from daily experience and from the research and analysis of the academic literature, is derived from the national and sub-national level. By contrast, our experience of “effective” global governance – decision-making by and for the international community that has a discernable impact on targeted behavior – is extremely limited. There is, however, a risk that in seeking to promote effective global governance by replicating at the international level what works well at the domestic level, we will overlook what are fundamental differences between the two systems.

This brief note is in response to a request to explore options for strengthening the “executive” function of global environmental governance. It begins with a quick review of the early philosophical justifications for the executive branch as it has been described in treatises on the role and structure of the state. It then reviews a number of modern constitutions to identify the kinds of functions that have traditionally been assigned to the executive branch in models of domestic governments.

A number of basic concepts of governance are extracted from this analysis, including the need to separate, check and balance powers between various branches of government, and the sources of the executive branch’s authority and legitimacy. Basic weaknesses in the analogy between domestic and global systems of governance are exposed, focusing, primarily, on the reluctance of sovereign states to cede authority to international institutions. There is, as a result, very little “separation of powers” between states as sovereign rule-makers, and the institutions they create.

The functions and concepts of the executive branch within domestic constitutional frameworks are then compared to the roles and structures of various international organizations, in an effort to identify whether they are necessary, desirable or politically feasible within a system of global environmental governance, and to explore how such a branch could derive both its authority and its legitimacy.

This analysis divides into three brief sections: the first focuses on the use of the term “executive” within global environmental governance to describe operational bodies delegated within treaty regimes to carry out mandates given to them by states parties. These executive committees, councils and bureaus are often appointed by the government

delegations, on the basis of constituencies, to represent the Parties as a whole in carrying out the day to day operational functions of the regime. The second section reviews the role of the executive as the administrator of government, in the elaboration, implementation and enforcement of rules established by rule-making bodies. The third section looks at the role of the executive as the head of state, providing overall leadership and policy direction by initiating, validating or overriding rules agreed by the legislative branch.

A number of parallels are found to exist between these executive functions and the roles played, for example, by the international civil service within the secretariats of international environmental agreements, and the implementing agencies that operate the agreements' financial mechanisms. It is stressed, however, that despite this loose functional analogy between domestic and international administrations, their "constitutional" roles are fundamentally different. Rather than checking or balancing the "legislative branch" the role of the executive within the international system is as the servant of the rule makers. Proposals for consolidating these administrative/secretariat functions as part of an effort to improve global environmental governance are briefly reviewed.

Parallels between the domestic system's executive function of "head of state" and positions within the international system are found to be still weaker. International environmental regimes do appoint high-level civil servants who carry titles such as Executive Secretary or Executive Director. Although these "executives" also serve at the discretion of their "electorate" their appropriate role is to be non-partisan, rather than setting and advancing the agenda of a political majority. Proposals for strengthening the environmental governance by, for example, enhancing the prestige of UNEP Executive Director, or by appointing a High Commissioner for the global environment are briefly reviewed.

Tentative conclusions suggest that the leadership function of the executive, upon which effective domestic governance depends, might best be achieved at the international level by the creation of a position that is separate from the sovereign and bureaucratic constraints of traditional treaty regimes and implementing agencies. Leadership might, for example, be better exercised through the creation of a post of high stature within the international system that would rely upon the independence, expertise and personal character of an individual.

THE ORIGIN AND RATIONALE OF THE EXECUTIVE FUNCTION

The concept of an executive, in terms of the “head of state” is, perhaps, as old as the concept of the state itself. Early “social contract” justifications of the state were based upon on the assumption that without a strong and absolute sovereign, human society would collapse into chaos. The legitimacy of the sovereign, in this early formulation of the modern state, derived from the need of the citizenry for order and safety, rather than divine right. In this sense it provided the earliest articulations of democracy.

The separation and balancing of powers into distinct branches of government arose from a need to check the absolute power granted to the sovereign executive. The division of these powers into three functional branches is, however, a relatively modern concept. Even as the concepts of the executive, legislative and judicial functions emerged they were not necessarily assigned to distinct branches. For example, the key division of powers that followed the English Civil War was only two-fold, between the legislative and the executive branches. The exercise of the judicial function was considered to be an integral part of the executive branch, rather than a third branch.²

Montesquieu is widely credited for the *trias politica*, proposing a constitutional system that would clearly separate the judicial, executive and legislative powers, institutionalized in distinct branches of government. In this separation, the legislative power lays down general rules of pro-active effect; the executive power executes the rules enacted by the legislature. The judicial power applies and interprets the rules, including by reviewing the constitutionality of actions taken by the other branches. This division of powers has since become the most commonly used in modern constitutional design.

For the purpose of this analysis, States parties to international environmental agreements and similar international organizations will be presumed to perform a function analogous to the legislature, acting through the plenary bodies of these regimes, e.g. the “conferences of parties”³ or the governing bodies of United Nations Environment Programme (UNEP) or the Global Environment Facility (GEF). It must be stressed, again, however, that the analogy is a loose one. The analogy is weak in part because states parties to treaties are themselves sovereign, political units, participating in this

² F Wormuth, *The Origins of Modern Constitutionalism* (1949).

³ See J Werksman, “Conferences of Parties to International Environmental Agreements”, in J Werksman, ed *Greening International Institutions*, (Earthscan: 1997); R Churchill and G Ulfstein, “Autonomous Institutional Arrangements In Multilateral Environmental Agreements: A Little-Noticed Phenomenon In International Law,” 94 *AmJIL* 623 (2000).

system of governance on the basis of a withdrawable consent, rather than as officials in an overarching and compulsory constitutional regime. Furthermore, states Parties, unlike legislators, are performing a dual role as both the designers and the main targets of legislation.

In modern domestic constitutions, the functions and powers assigned to the Executive Branch that might be most relevant to this exercise are reflected in these instruments with a remarkable consistency. The Executive is frequently assigned the power to:

- Appoint and dismiss ministers of state⁴
- Initiate some or all kinds of legislation⁵
- Promulgate or veto legislation⁶
- Report annually to the legislature on the state of the nation, and set priorities for the coming year⁷
- Propose and submit to the legislature for approval, an annual budget⁸
- Appoint judges, with the approval of the legislature⁹
- Conduct foreign relations and conclude international treaties¹⁰

These Executive functions can be divided roughly between those associated with the office of the prime minister, or head of state and those associated with the administration or wider oversight and implementation of the laws. Most constitutions spell out the functions associated with the head of state. Often, but not always, the core executive powers are vested in the office held by an individual. The cabinet, the structure of ministries and the role of the public administration are left to a combination of legislation and executive discretion to design.

EXPLORING THE DETAILS OF THE EXECUTIVE FUNCTION

Before turning to the exercise of comparing the administrative and leadership functions in domestic systems to their potential role in a global system of governance, this analysis looks first at the current use of the term “executive” to describe “delegated functions” in international environmental regimes.

⁴ E.g., the Constitution of Brazil, Article 84; of the Netherlands, Article 82; of Saudi Arabia, Article 57.

⁵ E.g., the Constitution of Brazil, Articles 61, 84; of China, Article 89.

⁶ E.g., the Constitution of Brazil, Articles 66, 84; of East Timor, Section 85; of the Russian Federation, Article 85.

⁷ E.g., the Constitution of Brazil, Article 84.

⁸ E.g., the Constitution of Brazil, Article 84; of China, Article 89.

⁹ E.g., the Constitution of the United States of America, Article II, Section 2, clause 2.

¹⁰ E.g., the Constitution of Brazil, Article 84, of East Timor, Section 85, of Saudi Arabia, Article 70.

The Delegated Function

Executive committees, governing councils and bureaus created by international environmental agreements and related regimes are established primarily to fill the institutional need to operationalize the will of what can be more than 150 states Parties. In order to enable a large number of Parties to take regular decisions in a more efficient manner, small, representative bodies are elected by and delegated powers from the membership as a whole. For example, the Executive Committee of the Multilateral Fund of the Montreal Protocol was established under that treaty to “develop and monitor the implementation of specific operational policies, guidelines and administrative arrangements”.¹¹ It performs some functions similar to those identified with the “executive branch” including the development of budgets, and the implementation of policy. But the Executive Committee’s membership is composed of “Parties” rather than individuals operating in a function formally distinct from the “legislative” branch of the Conference of Parties. Indeed most executive bodies of this type are formally required to reflect a balanced geographical or developmental representation of the Parties. Their formal legitimacy depends on this representativeness and their formal accountability back to the conference of parties. Although, in practice, these bodies can develop a degree of functional independence from the plenary bodies that appoint them, it’s an independence based on professional and technical discretion, rather than a constitutional separation based on check and balance.

The Administrative Function

In domestic constitutional systems, the executive branch’s authority to appoint a cabinet of ministers and its responsibility to ensure that the laws of the land are faithfully executed have given rise to the administrative function, performed by ministers and civil servants. A similar need to support the implementation of agreed rules has led to the establishment of an international civil service that roughly parallels the domestic civil service. In both systems, the civil service derives its legitimacy from its professionalism and its commitment to the underlying legal instruments. Initiatives at civil service reform at both the domestic and the international level have also stressed the need for efficiency and cost effectiveness as an additional standard by which to judge the performance of a public administration. The traditions of civil services differ radically from country to country, particularly with regard to the degree to which senior levels of the civil service are expected to be independent of party politics. The role of the president or prime

¹¹Decision IX/16; Annex V of the report of the Ninth Meeting of the Parties to the Montreal Protocol.

minister as the chief of the civil service does, however, tend to enhance the function of the administration as an effective balance against legislative authority.

By contrast, in the international system, the administration function of the “executive” does not check or balance the role of the “legislature” but is, instead, to act as its servant. The chain of command within the international civil service leads to an executive secretary or director, appointed by the parties, rather than to an equivalent of an elected head of state. This function of this executive secretary or director is, in turn, to carry out the duties assigned by the states parties.

The effectiveness of a domestic civil service is greatly enhanced by the role of a coordination mechanism, in the form of a cabinet of ministers. If it were replicable at the international level such a mechanism could be crucial to achieving the kind of “synergies” and “interlinkages” that many have indicated lie at the heart of improving global governance.¹² Much has been written about the institutional and geographical dispersion of the current system of global environmental governance and the need for greater coordination within this system. For example, the split between UNEP administered conventions and those tied more closely to the UNO, or more independent still, continues to frustrate those that would like a more unified administration of these treaties. The pros and cons of these proposals to consolidate treaty secretariats have been well and recently rehearsed as part of the International Environmental Governance process.¹³ Institutional distinctiveness is likely to persist as long as the international environmental law continues to be made through autonomous legal instruments made up of different constellations of parties.¹⁴ Geographical dispersion is likely to continue as long as the international institutions continue to rely on the competitive generosity of host countries as a source for infrastructure and other forms of support.

The Leadership Function

Most of the constitutionally assigned functions of the executive branch relevant to this discussion are associated with leadership, in terms of setting agendas, proposing budgets and initiating legislation, and filling positions of importance. In the current, decentralized system of global environmental governance these functions are spread over various regimes in the positions of the heads of secretariats, of agencies and the presiding officers of intergovernmental forums.

¹² Reference to UNU publications on Interlinkages, <http://www.geic.or.jp/interlinkages/>.

¹³ See, for example Joy Hyvarinen and Duncan Brack, *Global Environmental Institutions: Analysis and options for change*, London: RIIA, 2000; World Resources Report, 2002-2004, Chapter 7.

¹⁴ See Churchill and Ulfstein, n.3.

As in the administrative function, a strong distinguishing feature between domestic and international executives is the neutrality of the latter. In both parliamentary and presidential constitutional systems, the executive branch serves all its constituents, but specifically advances the policy agenda set by the political majority of the electorate. Heads of international agencies, and heads of diplomatic conferences, by contrast, depend upon a reputation for neutrality and even-handedness for their legitimacy and effectiveness. The primary function of the executive officer, or of a presiding officer of an international environmental institution is to advance and represent the objects and purposes of their constituent instrument. This can sometimes involve the gentle advocacy of positions that run counter to the political majority, and ensuring that the concerns of the politically weak or marginalized are taken into account.

One central characteristic of the head of state function of the Executive Branch, that is key to effective governance at the domestic level, is the authority to convene a cabinet of ministers. A global environmental executive might be placed in a position to convene the administrative heads of the various international bodies with environmental mandates. The executive could represent them within the equivalent of a cabinet convened by a higher executive authority. But as with other initiatives at strengthening global environmental governance, whether it is leadership, rule-making or dispute settlement, the strengthening of environmental governance only answers part of the problem. Strengthening one pillar in the global system (for example, environment) as against another pillar (for example, trade) immediately raises the need for an overarching means of reconciling jurisdictional overlaps and conflicts.

As far back as 1987 there have been calls for the establishment of a new post that voice the concerns of global environment at large that could add to the leadership being provided under existing, individual regimes and institutions. The Experts Group on Environmental Law of the Brundtland Commission¹⁵ recommended the appointment of a UN High Commissioner for Environmental Protection and Sustainable Development. Although the Commission did not itself expressly endorse the proposal it has since been picked up by others. The role of such a High Commissioner differs from proposal to proposal. In some manifestations, the role is more of a quasi-judicial function, an ombudsman for the environment who would receive and seek to address complaints from

¹⁵ Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development- Legal Principles and Recommendations* (Graham & Trotman/Martinus Nijhoff, 1987).

affected peoples, groups or states, in the manner of an ombudsman.¹⁶ To justify a global profile, a High Commissioner could have special responsibilities for transboundary issues, areas beyond national jurisdiction, as well as for representing the interests of future generations. There are obvious parallels in some of these proposals between an Environmental High Commissioner and the High Commissioners who currently act on behalf of victims of human rights violations and refugees. This suggests a structure that “would allow citizens concerned about environmental protection to circumvent national governments that presently stall on corrective measures.”¹⁷

The proposal for a High Commissioner was revived recently, as part of the International Environmental Governance process, and its justification was described by the Norwegian Environment Minister as follows:

“Overall, environmental questions need to get a higher international profile and I believe that a High Commissioner for the Environment could help achieving this. This role would in one respect be similar to that of the High Commissioner for Refugees; someone who can cut across bureaucratic and political boundaries when necessary.”¹⁸

The post of the High Commissioner for Human Rights was established by the UN General Assembly in 1993,¹⁹ in order to promote within the system of human rights instruments many of the same goals of systemic reform that have been called for in the area of international environmental law, and that are attributable to the executive function of leadership. The High Commissioner for Human Rights is tasked with, among other things, the coordination of human rights activities in the context of a number of distinct and overlapping legal instruments; engaging in dialogue with governments to remove obstacles to the implementation of human rights laws; and rationalizing, adapting, strengthening and streamlining the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness.

Significantly, the post of High Commissioner does not derive its authority directly from the parties and the institutions of the human rights treaty system, but from the

¹⁶ Institute of International Law. Responsibility And Liability Under International Law For Environmental Damage Resolution Adopted On September 4, 1997

¹⁷ C Tinker, “The United Nations System: Prospects and Proposals for Reform: Note, Environmental Planet Management By The United Nations: An Idea Whose Time Has Not Yet Come?” *NYUJIL&P*, Summer, 1990

¹⁸ Statement on International Environmental Governance by the Norwegian Minister of the Environment, Mr. Børge Brende Statement on International Environmental Governance 7th Special Session of UNEP Governing Council/Global Ministerial Environment Forum Cartagena, 13-15 February

¹⁹ High Commissioner for the promotion and protection of all human rights, General Assembly resolution 48/141 of 20 December 1993.

overarching authority of the UNGA. The High Commissioner is appointed by the Secretary General, and approved by the GA. This bestows upon the post a degree of separation of powers from the “legislative” mechanisms of the treaty regimes. Additional stature, authority and independence is given to the post by providing it with the rank of Under-Secretary General, and by emphasizing that its legitimacy derives from the “high moral standing and personal integrity” and the individual’s “general knowledge and understanding of diverse cultures necessary for impartial, objective, non-selective and effective performance” of their duties.

It should be recalled, however, that the Norwegian Minister was addressing the closing session for the IEG process, shortly before his and nearly every other proposal for a significant change to the present system of Global Environmental Governance had failed to receive support.

CONCLUDING REMARKS

Before any significant advance can be made on improving the effectiveness of the executive function of global environmental governance, we need a much deeper understanding of why previous efforts at reform in this area have failed. The IEG process, and the parallel process of the World Summit on Sustainable Development, should provide considerable insight as to source of continuing resistance to formal institutional reform. Does it reflect the international community’s satisfaction with the status quo? Or is it a reflection of a lack of faith in the capacity of classically structured intergovernmental organizations to achieve the profoundly challenging tasks assigned to them?

It is, perhaps, out of this frustration, that more recent proposals for improving global environmental governance have moved away from an effort to replicate the functions and institutions found in domestic systems, towards taking advantage of the institutional gaps in the global system. One recent proposal, for the establishment of a Global Environmental Mechanism (GEM) seems, to some degree, to move away from formal institutions towards a “loosely structured” “networked-based” model drawing on existing institutions and “public policy” networks and involving shift towards a “virtual” organizational structure.”²⁰

²⁰ D Esty & M Ivanova, “Revitalizing Global Environmental Governance: A Function-Driven Approach”, in D Esty, M Ivanova eds *Global Environmental Governance: Options and Opportunities* (Yale: 2002)

Such a loose arrangement could provide an opportunity to revive proposals for a leadership position based on the model of the High Commissioner. The GEM's functional model seems to cry out for the kind of catalytic and improvisational role that could be played by an individual who was granted a degree of separation from the formal, statist structures of the treaty-based bodies. While the challenges of negotiating a UNGA resolution along these lines should not be underestimated, it may prove an easier task than maneuvering through the various mandates and institutions of treaty-based bodies. Furthermore a post backed by a direct mandate from the General Assembly may have more freedom to navigate a loosely structured network that includes institutions within and outside the UN system, including those with responsibility for trade, finance and the activities of multinational enterprises. Finally, a High Commissioner might have the ability to respond more directly to the concerns of those most directly affected by pollution and the decline of the natural resource base – the individuals and communities that are still struggling to find an effective voice in global environmental governance.