

Recommendations for the Internet Governance Forum

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Abstract

In the author's submission to the inaugural Internet Governance Forum in 2006,¹ relevant excerpts were provided from chapters 1–3 of his draft PhD thesis, now titled *Multi-Stakeholder Public Policy Governance and the IGF*. For this year's submission, excerpts from the following chapters 4–6 are provided. The full thesis is made available in draft at <http://www.malcolm.id.au/thesis>.

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¹See http://www.intgovforum.org/Substantive_1st_IGF/JM_Contribution%20to%20IGF.pdf.

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Part I

Collective decision-making

To resolve that public policy governance of the Internet should be the province of a network of governments, private sector, civil society and intergovernmental organisations does not presuppose that its form should be that which has in fact taken shape in the IGF. The structure and processes of the IGF ... were not organised spontaneously, nor inevitably. A network can in fact take any of a number of different forms.

An interesting analogy is in the topology of computer networks such as the Internet. During the NSFNET period, the Internet was arranged in a hierarchical (or tree) structure whereby networks connecting to the Internet were required to establish direct links to the NSFNET backbone network (or if they were too small to justify a direct link, to link to larger networks that were in turn connected to the NSFNET backbone). So for example, in order for one university network to reach another, rather than sending its data across a link that directly connected the two universities, the data would be sent by the first university to the NSFNET backbone which would route it through to the second university by reference to an authoritative table of routing information that was maintained by the NSF.²

The topology of the modern day Internet on the other hand is a distributed mesh network, in which the routing function is decentralised. Any node on the network can communicate with any other node across a multiplicity of possible paths, none of which need include any given central point. The redundancy of any given link in such a network makes the network as a whole more resilient against failure.

Whilst on the Internet the decentralised paradigm is dominant, in organisations, the hierarchical paradigm prevails. ...

These two organisational forms, top-down (which will be termed authoritarian) and middle-out (or consensual), will be discussed below as possible structures for a governance network. However, two other power configurations for which no ready analogue is found in computer networking are also possible: the bottom-up form, which will be described as democratic, and the absence of ordering altogether which will be described as anarchic.

...

1 Anarchic

It is often mistakenly thought that anarchists favour disorder and chaos. In fact the essence of anarchy as a political philosophy is the promotion of private, voluntary ordering as an alternative to the authoritarian ordering of, principally, the state. Malatesta writes,

Society without the State, etc, describe exactly the concept which anarchists seek to express, of the destruction of all political order based on authority, and the creation of a society of free and equal members based on a harmony of interests and the voluntary participation of everybody in carrying out social responsibilities.³

Anarchism thus does not imply so much lack of ordering as lack of hierarchy. It is thus quite a natural form of structure for a governance network between peers. Social movements structured in such manner have been termed SPINs: “segmentary,

²Ford et al. [1993]

³Malatesta [1974], 13

polycentric, integrated networks,” and have been the subject of study for well over 30 years.⁴

1.1 Anarchy and the Internet

The compatibility of the architecture and culture of the Internet with these ideals was recognised early in its development. Bruce Sterling famously described the Internet in 1993 as “a rare example of a true, modern, functional anarchy.”⁵ A few years later, John Perry Barlow issued the *Declaration of Independence of Cyberspace*,⁶ an anarchist tract *par exemplar*.

...

1.2 Anarchistic Internet governance

It is appealing on an intuitive level to consider that the same anarchistic principles could be applied in structuring a governance network to deal with Internet-related public policy issues. The fact that anarchistic ordering is consistent with the Internet’s core architectural principles on a technical level, and also philosophically consonant with many of them on a cultural level (decentralisation, openness, egalitarianism, anonymity and cosmopolitanism in particular), a network forged on anarchistic principles is likely to be more successful than one modelled on, say, the hierarchical authority of traditional intergovernmental organisations, by reason of being more culturally appropriate.

How would this work in practice? In essence, it would simply mean involving all stakeholders in Internet governance, but disallowing any of them to coerce the others (even by democratic or meritocratic claims). The applicable structures of governance in an anarchistic order could thus not be posited in advance, but would be those that emerge from spontaneous networks between stakeholders that form and reform as required. Reagle, an anarchist who has examined these characteristics in the Internet’s technical governance, writes,

With the cacophony of ideas, proposals, and debates, and a lack of a central authority to cleave the good from the bad, how does one sort it all out? It sorts itself out. We need not delegate our values to a central authority — subject to tyrannical or partisan tendencies. The success of any policy is based simply on its adoption by the community.⁷

Johnson and Post ground their preference for anarchistic ordering in Internet governance in the fact that the geography of online activities does not coincide with the sovereignty of any existing legal authority. They posit the emergence of responsible self-regulatory structures on the net, based upon common consensus, much in the same manner as the law merchant emerged from amongst those engaged in transnational commerce.⁸

This should be carefully distinguished from self-regulation, at least in the conventional sense. Such self-regulation is a form of governance in which stakeholders develop standards or codes to which they prospectively agree to bind themselves, typically as a trade-off against the threat of external coercion (such as governmental regulation). This is both inconsistent with anarchism and a misreading of Johnson and Post, for whom no structured regulation should be presupposed at all; rather, spontaneous regulation should be left to emerge through consensus. To distinguish

⁴Gerlach [1999]

⁵Stirling [1993]

⁶Barlow [1996]

⁷Reagle [1999]

⁸Johnson and Post [1996]

this notion from self-regulation in the first sense given above, the phrase “decentralised collective action”⁹ may be used.

The “rules” that emerge from decentralised collective action do not derive their force from hierarchical authority, which leaves markets, norms and architecture as the three possible mechanisms of internal governance for an anarchistic governance network (although anarchists of the collectivist and communist schools, contrary to anarcho-capitalists,¹⁰ would omit the first of these, since market forces are supported by governmental enforcement of private property rights).

An example of the use of markets in anarchistic Internet governance is found in some of early experiments in gTLD administration. At around the time of the IAHC, other DNS systems such as eDNS¹¹ were set up on a free market model, that in their extreme form would have allowed an unlimited number of registrars to administer up to ten new domains each, whilst still interoperating with the legacy IANA and NSI-administered domains.¹² There was even a similar project in Australia, the AURSC, which ended up with 28 new TLDs.¹³ Both, having been superseded by ICANN (whose registry contracts prohibit dealings with alternate roots),¹⁴ are now defunct, though there do remain a number of other active alternate roots with limited use.

The result would have been either a market of competitors offering similar services, or the market’s convergence on a single winner through the force of network externalities,¹⁵ producing a succession of serial monopolies. Either of these outcomes could have been alternatives to the ICANN model in which a single body is institutionalised in the role through the authoritarian force of its contract with the United States Department of Commerce.¹⁶ Higgs has even applied game theory to the issue of multiple DNS roots, and concluded that it would be rational for multiple DNS roots to voluntarily cooperate.¹⁷

As for the use of norms within an anarchistic transnational network, the London Action Plan provides a good example. Whilst its members do agree to cooperate in the battle against spam through the use of tools such as domestic anti-spam legislation and education of users and businesses, they are not legally compelled to do so as they would be under a traditional intergovernmental agreement (not to mention that a traditional intergovernmental agreement would not include the private sector stakeholders that the LAP does). Rather, the LAP relies solely upon its members’ shared norms as its internal mechanism of governance.

As well as being culturally appropriate for the governance of networks engaged in Internet public policy development, decentralised collective action also offers a number of practical benefits over hierarchical methods for the internal governance of networks. These include the ability to be more responsive to changes in the environment, to transcend the archaic territorial focus that is implicit in the Westphalian state system, and to develop and implement policies less expensively and more quickly.¹⁸ In short, decentralised collective action is not only more culturally acceptable on the Internet, but also more efficient than authoritarian alternatives.

...

⁹Johnson and Crawford [2001]

¹⁰Kinna [2005], 25

¹¹See <http://www.edns.net/>.

¹²Rony and Rony [1998], 544

¹³Australian Root Server Consortium - see <http://www.aursc.au.net/>. Two other similar projects, uDNS and AlterNIC, are not only defunct but also no longer live on the Web.

¹⁴Mueller [2002], 220–221

¹⁵That is, the service becomes more valuable when more people use it: see Katz and Shapiro [1986].

¹⁶Mueller [2002], 56

¹⁷Higgs [2002]

¹⁸Weber [2002], 80, 83–84

1.3 Criticisms

It was concluded above that decentralised collective action along anarchistic lines is likely to be both more culturally appropriate and also more efficient than authoritarian regulation in the internal governance of Internet-based social networks. The case of Wikipedia has been examined as one instance of this.

However, there are also other factors beyond these to be considered in assessing the appropriateness of anarchistic organisation for a governance network. At root, these factors are its legitimacy and its effectiveness. It has already been determined that a network involving all stakeholders is the most legitimate mechanism of public policy governance for the Internet, and there is no reason to reopen that question here. However, where that network is organised along anarchic lines, its involvement of all stakeholders to the requisite degree is likely to be more difficult to demonstrate (and as already observed, the appearance of legitimacy is as important as the fact).

...

As far as effectiveness is concerned, certainly, the efficiency of anarchistic ordering, and its cultural appropriateness (which increases the likely effectiveness of its internal governance by norms), both of which have already been noted, are positive indicators. On the other hand, detracting from the effectiveness of an anarchically ordered governance network is its very voluntariness. Without denying that norms and architecture can effectively channel cooperative behaviour, there are also cases in which if stakeholders are given the choice to cooperate or to act strategically on their own, they will take the latter course.

... Thus for liberals, the institution of the state is necessary to protect individual rights that might be infringed by the strategic behaviour of others that game theory predicts.¹⁹ In other contexts, it may be necessary for some other hierarchical authority to take the state's place in performing this function.

It may also be properly objected by anarchists that rational choice theory tends to leave aside the forces of norms and institutions which can result in cooperative behaviour emerging sooner than rational choice theory might predict,²⁰ however in the present context the point remains that there is little empirical evidence of stable governance networks that are truly inclusive of governments, the private sector, civil society and international organisations forming spontaneously.

But for the supranational authoritative force of the United Nations, for example (admittedly exercised through a soft law process), it is doubtful that the IGF would have come into being. There are many more examples (and the IGF may become one of them) in which governments have strategically gained the dominant position in what should have been a multi-stakeholder network — in the ITU, for example — and other cases in which non-governmental stakeholders have done so, as in the case of the ill-fated IAHC and its gTLD-MoU.

What is perhaps needed to overcome the problem of short-term strategic behaviour, and the other problems of anarchistic ordering that have been noted, is a hybrid which preserves the efficiency and cultural fit of decentralised collective action, with the greater (or at least more certain) accountability, transparency and effectiveness made possible by more structured organisational forms that utilise governance by rules. ...

2 Authoritarian

... the adoption of an authoritarian structure for a governance network leaves open the question of how, and by whom, the structure would be established, as

¹⁹Sugden [1989], 83

²⁰Green and Shapiro [1994], 121–123

it cannot hoist itself into being by its own bootstraps (unless it could do so by force). There would have to be an existing organisation superior to, or at least preceding, the governance network, by which it was formed. That organisation need not itself necessarily be organised along authoritarian lines. It is in fact most likely that an authoritarian structure would emerge by a consensual process involving all stakeholders. . . .

2.1 Oligarchy

The principal advantage of oligarchical rule, in which power is restricted to a small defined group, is that by reducing the number of participants, decisions can be made more quickly and with less contention amongst the decision-makers than in a system, such as democracy, with a broader power base. These benefits of oligarchy accrue at the cost of it being less representative and accountable to the governed than democracy, and therefore offering them less protection against tyranny.

However, the force of this objection is lessened by two observations. First, as noted above, there *is* no transnational *demos* to which the interests of all four stakeholder groups can be traced. Therefore, at least until such a polity is brought into being, democratic representation is not an option, leaving oligarchy as perhaps the only practical alternative (though this question will be revisited at 3).

Second, there is empirical evidence that oligarchy may be the natural state of any organisation, no matter how it is initially structured; whether as a bureaucracy, democracy or anarchy. This is Michels' "iron law of oligarchy": that in any small group that there is a tendency for power to be concentrated in the hands of an elite who have both the will and the means to organise others.²¹

2.1.1 The IGF as an oligarchy

The same argument applies in principle to the IGF. If power within a governance network such as the IGF would inevitably evolve (or devolve) into an oligarchical form anyway, concentrated in the hands of those who have the initiative to put the most into the process, then perhaps it is quixotic to insist that the IGF should ever pretend to anything other than an oligarchical structure. . . .

But there are two problems, one procedural and the other normative. The procedural problem is that we still have no answer as to how the governance network is to operate, save that its composition is to be limited to a small number of powerful members. How are those participants to resolve disagreements between themselves? The specification of the oligarchical form alone provides no answer. . . .

The second and more fundamental problem is that there are no normative criteria implicit in the oligarchical form by which to determine who is to be privileged with the status of membership. Indeed, this question is entirely exogenous to the oligarchical structure, which simply entrenches existing power relations. Whilst it may be true that organisations will tend towards oligarchy in any case, it is fatalistic simply to allow that "those who will rule, will rule" without questioning how it came about that they should do so. Would those who might form an oligarchical governance network be the most public spirited amongst the stakeholder representatives, or simply the most politically and economically powerful?

Even the bureaucratic organisation, whilst already rejected as unsuitable for a governance network, provides normative guidelines for the progression of suitable candidates up the hierarchy of authority, by requiring that promotion should be on the grounds of merit, rather than on other grounds such as nepotism or political influence. But can the concept of merit be applied to a governance network, and if

²¹Michels [1962]

so, how would it fall to be assessed? These are questions central to another form of authoritarian governance: meritocracy.

2.2 Meritocracy

...

The more modern term meritocracy is used to denote a system of rule by which those best qualified to do so, by reason of their personal attributes or their technical expertise (which in the latter case is more specifically described as technocracy).

Of all the authoritarian forms of organisation considered so far, meritocracy could be said to hold the most promise, in that it provides a normative basis upon which the most competent representatives of each of the stakeholder groups, rather than necessarily the most powerful, could be afforded the right to lead the governance network.

This conception of a peak body of moral leaders or technical experts is not even so far from the way in which representative democracy functions, whereby the people delegate their power to those representatives whom they believe not only share their political preferences, but are also the most capable and well informed in political matters.

Unlike representative democracy of course, there is no democratic process by which the most meritorious candidates are selected. Therefore in order for the principle of merit to prevail over the “law of the jungle” of oligarchy it will be necessary for some other form of ordering, probably consensual for reasons already given, to set in place the rules by which merit will be assessed. It will also be necessary for the continuing merit of the incumbent authorities to be periodically measured against the same standard, lest they begin to act with unmeritorious self-regard and the meritocracy thus degenerate into oligarchy, a fate of which Aristotle warned.²²

...

2.2.1 The IGF as a meritocracy

This is not however to say that there is no organisation in the context of Internet governance which is both meritocratic and authoritarian (that is, the structure of which is not subject to displacement by consensual or democratic means). Take the example of the IGF’s Advisory Group, a steering committee tasked with the preparation of the substantive agenda and programme for the IGF’s first meeting. Rather than through a democratic or consensual process, this group was appointed through the authoritarian power of the United Nations.

Unfortunately the question of how the Advisory Group’s merit was assessed is somewhat obscure, as the process by which its members were selected was not public. Nonetheless as the selection process did not avail itself of (what is, let us accept for now²³) the inherent normative force of a democratic or consensual process, and as the United Nations has no legitimate authority to unilaterally prescribe the composition of a multi-stakeholder group,²⁴ some other objective normative basis must be presented for the attribution of merit to those selected, if the Advisory Group is to be considered as anything other than an oligarchy.

... there are two broad criteria upon which the merit of the members of any governance network formed by authoritarian means might be assessed. First (and most fundamental) is the extent to which they embody the values that that stakeholder group brings to the governance network. Second is the extent to which they

²²Aristotle [1943], 138–139

²³See 3.

²⁴See the introduction to this section and 10.1.2.

contribute to the substantive work of the governance network. Do either of these, then, provide an objective normative basis upon which the merit of the members of a governance network (such as the Advisory Group) might be determined? Taking them in turn:

- It is not too difficult to objectively determine whether a given stakeholder is a government, a member of the private sector, a civil society organisation or an intergovernmental organisation. However, beyond this there is no objective basis upon which to compare their relative merit within each stakeholder group. For example, there could have been no objective basis for the United Nations to determine that the values of civil society were better represented within the Advisory Committee by ICANN than the IETF, or of the private sector by Microsoft rather than Red Hat.

...

The argument is easier to understand when the respective merits of stakeholders *inter se* are considered in other contexts. For example, does the United States have more merit as a stakeholder within the United Nations than China? Does McDonalds better embody the values of the market than The Body Shop? Is Greenpeace more important than World Vision within civil society? In each case, perhaps so. But equally, perhaps not; and the point is not to decide the question either way, but simply to acknowledge that it is a subjective one.

- It may be possible to objectively analyse the participants' capacities to contribute to the workload of a governance network, based on much the same criteria as would have been used in assessing their suitability for employment. There are, certainly, a wealth of more-or-less objective criteria by which work-related competencies can be judged.²⁵ And there is in fact nothing wrong with the use of this criterion to judge the productive merit of members of a governance network, in so far as it goes. The problem is simply that without having been able to objectively determine which stakeholders were most meritorious by the preceding criterion, this criterion alone is a poor substitute. To rely upon it solely is to assess the merit of members of a governance network, by reference to their instrumental worth rather than their intrinsic worth as stakeholders, is to treat them as cogs in a decision-making machine, rather than as the very source of the values from which their decision-making draws its legitimacy.

A fundamental difficulty with the selection by authoritarian means of a meritocracy to lead a governance network is thus exposed. Democratic and consensual processes aside, there is no objective basis for adequately assessing the merit of candidates to lead a governance network engaged in the development of public policy. Thus in the end, although authoritarian meritocracy has come much closer than bureaucracy and oligarchy, it is still not quite an appropriate organisational form for a governance network.

2.3 Hybrid models

This does, however, suggest the way forward: a hybrid between authoritarianism in the form of meritocracy, and a more participatory form of anarchistic, democratic or consensual ordering, to fill the normative holes in the authoritarian option, while retaining many of its benefits (such as the greater efficiency of a smaller governance body). Such a mixed system of governance is in fact precisely what Aristotle

²⁵For example, Dubois and Rothwell [2000].

recommended.²⁶ It is also widely seen in Internet governance. ICANN, most notably has been described as a “semi-democracy,”²⁷ combining authoritarian and (at least notionally) democratic elements, through the composition of its board which is drawn partly from the meritocratic Supporting Organisations and partly from the At Large community.²⁸ The same idea is found in other organisations in which a standing committee is appointed alongside elected members, for example in the Wikimedia Foundation and the W3C.

...

2.3.1 Hybrid models in Internet governance

...

Hybrid regulatory models are found in the context of Internet governance also. Most significantly, ICANN remains contracted until at least 2009 to the US Department of Commerce, which whilst allowing ICANN to manage the DNS essentially independently, retains ultimate authority over the DNS root. auDA provides another good example. The process by which control of the au ccTLD passed from a pure self-regulatory regime under Robert Elz and later ADNA, to auDA which had the backing of NOIE, a Commonwealth government agency, has already been described. In this process, the Commonwealth was careful to assert ultimate control over the ccTLD management function through Division 3 of Part 22 of the *Telecommunications Act 1997* (Cth).

In the context of the IGF, the scope for a co-regulatory approach can be found in the fact that one of the concessions made by governments in the Tunis Agenda was that the issues of DNS management and IP address allocation would be left outside the IGF’s mandate, and remain under the private management of the ICANN regime. There is no reason why the governmental stakeholders in the IGF could not similarly agree to leave other issues to be regulated through the decentralised collective action of the stakeholders at large, whilst retaining ultimate authority to intervene on a domestic or intergovernmental level should decentralised collective action fail to adequately address the issues in question.

Now, that may be the practical effect of the prevailing hegemony of states in any case; that is, provided that a public policy issue is technically amenable to being addressed by rules, there would be nothing to stop governments or intergovernmental authorities from trumping the IGF’s decisions even if it were not structured in such a manner as to facilitate their doing so. The distinction though, formal as it may be, is between a governance forum structured along egalitarian, participatory lines, and one in which policy development is undertaken in the shadow of the explicit authority of states to intervene in the process and thereby override it or guide it along specific lines.

2.3.2 Governments as a proxy for the meritocracy

Would an IGF structured in such a manner, as a hybrid between the authoritarian power of governments and the anarchistic ordering of all other stakeholders, still amount to a governance network as it has been described in this thesis? It is not exactly the hybrid between meritocracy and decentralised collective action that was previously considered, as it substitutes governments for a meritocratic elite drawn from amongst all stakeholders. This is in one way indefensible, in that it privileges one stakeholder group over the others; a stakeholder group that we have already

²⁶Aristotle [1943], 195

²⁷Palfrey Jr [2004]

²⁸Weinberg [2001], 329

found lacks the legitimacy to exercise authority over transnational public policy issues.

Yet in another way, it could be argued that if it is necessary to concede to authoritarian ordering in order to address some of the identified limitations of anarchistic ordering, governments are in a better practical position to hold this elevated position than any of the other stakeholder groups. After all, it is they who can most effectively wield the coercive power of rules. And to allow governments to wield authoritarian power would neatly side-step the dilemma of how to select a meritocratic elite to do so. Whilst it was vaguely suggested above that such an elite could be selected through democratic or consensual means, most governments can be presumed already to have been selected by such means (though admittedly not in respect of transnational issues). Why then should it be necessary to reinvent the wheel? Reflecting this view, former ICANN President and CEO M Stuart Lynn has argued,

National government participation, in my view, is ... essential to end the Sisyphean effort of searching for a workable public accountability mechanism for ICANN. Three years of effort have proven that a global online election of ICANN Board members by an entirely unknown and self-selected membership is not a workable solution to this problem. ... Although governments vary around the world, for better or worse they are the most evolved and best legitimated representatives of their populations — that is, of the public interest. As such, their greater participation in general, and in particular their collective selection of outstanding non-governmental individuals to fill a certain portion of ICANN Trustee seats, could better fill the need for public accountability without the serious practical and resource problems of global elections in which only a relatively few self-selected voters are likely to participate.²⁹

If this view were to prevail, it would be that all stakeholders are equal within the IGF, but that some are more equal than others. ...

2.3.3 Open source principles in Internet governance

... A more considered answer will require the implications of the case study of open source software to be isolated; specifically, the assumptions that must be satisfied to ensure that the stakeholders in a governance network that is structured in authoritarian form are not at risk of being oppressed (that is, being subjected to authoritarian power that has not passed the normative tests of either objective merit or consent). These assumptions can be reduced to three:

- The existence of perfect substitutes for the product of the governance network
- Freedom of exit from the network
- Lack of coercion outside the governance network

If these assumptions sound familiar, it is because the first two are amongst those that underlie the ideal of the perfect free market (along with additional assumptions not needed here, as we do not require that the governance network be effective, only that it not be oppressive), and the third is one of those underlying deliberative democracy, to be discussed in the next section.³⁰ With these three criteria satisfied,

²⁹Lynn [2002]

³⁰See 3.2.1.

[i]t does not matter whether online discussion groups or even entire networks of such groups are internally autocratic, since individuals can always choose “their own more congenial online homes.” Cyberanarchists, then, see cyberspace as a market of alternative rule regimes. It is the ease of exit and the abundance of alternatives — in essence consumer choice in conditions approaching perfect competition — that bring to fruition the liberal ideals of liberty and consent.³¹

The next question then is the extent to which they can be fulfilled in the case of a governance network. Examining each of them in turn:

- In the case of a governance network, the substitutes for governance through that network are governance either through another network, or through another mechanism: that is, by rules, norms, markets and/or architecture. In few cases is the substitution likely to be perfect, and the closest available substitute will vary from one case to another. However, it may be good enough in many cases to persuade stakeholders who feel oppressed to opt out of the governance network in favour of pursuing the same end by that substitute means.
- Freedom of exit from a governance network is impeded by the transaction costs of switching to an acceptable substitute mechanism of governance, or developing a new governance network afresh. As suggested in the preceding point, the quantum of the transaction costs incurred may vary considerably from case to case. However in general, as seen from the example of open source software, these costs will be higher the more social capital the original project (or in this context, the original network) has developed, and the less the defecting project has to offer to differentiate itself.
- Whether the requirement of lack of coercion is satisfied in the case of a governance network depends on who it is that has authority over the network. Just prior to this case study, it was suggested that on pragmatic grounds, governments might be the best parties to act as the authorities of a governance network structured in hybrid authoritarian/anarchistic form, following the example of co-regulation.

However if it is required that no coercion be exercised outside the governance network, governments are the very worst stakeholders who could lead it, as they are the only stakeholders who can exercise significant coercive power over all other stakeholders through their domestic legal regimes, even if those stakeholders have opted out of the governance network in favour of other mechanisms of governance.

An example will put these observations in more concrete terms. Let us assume that the IGF has an authoritarian leadership, which drafts a code governing the issue of Internet interconnection costs. This code is entirely satisfactory to all of the other stakeholders, except for the private sector who claim that interconnection costs should continue to be set by the market (an alternative mechanism of governance, which it is costless for them to substitute for that of the IGF).

Are the three criteria satisfied? Yes, there is a perfect (or at least a costless) substitute for the code of the IGF. Yes, there is freedom of exit from the IGF so that even if its authoritarian leadership required all IGF members to subscribe to the code, the private sector would be at liberty simply to withdraw from the network. And as to whether the private sector could be coerced to accept the code, regardless

³¹Netanel [2000], 404–405

of its departure from the IGF — well, this depends on whether the authority behind the IGF is governmental or not. If it is, then it can pass the code into international or domestic law regardless, which defeats the very purpose of developing it through a governance network.

Let us change the scenario a little. In this case, the IGF's code on interconnection costs has been very successful amongst all stakeholders and has been voluntarily adopted by most of the private sector. A few private sector stakeholders however decide to opt out of the IGF regime and revert to reliance on the market to set interconnection prices. They immediately find that the success of the IGF's code has permanently lowered market prices for interconnection, and that the costs of differentiating their service so that it can be sold at higher prices are insurmountable. The authoritarian leadership of the IGF (if not composed of governments) not only cannot coerce these private sector stakeholders into accepting the code, but *it does not need to*. The IGF's very success has made it self-governing.

...

2.4 Criticisms

Although it may at first have seemed unlikely that an authoritarian form of organisation could be suited for a governance network, and indeed like anarchism it was found to be unsuitable in its pure form, in the end when combined with a participatory form of governance such as anarchism it has proved quite promising.

To recap briefly, the bureaucratic form of authoritarian organisation was found unacceptable because it devalued the identities of participants by limiting them to the performance of defined roles, oligarchy was unacceptable because it provided no normative basis to justify the authority of the oligarchs, and meritocracy was found unacceptable in cases where the merit of its incumbents was also assessed by authoritarian means, leaving only two cases:

- A meritocracy established by a democratic or consensual process, such as either a vote of all stakeholders, or a consensually-appointed nominating committee (a Nomcom in IETF and ICANN parlance); or
- A hybrid form of governance whose authoritarian leadership, not constituted solely by governments, is held in check by the force of certain idealising assumptions drawn from the example of open source software.

Both of these options remain vulnerable to criticism. As for the first, it was found necessary that the meritocracy not only be established by, but remain subject to the supervision of some democratic or consensual process, which begs the question, what such process? Whilst there may be an answer to this, it has not yet been discussed.

As for the second option, ... all that has really been shown is that the IGF's success depends upon it not upsetting its stakeholders enough that they are forced to seek alternative mechanisms of governance. Like the first option, it still begs the question of how it is to make decisions that are most acceptable to the IGF at large, save that it be through some participatory mechanism.

...

However in this instance we have not yet exhausted all the available alternatives, as the democratic and consensual forms of organisation have yet to be considered. When previously considering a democratic method for the selection of an authoritarian leadership for a multi-stakeholder governance network, it was considered a problem that there was no existing democratic polity to represent all stakeholders transnationally. But does this necessarily defeat the ideal of democratic ordering? This is one of the principal questions next to be addressed.

3 Democratic

... mainstream liberal democratic theory turns on the assumption that it is through some form of democratic government coupled with the recognition of individual civil and political rights, that its citizens' freedom to exercise their autonomy may be maximised. At the root of this assumption is that democratic government allows citizens the freedom of self-determination; that "citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees."³² Put even more simply, following Locke, it is to ensure that at some level government operates with the consent of the governed.³³ This will be described simply as "the democratic principle."

...

However, what democracy means for a liberal democratic nation state is not necessarily the same as what it means for a multi-stakeholder governance network. Notions such as "one vote, one value" and an institutionalised rule of law may well be quite foreign to a context in which collectivities join individuals as stakeholders, and in which the only decisions made are non-binding. Does this then mean that democracy can only be upheld within the nation state, and that leadership of a democratic governance network must therefore be left to governments?

It would, in a sense, be quite convenient if this were so. After all, it is the kind of thing they do all the time, and would save us much trouble in attempting to find an alternative structure for a governance network. However, apart from the conceptual lack of legitimacy of governments (whose sovereignty is geographically bounded) in speaking on transnational issues, and that they omit to adequately represent even the interests of all their domestic constituents, there is the fact that some governments cannot plausibly ground the legitimacy of *any* of their actions in democratic ideals. It cannot, for example, be assumed that the inhabitants of of Syria, Cuba or China have consented to being governed by the actions of their governments.

Hence government leadership of a democratic governance network cannot be countenanced. Because its authority is non-binding, stakeholders will simply ignore or avoid the dictates of governments if they do not accord with the democratic principle of consent. Recall John Gilmore's adage, now part of Internet folklore, "The Net interprets censorship as damage and routes around it." Or as Rosenau puts it,

governance is a system of rule that only works if it is accepted by the majority (or, at least, by the most powerful of those it affects), whereas governments can function even in the face of widespread opposition to their policies.³⁴

This characteristic of governance networks, which has also already been observed of open source software projects, suggests that they might fulfil the most basic principle of democratic governance: that of the consent of the governed. However there are several important subsidiary democratic principles noted above that that they do not so clearly meet. In particular ... by default such networks are likely to lack the institutional guarantees that liberal states provide of representativeness (such as universal suffrage and regular democratic elections) and of accountability and transparency (such as the separation of powers, judicial review and freedom of information legislation).

³²Habermas [1996], 449

³³Locke [1963]

³⁴Rosenau [1992], 4

It will therefore be necessary in this section to examine the essential nature of the principles of liberal democratic governance under the four headings mentioned above ...

3.1 Representation

...

Held has developed tests of extensity, intensity, and comparative efficiency,³⁵ to determine whether it is most appropriate for governance to be exercised at a grassroots level (the corporation or city, for instance), the national level, or a higher, supranational or transnational level.³⁶ These three tests respectively examine how extensive is the range of people affected within and across borders, how intensely each particular group of people is affected, and whether a lower governance level would likely be ineffective, requiring it to be dealt with at a higher level.

The appropriate constituency in any given case is to be “defined according to the nature and scope of controversial transnational issues.”³⁷ In some cases it may be unavoidable that the closest fit is not a perfect one, and in others the best outcome may be for an issue to be dealt with in overlapping and competing ways at multiple layers of governance. This equates to Fukuyama’s “multi-multilateral” model, and illustrates the commonality of the core of the cosmopolitan democratic approach with that of liberal institutionalism.

...

3.2 Consent

One problem that transnational democratic theory does not resolve is how to extend the limited range of decisions upon which agreement can be reached, given that freedom of exit from a governance network provides an in-built check on its power to oppress its stakeholders. In the case study on open source software, it was suggested that transaction costs could serve this purpose, and that those transaction costs would be the higher, the greater the social capital that the governance network had developed, making it relatively more attractive to its stakeholders than alternative mechanisms or forums of governance.

It is possible to go further and say that social capital is the defining attribute of a successful network, as such success is measured by its ability to coordinate mutually beneficial collective action (or MBCA) among its stakeholders, which is precisely the “income” that social capital returns.³⁸ In order to maximise the range of decisions that a democratic governance network such as the IGF might make, the long-term value of its social capital to its stakeholders, and thus the transaction costs of defecting from it to alternative fora, should be high enough to persuade them to voluntarily abide by and implement the network’s decisions even when they go against their own short-term interests.

How, then, may social capital be cultivated within a governance network, in order to achieve this end? One of the most important factors is the inculcation of norms that reinforce voluntary participation in the activities of the network, with the expectation that this will be reciprocated by other stakeholders to the common benefit.³⁹ These norms of cooperation in turn depend upon the stakeholders being institutionally empowered to participate in governance through the network. As suggested in the discussion of open source software, but as research also confirms,⁴⁰

³⁵Held [1995], Chapter 10

³⁶Held [1995], 234

³⁷Held [1996], 355

³⁸Uphoff [1999], 218–219

³⁹Uphoff [1999], 228–229

⁴⁰Lyons et al. [2001], 1236

there is a strong positive link between empowerment and participation, which is simply to state the perhaps obvious point that in order to encourage the participation of stakeholders in democratic or consensual governance, they must be able to see that their participation can influence the outcome.

Institutionalising the empowerment of stakeholders can also foster the development of an environment in which stakeholders trust each other to reciprocate the participation they each contribute to the governance network, resulting in a “virtuous circle” (or conversely, avoiding a vicious circle) that encourages their continued and enhanced participation in turn.⁴¹ . . .

Although these instrumental benefits may seem reason enough to empower stakeholders to participate in democratic governance, to do so is defensible on the broader theoretical basis that it better fulfils the democratic principle of consent (hence the title of this subsection of the thesis). Recall that democracy is a means rather than an end for the liberal, the end being a form of governance that permits the smallest possible encroachment upon individual liberty. Thus for the liberal, a democracy in which everyone’s views are heard and taken into consideration in more than just a token way, is simply a better democracy than one in which only the majority participates.

However the gulf between this ideal and the way democracy most often works in practice is quite wide. Conventionally, decisions made by the simple aggregation of preferences through representative democratic procedures can be quite arbitrary. Even without infringing upon any citizen’s human rights, the majority’s decision could still be entirely capricious and unreasoned. Although generally some deliberation takes place in representative fora (such as parliaments), at the level of broadest democratic participation (such as the ballot box), no reasons need be presented at all. Many voters may lack the time or inclination to assimilate all the information they need to even form a reasoned position, and it may be entirely rational for them, individually, not to do so.⁴²

This illustrates a practical tension between developing a democratic polity in which a large number of stakeholders are directly involved, and one in which the decisions they make are the product of reasoned deliberation — an apparent trade-off between “quantity and quality.” Yet in fact these are not the end-points of a continuum, but rather variables. . . .

Potentially rating highly on both variables is deliberative democracy, which is to be discussed below, and which intersects at its apex with transnational democracy (illustrating the theoretical case in which deliberative democratic principles are institutionalised at all levels of transnational democratic governance). . . .

3.2.1 Deliberative democracy

Deliberative democracy is concerned with citizens exercising their votes (or otherwise engaging in democratic decision-making) in a considered manner that reflects their reasoned deliberations formed during engagement with other citizens on the issue at hand.⁴³ Thus where direct democracy fails because its ability to produce reasoned decisions is predicated upon the existence of a more well-informed citizenry than exists in practice, and representative democracy cannot, even in theory, fairly represent the interests of all citizens (and in practice best represents those of powerful elites), deliberative democracy aims to remedy both those deficiencies,⁴⁴ resulting in closer adherence to the democratic principle of consent.

Cohen writes,

⁴¹Bertolini and Bravo [2004], 10

⁴²Downs [1957]

⁴³See Pettit [2003] 138–139.

⁴⁴Dryzek and List [2003]

The notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens. Citizens in such an order share a commitment to the resolution of problems of collective choice through public reasoning, and regard their basic institutions as legitimate in so far as they establish the framework for free public deliberation.⁴⁵

...

So far a working definition of deliberative democracy has been given and it has been distinguished from various other conceptions of democratic governance, but what remains to be established is a set of criteria by which a system of democratic governance can be compared against the deliberative democratic ideal. Four such criteria that a deliberative democratic process ought to satisfy are suggested by Cohen:

- It should be free; that is, participants should not be constrained either in considering proposals, or in implementing them once agreed, by external claims of authority.
- It should be reasoned, in that arguments should not be based upon force or unexamined preferences.
- It should be equal, such that parties to the deliberation are identically placed both in procedural terms, and also in that their status outside the forum does not impinge upon on consideration of their substantive contributions.
- It should aim to achieve a rational consensus.⁴⁶

Perhaps the most important corollary to these criteria follows from the proposition that opinions cannot be shaped by force. This being so, any position contended for must be supported by reasons that appeal not just to the proposer but to all, or at least to a majority. This results in a tendency for democratic deliberation to be framed in terms of the common good, simply because a participant's appeal solely to his own self-interest is unlikely to be successful in convincing many others.⁴⁷

This bias away from arguments based on pure self-interest makes it important that the preferences of participants in the deliberative democratic process are open to reasoned adaptation in response to other viewpoints, and that such adaptation is not constrained by underlying power relations. This does not mean that participants may not privately hold preferences for selfish reasons, but simply that for these preferences to prevail will require others to be convinced of them (perhaps on quite different grounds), through no other force than that of reason.

...

3.2.2 Deliberation outside the public sphere

... It is unnecessary to be too prescriptive about the appropriate structure of a deliberative democratic IGF at this point, at least until Chapter 6 when the IGF's present structure and composition are outlined (and unless a more suitable organisational form than deliberative democracy is found in the remainder of this chapter).

⁴⁵Cohen [1989], 21

⁴⁶Cohen [1989], 22–23; Cohen [1998], 194, and compare the eight criteria of Coleman at Coleman and Götze [2001]. 5

⁴⁷Cohen [1989], 25; Dryzek [2002], 171

It is more important however to have settled upon some essential principles of deliberative democracy that can be applied in various circumstances through a variety of implementations, than to find the blueprint for an implementation that is equally applicable across all organs of governance. Lacking such a blueprint, the closest approximation to the transnational democratic programme that can reasonably be pursued in the short term, and the most effective in furthering the democratic principle, is to simultaneously implement separate strategies for the deliberative democratisation of all appropriate domestic, international and transnational governance fora, by various techniques all drawing from the common underlying principles discussed in this section.

Such a pragmatically heterogeneous approach also entails that the adoption of a deliberative democratic organisation structure for the IGF need not await the development of an international public sphere (essentially the “transnational *demmos*” whose absence was earlier thought to preclude the adoption of a democratic organisation structure for the IGF). Rather, deliberative democratic theory equips the IGF to pursue the democratic principle here and now, by pursuing a variety of strategies to draw in all affected viewpoints and perspectives and subject them to the transformative power of dialogue.⁴⁸

3.3 Transparency and accountability

... transparency and accountability are auxiliary precautions against the potential for the regression of democracy into authoritarian forms such as bureaucracy or oligarchy, which in turn may offer a mask for inefficiency and corruption.⁴⁹ The allegation of democratic deficit is most often levelled against organisations that although democratic in form, in practice lack transparency and accountability because their operations are closed to their constituents.

3.3.1 Transparency

...

The Internet also has an important role to play in increasing democratic transparency, by broadening the potential accessibility of information and reducing the cost of its provision. It has also played a secondary role in heightening public expectations of the transparency of their governments’ actions; for example, expectations of the free public dissemination of the law.⁵⁰ This may be traced to the principle of the hacker ethic, reflected in the culture of the Internet, that “information wants to be free.”⁵¹ This exercises an architectural restraint upon attempts to curtail the dissemination of information online (though as Lessig argues, the ultimate failure of such attempts is no forgone conclusion).⁵²

The importance of transparency to democratic governance of course extends beyond the context of the liberal state to international and transnational governance fora also. Thus transparency is the first of seven critical variables identified by Young as contributing to the effectiveness of international institutions of governance,⁵³ and is also nominated by Picciotto as the first of four constitutive principles for democratizing globalism.⁵⁴

...

⁴⁸Roberts [2002]

⁴⁹Warren [2006]; Aristotle [1943]

⁵⁰Greenleaf et al. [1998]

⁵¹Clarke [2000]; Levy [2001], 40

⁵²Lessig [1999], 43–44

⁵³Young [1992], 176

⁵⁴Picciotto [2001], 344

3.3.2 Accountability

... as previously noted when considering the most appropriate structure by which to implement deliberative democratic principles, it is difficult to lay down any universal prescriptions as to how accountability may be assured within a forum of democratic governance, since there is so much potential for variation amongst these in terms of their size, structure, culture and hybridisation with other forms of governance.

Lacking such a uniform set of expected institutional protections, or in most cases any direct vertical accountability to national parliaments, it is perhaps no wonder that ... autonomous networks of transnational governance are left with “at best, weak or obscure mechanisms of accountability.”⁵⁵ Mathur and Skelcher write,

the fundamental democratic issue affecting institutions that have a public policy purpose that operate in a network governance environment ... is that popular understandings of political processes in liberal democracies are still predicated on prenetwork forms of governance in which elections, pressure group activity, public consultation events and other means provide channels through which messages are conveyed from citizens to politicians, who are conceived as being the authoritative decision-makers for public policy matters.⁵⁶

One approach to addressing this problem is to consider the underlying objectives of democratic accountability, and to craft appropriate mechanisms to implement them according to the specific circumstances of the governance network in question. In some cases, this may mean that the network should be structured so that it is accountable directly to the public, by means equivalent to ICANN’s ALAC. In other cases, it may be sufficient that members of the network be accountable only to other members (as in the case of the LAP), or to other layers of governance (as the Policy Advisory Body established under the gTLD-MoU could have been, given its link to the ITU), or to other networks in the same layer of governance (as the IETF is overseen by ISOC).

...

3.4 Participation

... the potential for the use of ICT to increase popular participation in democratic governance deserves particular consideration in the transnational context of the Internet. As the Internet itself transcends geographical limitations, it would be ironic if such boundaries were to constrain the ability of those wishing to participate in its governance from doing so.

...

3.4.1 Online deliberation

As noted above, digital fora can also be used as public spaces for political deliberation, due to the high degree of congruence between the inherent features of virtual communities (such as egalitarianism and cosmopolitanism), and the requirements of the Habermasian discourse principle for the conduct of rational political discourses in the public sphere.⁵⁷ The study of online deliberation has thus recently begun to attract academic attention,⁵⁸ building on the predictions of earlier commentators that:

⁵⁵Held [1995], 139

⁵⁶Mathur and Skelcher [2004], 4

⁵⁷Ess [1996], 216

⁵⁸See <http://www.online-deliberation.net/>.

[n]ew media, and particularly computer-mediated communication, it is hoped, will undo the damage done to politics by the old media. Far from the television dystopias, new media technology hails a rebirth of democratic life. It is envisaged that new public spheres will open up and that technologies will permit social actors to find or forge common political interests. People will actively access information from an infinite, free virtual library rather than receiving half-digested “programming,” and interactive media will institutionalise a right to reply.⁵⁹

Governments, however, have not been widely seized of the same vision, any more so than they have for the potential of deliberative democracy in general,⁶⁰ except to a limited extent on a local level.⁶¹ This is unfortunate in that online deliberation has the potential to achieve many of the same benefits as offline deliberative democracy, whilst also enjoying the efficiencies of digital democracy that could allow deliberation to be facilitated at a far lower cost than many of those offline techniques such as the 21st Century Town Meeting.

... The forms of online deliberation that are not based on the mainstream frameworks for offline deliberation may be most usefully divided into the following categories:

1. Group discussion
 - (a) Synchronous
 - (b) Asynchronous
2. Collaborative authoring
3. Decision-making

... although development is continuing apace on a number of fronts, there is already a rich variety of software suitable for the facilitation of online deliberation. Even so, software is not enough. ...

In short, unmoderated and unstructured discussion is very far from deliberation. This observation is echoed by Coleman and Götze, who note that “[i]n free-for-all discussions anyone can say anything, but no-one can have much expectation of being heard or of influencing policy outcomes.”⁶² Their research emphasises the role of expert moderation or facilitation of online deliberation, which accords with the requirements of most of the deliberative democratic techniques designed for offline settings.

...

3.5 Criticisms

...

3.5.1 Political issues

The final criticism to be examined has been raised and answered previously: that the absence of a stable transnational, multi-stakeholder *demos* for the regime of Internet governance by definition precludes the formation of a democratic governance network for that regime.⁶³ This issue calls for closer examination again now,

⁵⁹Bryan et al. [1998], 5

⁶⁰Coleman and Götze [2001], 36

⁶¹Gronlund [2003]

⁶²Coleman and Götze [2001], 17

⁶³See 3.2.2.

because its superficial plausibility, particularly within the intergovernmental circles of the existing IGF, may in the end be that organisation's undoing.

At the commencement of this section, the democratic principle was defined as the fundamental liberal tenet that a system of legitimate democratic rule must operate with the consent of the governed (that is, of all those potentially affected by such rule). When deliberative democratic theory was introduced it was posited that this principle is only fully realised where each of the governed is given the opportunity to speak on any question of governance in a forum of public deliberation.

This is all very well in theory. But a governance network actually organised along these lines, at least in the Internet governance regime, would be required to traverse a wide range of issue areas, and the stakeholders potentially affected by decisions made by the network could well vary from one such issue area to another. For example, those potentially affected by decisions made on the regulation of spam might be quite different from those affected by decisions relating to IPR.

This means that there can be no stable *demos* in the Internet governance regime. In other words, the IGF can have no defined membership; as indeed it does not. This is also sound in theory; it allows the organisation to be flexible and adaptive, growing or contracting to accommodate anyone who can, and to exclude anyone who cannot, frame their interest in a particular issue in the discourse of public reason.

However in practice, the notion that a democratic polity can exist in the absence of a defined transnational and multi-stakeholder *demos* is a profoundly counter-intuitive one for politicians, diplomats and even academics alike. Nitin Desai, for example, Chairman of the IGF's Advisory Group, baldly stated at a conference preceding the first meeting of the IGF, "The forum has no membership, it's an open door, a town hall, all views are welcome. But it's not a decision-making body. We have no members so we have no power to make decision."⁶⁴

...

Unless they can be convinced otherwise, the likely outcome for the governance network is that if governments participate in it at all, they will seek to circumscribe its role to being strictly advisory in nature, and will explicitly reserve for themselves the authority to override the process. This is quite a familiar tale, in which although a network between governments and citizens may be described as a "partnership," with the implication of equality between the parties, governments perceive their own role in such networks as being superior to those of the other stakeholders.⁶⁵ For example, this reflects the US government's relationship with ICANN⁶⁶ and the Australian government's with auDA,⁶⁷ and as will be shown in Chapter 6, has also been exactly the IGF's experience.

Yet there remains a glimmer of hope. Although a deliberative democratic form for the organisation of a governance network is by far the most suitable yet considered, it could be that its downfall lies in its claim to be a form of democratic rule. As already noted, it is a feature of deliberative democracy that it "aims to arrive at a rationally motivated *consensus*."⁶⁸ Perhaps, then, recasting the organisation in a formally consensual rather than democratic form, and modifying its procedures as required to accord with this new nomenclature (whilst still holding to the democratic principle), might resolve some of the objections of governments. This prospect is to be considered next.

⁶⁴Waters [2006]

⁶⁵Skelcher et al. [2005], 578

⁶⁶McCullagh [2005]

⁶⁷*Telecommunications Act 1997* (Cth), Part 22, Division 3

⁶⁸Cohen [1989], 22–23.

4 Consensual

... the fundamentals of the process of seeking consensus are conceptually very similar to those of deliberative democracy. Whilst there is much variation in the degree of agreement required to qualify as consensus, it need not amount to unanimity. Johnson and Crawford, for example, define consensus as having been reached when “opposition to a particular policy is limited in scope and intensity (or is unreasoned), and opposition does not stem from those specially impacted by the policy.”⁶⁹

It can be seen that the elements of this particular test closely resemble those of deliberative democracy, specifically in the requirement that opposition to a proposal be reasoned, and that such opposition stem from those specifically impacted by the proposal. As for opposition being “limited in scope or intensity,” this simply substitutes a subjective standard (though a high one) for the objective test of a democratic vote.

...

In fact perhaps counter-intuitively, the key difference between most consensual decision making processes and the deliberative democratic process is not that the former require a higher level of agreement, but rather that they are in other respects procedurally less stringent than the latter. So for example, decision making by consensus need not require that deliberation take place at all. ...

From the above it might be assumed that a consensual decision making process would most likely be less useful than one based upon the more theoretically rigorous deliberative democracy for structuring an organisation’s decision-making procedures in accordance with the democratic principle. However, well-designed consensual processes can in fact be more useful in at two relevant circumstances.

The first is where it is impossible or impractical to satisfy the preconditions of deliberative democracy. ICANN, for example, purports to act upon the consensus of the entire Internet community,⁷⁰ which, until a universal online public sphere develops, is not a body capable of public deliberation in the sense required by deliberative democracy. Another example is where the only criteria for decision making are technical and objective, since in such a case the views of the organisation’s members would not be pluralistic as deliberative democracy requires.⁷¹ Thus consensus is the standard of agreement within many technical standards organisations, including the IETF (though perhaps in denial of the fact that subjective public policy issues are also often engaged in the development of standards).

The second case in which consensus-based processes can be employed where deliberative democratic processes cannot is where consensus is to be reached between groups rather than individuals (either in their own or in representative capacities). In common with its parent liberalism, deliberative democracy, even more so than representative democracy, has a very atomistic focus, based on the equal rights of individuals to participate in political deliberation. Lacking this theoretical baggage, the pursuit of consensus is a conceptually more suitable mechanism for reaching agreement at higher levels, whilst also adhering more closely to the democratic principle than representative democracy at those levels, due to the democratic deficits to which representative democracy becomes subject the further removed it is from the grassroots.

The relevance of this to the design of a network for the governance of Internet-related public policy issues lies in the fact that one of the most distinctive attributes of such a network is its multi-stakeholder composition. The individualistic focus of the discussion on deliberative democracy may have obscured the significance of the independence of each of the stakeholder groups. The conclusion of the preceding

⁶⁹Johnson and Crawford [2000]

⁷⁰Post [1999]

⁷¹Cohen [1989], 21

section has however brought this issue back into focus, by illustrating the disruptive tendency of governments to act unilaterally in democratic governance networks; a problem to which deliberative democracy offers no clear solution.

4.1 Consensus between stakeholder groups

We will therefore now consider the potential of requiring that consensus be reached between the stakeholder groups on any proposal that has been democratically agreed within and across those groups, thereby giving each stakeholder group a formal veto over it. Since multi-stakeholder governance networks are inherently consensual structures anyway, and possess only soft power with which to enforce their decisions, the recognition of a formal requirement of consensus amongst stakeholder groups is also a more natural fit for this mechanism of governance than democratic voting.

This could address the problem of government unilateralism in two ways. First, it would provide an alternative to the use of the effective power of veto that governments already possess in many issue areas. Instead of denying the ability of the governance network to make even non-binding decisions, and overriding its authority through the use of the coercive force of law, it will be possible for governments to formally veto any proposal without thereby undermining the authority of the governance network as a forum for ongoing collaborative policy development.

Secondly, and alternatively, even if governments do continue to deny the independent authority of the governance network to develop soft law and purport to relegate it to an advisory role, the formal requirement that consensus be reached between all stakeholder groups would institutionalise a power of veto for the other stakeholders, that would go some way towards equalising their power with that of governments. ...

4.2 Case study: consensus in Internet governance

Consensus is the dominant method for the internal governance of the existing institutions of Internet governance that preceded the IGF, including ICANN, the IETF and the W3C. This is arguably no coincidence, as the decentralised norms of consensus decision making are more compatible than those of hierarchical decision making structures with the Internet's cultural norms of decentralisation, interactivity, openness, egalitarianism and cosmopolitanism.

However, as foreshadowed by the introduction to this section, there is considerable variation in each organisation's conception of consensus, including the degree of agreement required, the processes by which it should be fostered, and how and by whom it is declared.

...

4.2.1 APNIC

...

APNIC's policy development process is self-described as one in which policies are "developed by the membership and the broader Internet community through a bottom-up process of consultation and consensus."⁷²

The main forum in which this process takes place are the twice-yearly APNIC Open Policy Meetings (OPMs), held in various locations within the region, and which are open to APNIC members and non-members alike. For those from developing countries who could not otherwise attend an OPM in person, APNIC

⁷²Tseng [2006]

grants a number of fellowships. Remote participation is also facilitated using video streaming, audio streaming, live transcripts, Jabber chat software and podcasts.⁷³

...

A proposal for the adoption or amendment of an APNIC policy begins by tabling notice of the proposal to the relevant SIG mailing list and the SIG Chair at least four weeks prior to an OPM at which it is intended to be agreed. At the OPM, the proposal must meet with consensus both at the relevant SIG session, and also at the plenary Member Meeting. For this purpose, “consensus” is simply defined as “general agreement” as observed by the Chair of the meeting. If consensus is not reached at either stage, the SIG may resolve that the proposal should be amended for submission at a following OPM, or be withdrawn.

Following an OPM at which a proposal meets with consensus, an eight-week comment period begins, during which the proposal remains open for discussion on the relevant SIG mailing list. At the expiry of this period, the SIG Chair and co-chairs will determine whether any substantial objections to the proposal have been made. If so, then the proposal fails, and again the SIG may determine to amend it before it is proposed again, or to withdraw it.

A proposal that survives the comment period then goes to the Executive Council of APNIC, which will normally simply endorse the proposal as formal APNIC policy, but may refer it back to the SIG for further discussion if the Executive Council itself is unable to agree upon the proposal by majority vote, or may require a majority vote of endorsement by APNIC members. This introduces the possibility that the APNIC policy development process may not remain purely consensual throughout, as the last stage of decision making may employ a hybrid of consensus and democracy.

4.3 Criticisms

...

The final group of criticisms of consensus-based decision making to be discussed here relate to its potential to become dysfunctional even where complicating factors such as cultural difference and competing claims of right are absent.

One such dysfunction, the phenomenon of “groupthink,” is ironically even more prevalent in more cohesive groups, because their members are reluctant to break the group’s consensus, giving them a propensity to make decisions rashly.⁷⁴ Conversely, consensus-based decision making can lead to polarisation and deadlock,⁷⁵ whereby the views with which participants enter the discussion become entrenched in more extreme forms, so that consensus becomes more difficult and takes much longer to achieve. This phenomenon is most evident where the views in question run along stakeholder lines and the stakeholder groups are separated,⁷⁶ as occurs in a segmentally autonomous consociation, in ICANN’s SOs, and amongst members of self-selecting virtual communities.

These problems are easily countered by the use of deliberative democratic techniques designed to introduce participants to a range of viewpoints other than their own (by requiring them to actively engage with other participants, and through the provision of factual background materials), and by requiring them to justify their views against these other perspectives through public reason. As these techniques have been described at length, no more time need be spent on them here.

A much more problematic dysfunction that is inherent to consensual decision making is that minorities are granted disproportional power over the process. This

⁷³See <http://www.apnic.net/meetings/remote/>.

⁷⁴McCauley [1987]

⁷⁵Isenberg [1986]

⁷⁶Dryzek [2005]

enables them to abuse their effective right of veto by engaging in blocking tactics and other strategic games rather than seeking mutually satisfactory outcomes in good faith. ...

A third means to dissuade participants from the abuse of their right of veto is through the development of supportive norms that constrain the use of that power except where it is essential to protect deeply-held interests of the blocking party that the interests of the group ought not to be able to override.⁷⁷

The applicable norms isolated by Butler and Rothstein are trust, respect, unity of purpose, nonviolence, self empowerment, cooperation, conflict resolution, commitment to the group, active participation, equal access to power, and patience.⁷⁸ For Skelcher, the norms of cooperation and recognition of the equality of all parties are most central.⁷⁹

There is no template by which for such norms to be inculcated, but they tend to develop spontaneously when members of the network cooperate towards mutually beneficial outcomes, and also tend to be self-reinforcing.⁸⁰ This process of building social capital can be “kick-started” by the use of designs for deliberation that encourage participants to find mutually acceptable outcomes rather than to adopt adversarial positions.

But at the end of the day, perhaps the best defence of decision making by consensus in the context of a transnational governance network is that the failure of consensus is a strong indication that it was not appropriate for the issue in question to be dealt with through the soft power of a governance network anyway, and that it should instead fall through to be dealt with by some other mechanism. Johnson and Crawford write:

Failure to reach a global consensus may be a success rather than a failure, however, because it leaves undisturbed the power of many diverse and decentralized actors to make their own decisions. These actors may find even better ways to proceed than might have emerged from a compromising committee.⁸¹

It can thus be considered that a consensual governance network is merely one supplier in a competitive market of governance solutions, and as in the case of the open source software development model, it is freedom of exit — the ability for participants to vote with their feet — that makes these suppliers accountable. ...

In reality, consensus is a common requirement for the success of any possible organisation form for a transnational governance network. The main benefit of the consensual form is that it also reflects this reality institutionally in the organisation’s design, thereby both providing an early gauge of the likely ultimate adoption of the network’s soft law output by its participants, and also ensuring in accordance with the democratic principle that those who are to be governed by that law are those responsible for writing it.

5 Collaborative public policy development

Previous chapters introduced governance by network as the only mechanism capable of bringing together multiple stakeholder groups to address policy issues in concert. Since governments and intergovernmental organisations are amongst these stakeholders, the network may determine that they should address a policy issue

⁷⁷Skelcher [2005], 105

⁷⁸Butler and Rothstein [2004], 20–23

⁷⁹Skelcher [2005], 103

⁸⁰Bertolini and Bravo [2004], 10

⁸¹Johnson and Crawford [2001]

through domestic legislation or intergovernmental agreement. If a market-based solution is more appropriate, private sector stakeholders will be in a position to fill it. If an issue is better addressed through norms, civil society can explicate these norms publicly. Or all four groups may act together, by collaboratively developing an independent body of transnational law for the guidance of all their constituents.

What had not been discussed until this chapter was exactly how they ought to make those sorts of collective decisions. In a sense, consensus is the archetypal decision making structure for governance networks, since the organisation's internal structure in that case mirrors the relationship of the organisation to its stakeholders. However this chapter has revealed elements from each of the four broad types of organisation structure for decision making which are instructive for the design of a transnational governance network developing Internet related public policy.

From anarchism, it was found that the most empowering structure for participants in any organisation may in fact be the lack of structure — or rather, the lack of constraint as to the structures they may voluntarily organise themselves, through the non-coercive mechanisms of markets, norms and architecture. Whilst the resulting network is often more efficient, and more consonant with Internet culture than hierarchical alternatives, this very lack of control also makes it difficult to ensure the network's adherence to liberal democratic values such as accountability and transparency. The use of hybrid forms such as co-regulation was found to be a promising method of addressing this deficiency.

From authoritarianism, it was found that meritocracy could provide an effective structure for a governance network, being designed to ensure that those most qualified to rule did so, rather than the most powerful or privileged. Perhaps unexpectedly, it was also found to exist prominently on the Internet, within the IETF (in a hybrid consensual form) and many open source software projects. However, in order for it to accord with the democratic principle, it was necessary either that the criteria for selection of the meritocracy be agreed by consensual or democratic means (as in the IETF's case), or that freedom of exit and a number of other conditions found in the case of open source software be fulfilled.

From democracy, liberal theory was identified as the source of the democratic principle, that any interference with an individual's liberty requires their consent. However, it was found that pure direct democracy, or representative democracy that simply mirrored the majority's preferences, could lead to illiberal outcomes including the tyrannical trampling of minority interests. Rather than compelling the majority to respect those interests by authoritarian means, a mechanism was found in deliberative democracy to enable the *demos* to develop its own capacity to produce fairer and more reasoned outcomes. Similarly digital democracy was found to offer the potential to extend the accessibility and improve the efficiency of these deliberative democratic fora.

Thus we return to consensus, which also has a long track record of use in within institutions of Internet governance, usually in hybrid form. Otherwise largely intersecting with deliberative democracy, the unique insight gained from consideration of consensual decision making was its application at larger scales, through consociationalism. This can allow groups insistent upon retaining their independent power yet wishing to collaborate in governance, to do so in the knowledge that they and the other participating groups share the power of mutual veto over any decision of collective concern.

Drawing together these insights, it can be concluded that an appropriate structure for a transnational network for Internet governance may consist of an open and transparent forum within which members of all stakeholder groups deliberate with the aim of reaching consensus, led by a meritocratic executive council to which each group appoints its representatives using consensual or democratic means, and which would be required to ratify all decisions of the forum by consensus. . . .

Part II

Reform of Internet governance

...

6 IGF

...

6.1 Preparations

...

6.1.1 Submissions

... what would prove to be a recurrent division can already be seen between those preferring a restrictive interpretation of its mandate, which downplayed or refuted its capacity to make policy recommendations, and those who took an expansive view of its mandate, who saw that capacity as the forum's *raison d'être*.

The former group largely consisted of those who had opposed the establishment of the IGF at first; the technical community (such as Nominet which stated, “[i]t should not be a decision-making body”),⁸² the private sector (such as the CCBI and ICC which stressed “the IGF will not have decision-making powers”),⁸³ and OECD governments (such as Canada which wrote that “the IGF is to provide a platform for policy discussion, not for the development of policy”).⁸⁴

The latter camp was dominated by civil society (such as the Association for Progressive Communications (APC) which saw the IGF producing “[s]pecific recommendations where there is sufficient consensus”),⁸⁵ and developing country governments (such as Azerbaijan, which wrote that the Forum should produce “recommendations that ... are not legally binding but could be a very good source for policy-making and decision-making”).⁸⁶

Moving to the IGF's structure, there was widespread agreement across both camps that the “effective and cost-efficient bureau” referred to in the Tunis Agenda should have a narrow mandate limited to setting the agenda for plenary meetings, subject to bottom-up consultation.⁸⁷ The need for a separate lightweight Secretariat was also accepted by many.

Beyond that however, the first camp referred to above (for convenience, “Forum doves”)⁸⁸ were more likely to de-emphasise structure, as illustrated by the statement that “Australia does not support the IGF establishing a range of sub-groups or subcommittees,”⁸⁹ and ISOC's claim that it was important to “[l]imit Forum-related organizational structures.”⁹⁰

⁸²Nominet [2006], 1

⁸³CCBI and ICC [2006], 2

⁸⁴of Canada [2006], 1

⁸⁵APC [2006], 1

⁸⁶of Azerbaijan [2006], 1

⁸⁷For example, of Canada [2006], 3; of Azerbaijan [2006], 2; CCBI and ICC [2006], 5–6; IGP [2006], 5

⁸⁸From the Internet Governance Project's summary of a forum held by the Oxford Internet Institute on 1 September, found at <http://www.internetgovernance.org/events.html>.

⁸⁹of Australia [2006], 1

⁹⁰ISOC [2006], 2

A more substantial structure tended to be supported by those in the second group referred to above (“Forum hawks,” let us call them).⁹¹ For example, Saudi Arabia recommended the formation of “virtual working groups” which would coordinate online,⁹² and the Internet Governance Project fleshed this idea out with a comprehensive proposal to structure the IGF rather along the lines of the IETF. It recommended a twelve-person bureau containing five representatives of governments, and two each from the private sector, civil society and the academic and technical communities, plus a chair.⁹³ This proposed IGF Bureau would elect a chair for the Forum at large and set the agenda for its plenary sessions, driven by proposals of IGF working groups. It would also approve the formation of such working groups, and exercise oversight of the Secretariat.

Turning finally to the IGF’s processes, the divide already observed continued along much the same lines, between Forum doves who viewed the IGF as principally a meeting (as for example Canada which did “not envisage the establishment of ongoing work programs for the IGF”),⁹⁴ and Forum hawks who viewed it as “a process, punctuated by an annual meeting”,⁹⁵ and who were concerned with how it might arrive at the recommendations that it was to make pursuant to its mandate.

Perhaps the extreme position from the Forum doves came from the ITU, which suggested in its response to the questionnaire that “the WSIS rules of procedures themselves could be considered as the starting point for the IGF processes and procedures”⁹⁶ — referring to the same rules that had infamously consigned civil society to the sidelines during WSIS.

As for the hawks, Vittorio Bertola, a member of the CS-IGC (though not writing in that capacity), drew upon the model of the IETF in suggesting that working groups of the IGF should develop their recommendations on a rough consensus basis, before presenting these to the plenary body as policy proposals for adoption.⁹⁷ The APC largely agreed, and suggested that it should then fall to the Chair to rule on the existence of rough consensus within the plenary meeting.⁹⁸

...

6.2 Outcomes

The outcomes of the first IGF meeting had been predetermined by the Secretariat and Advisory Group before the meeting opened, and were stated on the IGF’s Web site:

The outcome of the meeting will be the reports of the individual sessions as well as of the meeting as a whole. There will be no negotiated texts such as decisions or resolutions. The Chairman may also wish to make a summing-up of the meeting. The report of the meeting will be submitted to the Secretary-General and made available on the website.

In addition, all the material that was used as input into the meeting will remain on record on the IGF Web site.

As a third possible outcome, there may be “dynamic coalitions” emerging from Athens, ie a group of institutions or people who agree to pursue an initiative started at the inaugural IGF meeting.⁹⁹

⁹¹From the Internet Governance Project’s summary of a forum held by the Oxford Internet Institute on 1 September, found at <http://www.internetgovernance.org/events.html>.

⁹²of Saudi Arabia [2006], 2

⁹³IGP [2006], 5

⁹⁴of Canada [2006], 5

⁹⁵APC [2006], 2

⁹⁶ITU [2006]

⁹⁷Bertola [2006], 2; and see also, from another CS-IGC member, Doria [2006].

⁹⁸APC [2006], 1–2, 8

⁹⁹See http://www.intgovforum.org/athens_outline.htm.

...

Save that the mission and contact details of each of these dynamic coalitions is listed on the IGF Web site, as matters stand they have no formal institutional affiliation with the IGF, nor any access to the resources of the IGF Secretariat.

This is not by omission but by design, since in that independence lies the essence of the difference between a dynamic coalition and a working group. That the Advisory Group would be more willing to sanction the bottom-up development of dynamic coalitions than the establishment of formal working groups was evident as early as the February consultations in the following statement of Nitin Desai:

There has been a great deal of discussion on the motion that you shouldn't just focus on this event, but you should also be focusing on IGF as a process for things happening which will feed into the IGF. Certainly if it is a bottom-up process, it is not something which requires decision by anybody. There's nothing whatever which stops people forming a group to contribute to the IGF.

However during the May consultations, Desai also acknowledged that there exists a continuum between two extremes: that of a conventional United Nations conference at which all all events and groupings are formally planned and structured, and that of the World Social Forum¹⁰⁰ where for the most part only a venue is provided by the organisers, and all meetings and initiatives are self-organised by participants.

The relationship between the IGF and its dynamic coalitions is currently positioned at this second extreme, since no strictures whatever have been placed upon the objects, structure or processes of dynamic coalitions claiming association with the IGF. Probably the most obvious consequence of this¹⁰¹ is the diversity that the eight existing dynamic coalitions display in these respects, to the extent that the groups currently sharing the appellation of dynamic coalition can be divided into three quite distinct types. These may be described for convenience as networks, working groups, and BOFs.

...

6.2.1 Follow-up

...

Even Nitin Desai acknowledged for the first time that “there is language in paragraph 72 which talks of recommendations as appropriate, and we still do not have a process for figuring out how to get to those recommendations. But these are things which will evolve.” He also revealed that the question of the IGF's progress towards fulfilling the neglected paragraphs of its mandate had come up in the Advisory Group, although he did not indicate what strategies, if any, it had privately adopted. In any case, the CS-IGC recommended that a “meta-governance” theme be included in the Rio agenda to deal with such issues as these in a more overt and open fashion.

... the dynamic coalitions were now becoming widely accepted as a first step for the IGF towards developing the capacity to produce recommendations. Thus the EU (through Germany) stated, “we feel that Athens has provided an opportunity for a concrete outcome, not least in the form of dynamic coalitions. We welcome this development, and we hope to see it continued in the meeting in Rio de Janeiro, providing the different dynamic coalitions with an opportunity to present their work.” Switzerland spoke to similar effect, as did Australia ...

¹⁰⁰See <http://www.forumsocialmundial.org.br/>.

¹⁰¹Others will be noted at 10.1.3.

The suggestion that the relationship between dynamic coalitions and the IGF should be more clearly defined, acknowledged in the synthesis paper, was reiterated by the CS-IGC which said,

A transparent, multi-stakeholder and democratic process should be commenced to develop criteria for the recognition of “dynamic coalitions” by the IGF, whereby the output of coalitions that satisfied those criteria could be formally received for discussion at a plenary session of the following IGF meeting.

...

7 Other proposals

The process that led to the establishment of the IGF at WSIS hardly took place in a vacuum. It was rather the outcome of the convergence of pre-existing forces driven by diverse actors seeking to reform existing Internet governance arrangements, and produced a compromise that adequately accommodated the heterogeneous interests of the most powerful of those actors. Some of those interests may have been addressed by the IGF’s establishment, but others were not; as seen in the continued pressure for movement on “enhanced cooperation,” from the Forum hawks in particular.

...

8 The need for further reform

... it was found that proposals that would require states to accommodate the decentralised governance of an anarchistic network of Internet stakeholders carry no assurance of multi-stakeholder participation or democratic accountability unless conducted within a more formal structure. On the authoritarian account, this is where the need for hierarchical oversight and coordination comes in, which is the essence of the “process towards enhanced cooperation”; however, the need to ensure freedom of exit from the network limits the legitimate use of governmental or intergovernmental power in any such structure (though it may well not limit its application in practice).

Also in accord with previous findings, little promise was found in democratic models of governance that sought to implement a system of representative elections, unless they also incorporated a deliberative process, which would make them a special case of the consensual model. But even such consensual networks presented a difficult question: whether they should be anchored to the international system through a treaty of some kind, or exist as autonomous transnational legal institutions.

In the former option lay the danger that the network would become beholden to government, but the latter carried the perhaps even more acute risk that states would refuse to participate in the network, significantly curtailing its legitimacy and effectiveness. On balance, it would be perverse to refuse to countenance a thin link between any consensual network of Internet governance and the existing international system, at least until the network builds up sufficient social capital across all stakeholder groups to break free and become fully autonomous.

Such a network does not exist in any of the alternative models of Internet governance reform that were examined in this chapter, but it does describe the IGF of the Tunis Agenda quite well. It describes the IGF as it actually exists somewhat less well, however the required theoretical and factual background is now in place

to enable us to identify the deficiencies of the IGF as it stands, and to make the necessary recommendations for its reform.

Part III

The IGF's report card

In working towards making recommendations for the reform of the Internet Governance Forum, this thesis began by developing a taxonomy of five available mechanisms of governance, and describing the site of their prospective application in terms of seven persistent features of the technical and social architecture of the Internet: decentralisation, interactivity, openness, egalitarianism, anonymity, cosmopolitanism and resilience.

Chapter 2 illustrated that most existing institutions of Internet governance in the spheres of technical coordination and standards development were based upon the non-hierarchical forces of norms, markets, and architecture, whereas the bodies seeking to exercise public policy governance tended to be governmental or intergovernmental and thus to rely upon the hierarchical power of rules; a mechanism much more at odds with many of the architectural features with which the Internet had been imbued by its designers.

As Chapter 3 described, this clash of cultures was indicative of a deeper deficiency of the international system, that was beginning to be recognised and addressed systemically through the increasing incorporation of civil society and private sector participation in the development of hard and soft international law, but also extra-systemically through the development of parallel transnational legal orders for public policy governance, such as international commercial arbitration and the ICANN regime.

However whilst this “new medieval” system addressed the exclusion of transnational non-state interests from the dominant international order by admitting of a more pluralistic conception of law, it offered in itself no greater assurance of the legitimacy and effectiveness of governance by such non-state actors and networks.

The challenge of Chapter 4 was therefore to examine possible structures and processes for a governance network that would be as legitimate and effective as possible across the contexts of both the international system and cyberspace. In particular, it should be more legitimate than alternative models of reform based around international law or private-sector leadership, and more effective than the prevailing models of domestic law and decentralised collective action.

On both counts, the key was to be found in the facilitation of multi-stakeholder participation. This would enable the governance network to draw from the legitimacy of all stakeholder groups, and also improve its effectiveness over the two alternatives of a hierarchical international legal regime shoehorned into the decentralised and egalitarian architecture of cyberspace, or a private transnational legal regime seeking an autonomous role within an international system still shackled to its Westphalian past.

Although this still left many details unspecified, Chapter 4 drew elements from anarchic, authoritarian, democratic and consensual organisational models in attempting to strike an appropriate balance between the pursuit of the democratic principle of consent (already well illustrated within “native” Internet governance institutions such as the IETF) and the stability and accountability of the liberal democratic model (better known within the international system).

It was suggested that an appropriate balance could be found in an open and transparent multi-stakeholder forum whose members would deliberate upon public

policy issues with the objective of reaching consensus, subject to the oversight of an executive council to which each group would appoint representatives using consensual and/or democratic means, and which would have the responsibility of ratifying any decisions of the larger group by consensus.

However as Chapter 5 revealed, this is by no means a description of the Internet Governance Forum as it exists today. In tracing the progress of recent reforms to the Internet governance regime, that chapter accentuated the very real influence of political forces on the role, structure and working processes of the IGF, to the extent that it is yet unclear whether it will even be in a position to fulfil its mandate in the Tunis Agenda. Does this mean that the theoretical model of a legitimate and effective multi-stakeholder Internet governance network that was settled upon in Chapter 4 may after all prove too idealistic to consummate in practice?

The purpose of this chapter is to address that question, drawing together the insights gained in the preceding chapters to examine the extent to which the Internet Governance Forum presently falls short of its ideal, and to propose how the gap between theory and practice might be bridged. This undertaking is to begin at the macroscopic and end at the microscopic level. That is, maintaining the method of Chapter 5, we will begin by looking at the roles in which the IGF legitimately acts, before moving on to discuss the effectiveness of its structure and its processes in the conduct of those roles.

...

9 Role

The Tunis Agenda recognises “that there are many cross-cutting international public policy issues that require attention and are not adequately addressed by the current mechanisms.”¹⁰² The deficiencies of each of these current mechanisms were first noted in the introduction to this thesis.

...

This does not mean that there is no place for the use of each of these mechanisms of governance. Quite the contrary; the use of all of them in concert is likely to be necessary to achieve policy objectives in many issue areas. But in order for their legitimacy and effectiveness to be maximised, they should be employed in a coordinated rather than an *ad hoc* manner, whereby not only the policy objectives to be achieved, but also the means by which they are to be achieved, are the subject of democratic deliberation amongst all affected stakeholders.

This is the essential advantage of the use of the mechanism of governance by network as in the IGF. Such a governance network does not so much incorporate all the other mechanisms of governance, as transform them, synergistic increasing both their legitimacy and effectiveness. They are endowed with greater legitimacy by being subjected to multi-stakeholder democratic oversight, and with greater effectiveness because they can be deployed through the network, either alone or in combination, in an adaptive manner.

Governance by network can thus be understood as a meta-mechanism, in that it provides the means by which for the use of other mechanisms of governance themselves to be governed. To put this in practical terms applicable to the case of the IGF:

- If all stakeholder groups within the network reach consensus at the level of principle on a hierarchical approach to a particular issue of governance, governments can give effect to those collaboratively developed principles by coor-

¹⁰²WSIS [2005], para 60

minating their use of domestic and/or international legal rules (perhaps within other intergovernmental fora);

- Alternatively (or additionally), if it is considered appropriate to address an issue through the use of norms, the network can develop a soft law statement of those norms which civil society stakeholders can take the lead in disseminating through their own domestic and transnational networks;
- If an issue can be effectively addressed through the use of markets, the IGF's private sector members can create or enter such markets, whilst with all other stakeholders they monitor for any market failures that may need to be corrected by other mechanisms (in principle, this is much like a domestic co-regulatory framework); and
- If the use of architecture is considered an effective approach in a particular issue area, it will fall to all stakeholder groups to develop a statement of public policy principles to be transmitted to the relevant body such as the IETF responsible for the development of standards and protocols in reference to that framework of principle.

The roles that are inherent in the IGF's function as such a governance network are twofold, and have been described above in the criteria of organisational roles as policy-setting and coordination. The former role is that which allows its stakeholders to collaboratively decide upon the objectives to be achieved, and the latter includes the process of establishing the means by which they are to be achieved.

As already noted, these two roles of policy-setting and coordination are found in the mandate of the IGF in the Tunis Agenda. . . .

9.1 Policy-setting

One of the fundamental issues about the role of the IGF that has divided the Forum hawks and doves is as to whether it has a decision-making role. Perhaps the strongest denunciation of this prospect has come from Nitin Desai himself, who said shortly before the inaugural meeting, "It's not a decision-making body. It cannot be a decision making body. It does not have a membership, so who is going to author a decision? So there's no way it can ever become a decision-making body."¹⁰³

To some extent, the division can be blamed on an unfortunate choice of terminology. Decision-making, after all, is a process, not an event. This process is sometimes divided into the separate acts of decision-shaping (or decision-recommending) and decision-taking, in recognition of the fact that these may involve quite different parties.¹⁰⁴

If decision-making simply meant decision-taking, then Desai would be quite correct, as this phase of the process will often take place outside the IGF, depending on the mechanism of governance employed. In particular, governance by rules will continue to be made in national parliaments and within intergovernmental organisations, no matter how much weight they may give to the IGF's recommendations. To the extent that talk of a decision-making role for the IGF seems to imply otherwise, and particularly if it is also assumed that the decisions being spoken of are to be binding,¹⁰⁵ the doves' objections are understandable.

¹⁰³The speech in question is referred to at Waters [2006], but Desai's actual words are misreported there. The words transcribed above, which are stronger than those reported in the article, are taken from the audio recording available at <http://kierenmccarthy.co.uk/mp3s/nominet-igf-9oct06/nitin-desai-combined.mp3>.

¹⁰⁴Smith [2001], 85

¹⁰⁵For example, a doctoral candidate from the Université de Montréal objected to the author during a workshop at the Athens meeting, and again in private correspondence on file with the

However on closer analysis, the division between Forum hawks and doves on the role of the IGF is more than simply one over terminology. Many doves have been quite explicit that besides not taking decisions, the IGF should not even not make recommendations, and indeed should not be a forum for policy development at all, in spite of the express words of its mandate.¹⁰⁶ This goes far beyond a simple objection to the notion of the IGF making binding decisions (which, by definition, involves governance by rules), but would appear also to proscribe its participation in the development of norms and architecture and in the operation of markets. Indeed, in these cases, there is no real decision-taking phase of the decision-making process.

Even in the case of governance by rules, the division between decision-shaping and decision-taking (or between policy development and policy-setting) is quite an artificial one. Rather than separate acts, they are more of a continuum, along which power is apportioned between those endowed with formal authority and those from whom their authority is derived. At one end of the continuum (with APNIC providing a good example), the authority of the decision-taker is little more than formal, with its constituents retaining the substantive power to set policy. At the other end, those in authority reserve full discretion to disregard or override any recommendations made by the organisation's stakeholders.¹⁰⁷ ...

9.1.1 Recommendations

What, then, is the appropriate point along that continuum for the IGF? The notion that it should be at the most restrictive extreme — that the IGF ought not to make decisions or recommendations at all — is difficult to sustain, because the effect of this would be to deny its role in providing input into other institutions in the Internet governance regime, in outright contradiction of its express mandate in the Tunis Agenda.¹⁰⁸

Moreover despite the ardour of the Forum doves on this point, the idea that the IGF ought not to make recommendations is quite a novel one. It was certainly not the view of WGIG, which saw the forum they proposed as one in which “all stakeholders will be represented and feel free to discuss and make recommendations.”¹⁰⁹

...

As the previous chapter's detailed account of preparations for and follow-up from the first IGF meeting illustrated, the arguments of the Forum doves for limiting the role of the IGF in making recommendations follow two recurrent themes:

- That delegates will not participate freely and frankly at the IGF if they are under pressure to make decisions.¹¹⁰
- That because the IGF has no fixed membership, it is not a body capable of making decisions.¹¹¹

author, that “the IGF was acceptable largely because of its non-binding nature, but it simply does not have the mandate to re-negotiate its own terms or to insist that anything it does is binding to anyone.”

¹⁰⁶of Canada [2006], 1

¹⁰⁷There is no good example of this from amongst the eight organisations selected in the previous section, upon which this chapter is to focus where possible, but the WTO is an example from the earlier shortlist of forty.

¹⁰⁸WSIS [2005], para 72(c) (which calls upon the IGF to “[i]nterface with appropriate inter-governmental organizations and other institutions on matters under their purview”), and para 72(g) (which requires it to “[i]dentify emerging issues, bring them to the attention of the relevant bodies and the general public, and, where appropriate, make recommendations”).

¹⁰⁹Sha'ban [2005], 235

¹¹⁰ICC [2007]

¹¹¹Waters [2006]

As to the first of these objections, it is true that strategic behaviour and back-room deals are a hallmark of the participation of governmental delegates in intergovernmental negotiation processes. WSIS is as good an example of this phenomenon as any, and there is no reason to think that it would not be replicated within the IGF if its decision-making apparatus were to be modelled on that of a traditional intergovernmental forum.

However, there are two answers to this objection: first, there is no reason that the IGF should make decisions in the manner of a traditional intergovernmental forum; indeed, this is one suggestion that *nobody* has made. As Chapter 4 illustrated, there are techniques from the literature on deliberative democracy, and others from that on consensual decision-making, that are designed to avoid strategic decision-making in favour of the collaborative development of a rational consensus through a process of deliberation amongst equals. This is a matter that will fall for fuller discussion under the treatment of the IGF's processes, rather than that of its role.¹¹²

Second, it is difficult to see how the tendency of governmental (or indeed other) delegates to engage in dysfunctional behaviour, could possibly detract from the mandate of the IGF as expressed in the Tunis Agenda. It is doubtless that IGF meetings will proceed more smoothly without the requirement to adhere to that mandate, but if the smooth running of meetings were an overriding criterion, the mandate ought never to have been drafted to include a policy-setting role for the IGF in the first place. As William Drake pointedly observed during the afternoon of the first consultations on the convening of the IGF in February 2006, "Presumably, when governments carefully negotiated this text, they meant what they said."

In answer to the second objection of the Forum doves, that it is impossible for a body without a fixed membership to make decisions, this was ... shown to flow from the misconception that democratic decision-making requires adherence to the principle of "one vote, one value." In fact, it was shown that the democratic principle can also be legitimately and effectively institutionalised in alternative forms that do not require numerically proportional representation, so long as they engage all affected viewpoints and perspectives in a process of rational deliberation.¹¹³ ...

9.1.2 Transnational law

Making recommendations to other bodies is one aspect of policy-setting, but the IGF is also directed to "discuss issues that do not fall within the scope of any existing body."¹¹⁴ What is to be the outcome of these discussions, where no appropriate organisation exists to receive any recommendations that may flow from them? Or, indeed, where there is an existing organisation to receive the IGF's output, does the making of recommendations to that body mark the end of the matter, even if those recommendations are ignored?

To answer these questions, it is necessary to more precisely place the IGF's position along the continuum from decision-shaping to decision-taking. In summary, it will be argued that:

- in respect of issues not falling within the scope of any existing body with a legitimate claim to exercise governance over them, the IGF should exercise essentially a decision-taking (or to be more accurate a policy-setting) role; and
- in other issue areas, the normative force of the IGF's recommendations will vary, as they must be balanced with the parallel policy-setting activities of

¹¹²See 11.

¹¹³See 3.2.2.

¹¹⁴WSIS [2005], para 72(b)

one or more other bodies, which may also have a measure of legitimacy of their own.

It is the first case that is to be discussed here, with the second to be dealt with in due course.¹¹⁵

To state that the IGF should set policy on its own account in issue areas not being dealt with by other bodies is hardly a radical proposition. It implies nothing more than that as a governance network whose structure and processes are demonstrably legitimate for the performance of its assigned role (assuming this to be the case, for now), its policy recommendations carry normative force in their own right, and do not require the imprimature of any other body. It does not mean that the IGF's recommendations will become formally authoritative (at least not in the short to medium term); rather as Held argues, "it needs to be stressed that any global legislative institution should be conceived above all as a 'standard-setting' institution."¹¹⁶

Like other standards-setting institutions, those of the IGF that prove successful will tend to be adopted and promulgated at domestic and local levels using the mechanisms of rules, markets or architecture; indeed this may be necessary in some issue areas for their effective realisation. However the normative status of its recommendations are derived not from whether or how they have been adopted by stakeholders, but from the multi-stakeholder structure and democratic processes by which they were developed.

...

To put this into context, consider if the IGF were to develop an Internet Bill of Rights by consensus amongst its stakeholders, which was not intended to be delivered to an intergovernmental body for formal signature and ratification. Such a document could still have effect as an instrument of governance by norms, to the extent that it informed the decentralised collective action of its stakeholders, who would tend to act in accordance with it or be judged by reference to it. After some time, it might be the Internet Bill of Rights had become sufficiently ubiquitous amongst stakeholders in Internet governance, perhaps even being referred to in legislative instruments in the same way that Internet standards are today, that it could be described in its own right as an instrument that "people identify and treat through their social practices as law."¹¹⁷ At this point, the Internet Bill of Rights would effectively have passed into transnational law, and the IGF become a transnational lawmaker.

In order to even commence along this path and thereby build up a track record of "running code," the authority of the IGF to develop transnational law must not only be formally legitimate, but must also be seen as such by all participants and stakeholders in the Internet governance regime. As noted above, this in turn requires that the IGF possess a multi-stakeholder structure and democratic processes (for example, that its output is the product of open, reasoned deliberation, and that it incorporate mechanisms of democratic accountability and transparency). A further prerequisite of the IGF acting as an autonomous transnational lawmaker is that its legitimacy to set policy in a given issue area is not shared with another body. If it is, then the development of transnational law will engage the IGF not only in its role of policy-setting, but also in the role of coordination with that other body, which is to be discussed below.¹¹⁸

¹¹⁵See 9.2.

¹¹⁶Held [1996], 356

¹¹⁷Tamanaha [2001], 194

¹¹⁸See 9.2.

9.1.3 Themes and content

...

A better response is that there is an implicit qualification to the non-duplication criterion: that in order for an organisation's work programme to be excluded altogether from consideration by the IGF, it must fulfil the WSIS principles that "international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations."¹¹⁹ This interpretation, which accords with the findings of this thesis, has the consequence that the IGF is not precluded from making recommendations in any area of Internet-related public policy unless the body by which such issues are already being dealt with is adequately democratic and multi-stakeholder in composition, such that the IGF's involvement would be redundant.¹²⁰

...

9.2 Coordination

The IGF's role of coordination was described above as including the process of establishing the means to achieve the objectives that were determined during the policy-setting phase. This is indeed an important element of the coordinating role, and probably the most often mentioned, in the context of the IGF forwarding its recommendations to appropriate other bodies to be implemented through some other mechanism of governance such as rules, where the political and moral force of its self-developed norms is insufficient.

For example, the opening remarks of the UN Secretary-General that were transmitted to the Athens meeting noted that "while the Forum is not designed to take decisions, it can identify issues that need to be tackled through formal intergovernmental processes."¹²¹ ...

Although only intergovernmental organisations are mentioned here, the IGF also has a role to play in coordinating with non-governmental actors; most notably the other specialised Internet governance institutions that preceded the IGF. Although only ICANN and the RIRs are referred to in the Tunis Agenda in this regard (and then only obliquely rather than by name), other notable organisations in this category are those involved in the standards development sphere, which has been largely isolated from any public policy oversight to date.¹²²

The role of coordination is also broader than the making of recommendations, particularly in that the Tunis Agenda makes it clear that the process is to be two-way; speaking of it in terms of "discourse between bodies," "engagement," and the need to "interface" and "exchange." Thus in appropriate cases, just as the IGF can forward its output to other organisations, so other organisations can provide material to the IGF as an impetus for or an input into multi-stakeholder deliberation. For example, the OECD could submit its Anti-Spam Toolkit¹²³ for multi-stakeholder endorsement by the IGF. In a sense it has already done so, by submitting it as a contribution to the Athens meeting (though this fell rather flat, as the IGF had

¹¹⁹WSIS [2003], para 48

¹²⁰This conclusion will be refined at 9.2.1.

¹²¹of the Secretary-General [2006b]

¹²²Examples of public policy issues arising in the standards development sphere that fall within the IGF's main thematic areas include in the area of openness, the W3C's P3P and PICS specifications; in the area of security, the IETF's DNSSEC; in the area of diversity, the Punycode specification for converting domain names written in multilingual characters into the format used by DNS servers (see IETF [2003]); and in the area of access, the IEEE's 802.11 family of specifications used to deploy Wireless Local Loop networks.

¹²³OECD [2006]

not developed the procedures necessary for it to deliberate upon or respond to the input).

...

9.2.1 Meta-governance

It has been concluded that the legitimacy of the IGF's policy-setting role flows (or rather, should flow) from its multi-stakeholder structure and democratic processes. Many of the organisations and networks it must coordinate with do not share those virtues, yet assume a role pre-eminent to that of the IGF. How is the IGF to relate to these other bodies and reconcile their governance programmes with its own?

Two possible answers to this question can be dismissed in short order. The first is that the claims of other institutions with lesser legitimacy than the IGF to exercise authority in Internet governance should be denied, and that the IGF should purport to act as the sole legitimate policy-setting body for the regime. This answer in turn fails on two counts. One is the obvious point that were it to make such an audacious claim, it could no longer expect the impugned institutions to remain as participants in the IGF.

The other more significant reason is that formal authority is still important. The IGF is a microcosm of the mythical greater public sphere in which democratic deliberation takes place. This public sphere does not take decisions on its own account, but must be linked with formal decision-making bodies such as parliaments and courts.¹²⁴ So it is too with the IGF, whose role it is to coordinate with bodies holding formal authority, such as domestic governments and international organisations, not in order to usurp their function, and but in order to elevate them to greater levels of democratic legitimacy. Therefore they cannot be regarded merely as functional appendages to implement or enforce the IGF's recommendations, but rather as the formal policy-setting authorities that can give force to those recommendations in the international system.

To give an example, the IGF might seek that its recommendations in a particular issue area — say on the Internet Bill of Rights, to return to an earlier hypothetical case — be given force in the international system. In order for this to be achieved, it could petition the General Assembly to resolve that a new treaty or convention on this topic be drafted. States would, as always, formally take the leading role in this process, but could utilise a document prepared by the IGF as their first draft; indeed, they would have every reason to do so if they participated in the process by which it was prepared within the IGF. The IGF could also be consulted during the intergovernmental negotiation process (much as, imperfectly, civil society was consulted during the WSIS negotiations), with the result that the final treaty, although *de jure* intergovernmental, would *de facto* be a document of multi-stakeholder ownership.

Lest this example be thought far-fetched, it closely describes the process by which the Mine Ban Treaty, and more recently the Disability Convention,¹²⁵ were prepared largely at the initiation and with the integral involvement of civil society.¹²⁶

If the first possible response of the IGF to the involvement of less legitimate bodies in Internet governance was to oppose their claims, and this response has been rejected, then the second and contrary response is to yield to those claims, and thereby to allow its own recommendations to be accorded the weight that other institutions would accord them. In this case, if WIPO should insist that it remain the sole venue for policy-setting in relation to intellectual property issues, and the

¹²⁴Habermas [1996], 371

¹²⁵*Convention on the Rights of Persons with Disabilities*, 6 Dec 2006, A/61/611 (not yet in force)

¹²⁶Cameron [1999]; Lord [2004].

WTO the only proper forum in which for the development of international trade policy, then the result would be the IGF's recommendations carrying little if any weight within those bodies.

This response is also clearly problematic, since along the continuum between decision-shaping and decision-taking, whilst the IGF is not to act as a decision-taker in place of existing governance bodies that exercise that role, neither should it be relegated to the position of just another stakeholder submitting input into higher-level policy-setting processes.

To do so would be to deny the individual autonomy of its participants who have delegated to the IGF the function of expressing their collective interests. Its recommendations are therefore no longer merely the expression of individual preferences such as would be received as input into a "participatory democracy-style" open consultation, and having a purely advisory status, but rather the culmination of a democratically legitimate policy development process in its own right.

So if the IGF is not to reject the parallel claims of authority of less legitimate organisations, but nor to accede to them, what is the IGF's responsibility when faced with a clash between existing bodies' authority and its own? The Tunis Agenda suggests the answer. It states that the IGF is to "[p]romote and assess, on an ongoing basis, the embodiment of WSIS principles in Internet governance processes."¹²⁷

This means that in interfacing with "appropriate inter-governmental organizations and other institutions on matters under their purview," the IGF is to assess the extent to which they satisfy the criteria that "international management of the Internet should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations."¹²⁸

The result of this assessment will then inform the IGF's relationship with these other organisations. If an external body adequately embodies the WSIS principles in its own right, then in order to remain non-duplicative, the IGF's role will be narrower than in the case of a body that does not fulfil those principles. In the latter case, the IGF's role of coordinating with that body will require it to seek to provide an overarching multi-stakeholder democratic framework by which to augment the body's structures and processes so that the WSIS principles are fulfilled for that issue area within the governance regime as a whole.

...

10 Structure

Having set out the specific roles of policy-setting and coordination that are inherent in the IGF's function as a governance network, as well as being mandated by the Tunis Agenda, it is now necessary to assess whether an appropriate institutional structure exists to support the fulfilment of those roles.

In making this assessment, both too little structure and too much structure are to be avoided. As will be seen, the case of too little structure bears much resemblance to the IGF in its present form, which is essentially that of an annual conference on Internet governance, and which provides a banner under which for stakeholders to engage in decentralised collective action through dynamic coalitions. The problem with such a lack of structure is that multi-stakeholder policy development does not "just happen" without a degree of institutionalisation:

Without roles and rules for decision-making and resource mobilization, collective action becomes more difficult and thus less likely. Facili-

¹²⁷WSIS [2005], para 72 (i)

¹²⁸WSIS [2003], para 48

tating communication among persons, as well as resolving any conflicts that may arise among them, is likewise needed for getting and keeping people together to accomplish things that are beyond the capability of individuals who are seeking just their own well-being.¹²⁹

On the other hand, worse still than a lack of structure is a surfeit, especially when the structure is ill-matched to the effective and legitimate fulfilment of the network's roles. This too can be seen in the IGF, for example in the juxtaposition of the hierarchical leadership of the Secretary-General of the United Nations and his Secretariat (at least in relation to questions of the IGF's role and structure) with what is notionally an open, consensual and multi-stakeholder network of equals.

Thankfully the deficiencies of the IGF's present structure are neither inevitable nor irremediable, since the IGF was expressly established to "have a lightweight and decentralised structure that would be subject to periodic review."¹³⁰ ...

10.1 Existing structures

The existing structures that are to be considered here are the annual plenary meetings of the IGF, the Secretariat, the Advisory Group, the open consultation meetings, and the workshops and dynamic coalitions organised by stakeholders.

10.1.1 Plenary

...

On the surface ... the structure of the IGF's plenary body accords quite closely with the deliberative democratic ideal. It is open to all stakeholders, including — uniquely for a UN body — unaffiliated individuals. Stakeholder groups are not segregated. There is no cost to attend, other than travel and accommodation costs or the costs of obtaining Internet access through which to participate remotely.¹³¹ However, where the plenary structure of the IGF falls down is in its disempowerment to perform its policy-setting roles, such as the making of recommendations.

This shortcoming is of course not the result of oversight, but design. Nitin Desai has consistently argued, as he did again at the open consultations in May 2007:

If you are going to have agreed recommendations, who are the people who will have a right to sit at that table? To recite this [agreement]? Because we do not have a membership defined for IGF, because we only defined it as an event. And in a multistakeholder environment, there is a genuine problem in talking in terms of membership. Are you going to say all those who are present [decide]? Then let's be very realistic. With the under-representation that you will always have, [and] continue to have from developing countries, all those present will probably give you a geographically unbalanced mix. It will also vary depending on where the meeting is held.

The appropriate response to this line of argument depends on how strongly it is taken. In its strongest form, it implies not merely that the plenary body of the IGF cannot make recommendations in its present, imperfectly-constituted form, but that no open plenary body, however constituted, is capable of fulfilling a policy-setting role. This is an objection that goes to the heart of the IGF's mandate, and has been answered earlier in this chapter, when it was reiterated that although such a body may be unsuited as a representative democratic forum, it can be perfectly

¹²⁹Uphoff [1999], 228

¹³⁰WSIS [2005], para 73

¹³¹But see 11.4 regarding the limitations of the latter.

well suited for democratic deliberation, provided that the perspectives of all those significantly affected are able to be voiced during the discussion.¹³²

If on the other hand the above argument is taken simply as pointing to the fact that many stakeholders who would otherwise participate in the IGF will be precluded by cost and distance from attending its annual plenary meetings in person, then it should be understood that this disadvantage impacts upon each of the roles in the IGF's mandate, not merely its policy-setting role. The appropriate response to this disadvantage is therefore not to sweep the most inconvenient paragraphs of the IGF's mandate under the carpet, but rather to attempt to ameliorate the underlying causes of the problem. Indeed, this itself falls within the IGF's mandate to "[s]trengthen and enhance the engagement of stakeholders in existing and/or future Internet governance mechanisms, particularly those from developing countries."¹³³

There are a number of specific strategies by which the disadvantage of those who cannot attend annual meetings of the IGF can and should be redressed, such as:

- Structuring the IGF less as a monolithic annual event, and more as a process made up of a number of coordinated events and activities including intersessional regional meetings and parallel fora for online participation.
...
- Online participation should be facilitated not only as a parallel process (whereby discussion and deliberation takes place in online fora that are separate from the annual offline meeting), but also as a channel for communication between the annual meeting and remote participants. This means both that the proceedings at the annual meeting should be accessible to remote participants, and also that the contributions of such participants should be received by the meeting much as they are received by those present in person.
...
- If it is taken as a given for now that full participation in the process of policy development within the IGF requires attendance at its annual plenary meetings, the fulfillment of the IGF's mandate will depend upon those from developing countries being provided with additional assistance to attend those meetings.
...

In summary then, the basic structure of the IGF's plenary body as an open forum has been found to be well-suited to the fulfillment of its policy-setting roles through appropriate deliberative democratic processes,¹³⁴ and although the argument that it is improper for such a body to engage in policy development at all has been rejected, this argument has drawn attention to the need for the IGF to foster fuller participation by disadvantaged stakeholders, through a number of strategies including the development of regional and online fora that can be coordinated with the main plenary forum, the facilitation of dialogue between the plenary meeting and remote participants, and the provision of support to those who wish to participate in the plenary forum but are otherwise unable to do so.

Despite all this, it may still be that the IGF's plenary body ought not to become its peak decision-making organ. Whilst it cannot be questioned that the IGF has a mandate to perform policy-setting roles, those roles might in practice be more

¹³²See 9.1.1.

¹³³WSIS [2005], para 72(f)

¹³⁴The nature of which are to be discussed separately at 11.

effectively distributed between the open plenary body and more highly institutionalised organs of the IGF. It has already been noted that, regardless of how sound the conceptual justification may be for policy development to be conducted by a body of indeterminate size and composition, governments will be loathe to concede any more than the weakest advisory authority to such a body,¹³⁵ and that a more substantial connection to the existing international system is likely to be required if the IGF is to progress any further along the continuum from decision-shaping to decision-taking.

Were the plenary body therefore to delegate the formal part of its policy development authority to some form of subcommittee with a more tightly defined membership, the balance of the plenary's own activities would draw it somewhat closer to the role espoused by the Forum doves: it would become less of an assembly, like the General Assembly of the United Nations, and more of a think tank or a public policy institute. Its principal function would remain to engage in democratic deliberation, with the aim of reaching consensus on issues of Internet-related public policy, but it would no longer be called upon to assess its own achievement of consensus, nor to draw the output of that discursive process together into an agreed form suitable for input into other organisations. Those functions would instead lie elsewhere.

The question then becomes, where? If the plenary meeting is not to act as the peak body for policy development within the IGF, who else is to do so: the Secretariat, the Advisory Group, or some other organ or organs altogether?

10.1.2 Advisory Group

... the fundamental problem with the structure of the Advisory Group is that it lacks legitimacy.¹³⁶

In the first case given above, where the Advisory Group is conceived as a meritocratically-selected executive committee for a multi-stakeholder governance network, its illegitimacy arises from the undemocratic manner in which it was convened. It will be recalled from Chapter 4 that the only legitimate means by which a meritocracy can be selected are consensual or democratic.¹³⁷ In no sense could the Secretariat's selection of candidates for the Advisory Group (some of whom responded to an open call for nominations, and others who were privately solicited), in a closed process pursuant to criteria that were never published, be described as consensual or democratic.

...

If on the other hand the Advisory Group is effectively powerless in its own right, merely serving as a focus group to be consulted for its opinions on the substantive agenda and programme of the IGF before the UN Secretary-General and the Secretariat make their own decisions independently, then the deficiencies of the process of its appointment become secondary, and the illegitimacy of the Advisory Group reflects that of the authoritarian power lying behind it.

...

Almost by definition, it is illegitimate for the United Nations thus to exercise leadership of a multi-stakeholder governance network, because the UN remains fundamentally an intergovernmental organisation, which allows for only limited participation in certain of its activities by civil society and the private sector. It is for the same reason that it was argued above that the Secretariat should be limited to performing technical roles.

¹³⁵See 3.5.1.

¹³⁶There are also problems with the working processes of the Advisory Group, including its lack of accountability and transparency, but these will be dealt with separately at 11.

¹³⁷See 2.2.1.

...

Therefore, reform of the Advisory Group is necessary. The most pressing reforms are twofold. First, like the Secretariat, it must be appointed by multi-stakeholder, democratic means, though as also noted in respect of the Secretariat, this implies a parallel reform that would provide the means for the stakeholder groups each to nominate or appoint their own representatives to smaller committees of the IGF. Whilst this reform is yet to be discussed in detail, it would hardly be much of an innovation, as it was in like manner that civil society's representatives were appointed to WGIG.¹³⁸

The second required reform is not so much one for the Advisory Group, as one that the limitations of the Advisory Group make necessary. It is the need for another body to take up functions that exceed the mandate of the Advisory Group and Secretariat. Some of these are functions that they have taken upon themselves regardless of this being in excess of their mandate; such as setting the structure and working methods of the IGF.¹³⁹ Others are functions that they have not attempted to address at all, such as the facilitation of the development of recommendations, as Brazil emphasised during the May 2007 open consultations in pressing for the establishment of an IGF bureau.

...

10.1.3 Workshops and dynamic coalitions

... there are no institutional checks and balances to ensure that the structure of a dynamic coalition is (and remains) multi-stakeholder and democratic, nor that its procedures are accountable and transparent. In the absence of such democratic safeguards, dynamic coalitions that are:

- networks may impose membership restrictions that prevent any interested IGF member from participating (as for example in the case of the StopSpamAlliance), which may be more productive of balkanisation than coordination if important stakeholders are excluded;
- working groups may be organised along oligopolistic lines rather than as open and diverse deliberative fora, resulting in the production of recommendations that are of no assistance to the plenary body (unless it replicates their development by more democratic means), as well as the possible fragmentation of dynamic coalitions into multiple competing groups that produce conflicting recommendations in the same issue area;¹⁴⁰ and
- BOFs may include narrow interest or advocacy groups (as in the case of the A2K@IGF dynamic coalition, which includes only members with a programme of liberalisation of IPRs, and none with a balancing — even if reactionary — perspective such as Microsoft, the MPAA or WIPO). Whilst it is quite legitimate for stakeholders to form such groups, they ought to be differentiated from working groups in order that their advocacy is not confused for the outcome of a deliberative democratic process.

The second significant problem caused by the under-institutionalisation of dynamic coalitions, which specifically affects working groups, is that there is no formal mechanism by which for their reports or recommendations to be received by the IGF's

¹³⁸de la Chapelle [2005], 281

¹³⁹Muguet [2007], 6

¹⁴⁰This does not mean that multiple dynamic coalitions in the same issue area should be prohibited, since this would exclude the potential benefits of regulatory competition. However only if competing recommendations are the output of equally multi-stakeholder and democratic processes can the plenary assess them on a level footing.

plenary body as an input to its policy-setting role. The working groups of other organisations such as APNIC and CGI.br support and are coordinated with the programme of their plenary bodies; for example in that policy proposals are required to meet with consensus within APNIC both at the level of their originating SIG, and again when formally tabled at a plenary Open Policy Meeting (with the superadded requirement of ratification by APNIC’s Executive Council). . . .

In contrast, the activities of the IGF’s dynamic coalitions are quite divorced from those of the annual plenary meeting, with no occasion other than the brief daily “summing-up” (for Athens) or “reporting back” (for Rio) sessions available for them to informally present their output to the meeting, and no means for that meeting to deliberate upon the output in turn.

. . .

Both of the problems noted above point to the need for stronger institutionalisation of the relationship between the IGF and its dynamic coalitions. This initially requires a mechanism by which for dynamic coalitions proposed by stakeholders to be recognised by their parent body, which would again most conveniently fall to a multi-stakeholder subcommittee of the IGF to be charged with that task. . . .

10.2 Structural reform

Common to the reforms proposed above to the plenary body, Secretariat, Advisory Group, open consultation meetings and dynamic coalitions is the need for a new, democratically or consensually appointed multi-stakeholder body to exercise the following substantive functions:

- preparing documents for the use of the plenary body (a function currently performed by the Secretariat), including:
 - background briefing documents to inform discussion and foster the development of consensus at open consultation and plenary meetings; and
 - synthesis papers and reports summarising the contributions and discussions of stakeholders at such meetings;
- preparing the substantive agenda and programme for IGF meetings (that is, assuming the functions of the existing Advisory Group);
- creating multi-stakeholder democratic structures and processes for the IGF that incorporate any consensus of stakeholders expressed during open consultation meetings, including processes for:
 - the approval of workshops and recognition of dynamic coalitions;
 - the receipt of the output of workshops and dynamic coalitions as inputs to open consultation and plenary meetings;
 - policy development within the plenary forum; and
 - coordination with other existing bodies;
- assessing the consensus of open consultation and plenary meetings on substantive policy issues and as to the appropriate response to those issues; and
- preparing formal responses in the appropriate form based on the consensus of the plenary forum (such as recommendations for input into other organisations).

Such a body would essentially constitute the “effective and cost-efficient bureau” referred to in the Tunis Agenda and in early contributions from Forum hawks that preceded the formation of the Advisory Group, such as those of the IGP and MMWG referred to above.¹⁴¹ Once it had become apparent, following the expiration of its initial mandate from the Secretary-General, that the Advisory Group possessed neither the capacity nor the legitimacy to fulfil the roles that the Tunis Agenda and the hawks demanded, some of the hawks began to renew their calls for a multi-stakeholder bureau, and these are calls that would also be addressed by such a body as outlined above.

...

10.2.1 Nominating committee

Having concluded that a multi-stakeholder bureau is required, an obvious question that arises is how its members should be appointed.

... the answer lies in a hybrid approach, which includes elements of the hierarchical, democratic voting and consensual methods. A model for such a hybrid is found in the IETF’s nominating committee (the Nomcom), which makes appointments to the IAB and to the IETF’s IESG.

...

Thus in summary, the first significant structural reform that is required for the IGF is the establishment of a nominating committee comprised of equal numbers from each of the stakeholder groups, who would periodically deliberate upon the appropriate composition of a multi-stakeholder bureau for the IGF, and then separately nominate candidates from their own stakeholder groups either by voting or through consensual means. This nominating committee would be chosen by random selection from an open pool of volunteers, subject only to be fulfilment of criteria designed to ensure that the process is also substantively democratic. The establishment of these criteria, along with similar criteria for the bureau, and the appointment of the nominating committee’s non-voting chair, liaisons and advisors, would be performed in the first instance by the Secretary-General, and thereafter by the bureau itself, in both cases acting upon any consensus that may emerge during deliberation by the IGF’s plenary body.

10.2.2 Multi-stakeholder bureau

The second significant reform is the establishment of the multi-stakeholder bureau itself. ...

So in summary the multi-stakeholder bureau of the IGF is to be a balanced group of individuals appointed as representatives of their stakeholder groups, who are to deliberate on its operational programme together, but to exercise a power of veto of its formal recommendations within the stakeholder groups. Its chair, subcommittees, advisors and liaisons are to be appointed by the bureau itself. In the case of the chair, who exercises a special coordinating role, this should be done by voting, subject to the position’s rotation through all of the stakeholder groups and ideally the appointment of two co-chairs to provide continual stakeholder balance.

11 Processes

...

Having said this, much of where the IGF’s falls short lies not in its structure but in its processes. So for example unless the theoretical openness of the plenary

¹⁴¹IGP [2006]; MMWG [2006]

forum is matched with processes that actually render it reasonably accessible to all affected stakeholders, this not only defeats the openness of the structure, but can also obscure the need for reform. Such a gap between theory and practice has been observed in the case of ICANN, for example by Johnson and Crawford who wrote in 2001:

Articulating, exploring, and discussing the details of policies likely to attract consensus support requires patience and precision — not just open listservs and occasional meetings in places most impacted parties find it hard to get to.¹⁴²

...

An obvious example of this implementation gap in the case of the IGF is the holding of consultation meetings in Geneva, which privileges intergovernmental stakeholders and governments with permanent delegations in that city, and to a lesser extent the well-resourced private sector, over stakeholders from civil society and developing countries.

...

Further analysis of the procedural reforms required of the IGF in order for it to fulfill its potential as a democratic multi-stakeholder governance network requires a more thorough conceptual framework. This can be taken directly from Chapter 4, in which the basic principles of liberal democratic governance were discussed under the four headings of representation, consent, transparency and accountability, and participation. These will be considered again here in turn in their application to the IGF's processes.

11.1 Representation

...

The evolution of the UN multi-stakeholder process from UNICTTF through to GAID and the IGF illustrates that as the openness and inclusiveness of the plenary body has been increased, so it has been disempowered, with decision-making authority instead being concentrated at the highest executive level; or in practice, in the organisations' UN-appointed Chairs and Secretariats. The UNICTTF's frank explanation is that "stakeholders involved in the ICT TF sometimes have competing or even conflicting aims. Organizations, including multilateral, bilateral and civil society groups are often competing for influence, leadership, support, and attention."¹⁴³

Whilst this fact is undeniable, to accept it as a justification for the relegation of those stakeholders to a lowly advisory role flies in the face of UN rhetoric about the need for multi-stakeholder public policy governance, for which the proffered alternative of participatory democratic consultation is a poor substitute. The democratic principle, which specifies that governments must operate with the consent of the governed, and the principle of subsidiarity which requires that governance should be exercised at the lowest practical level, require more. So too, for that matter, does the Tunis Agenda.

11.1.1 A consociational multi-stakeholder process

How then, should the bureau produce its recommendations or other formal output, given that it in doing so it is to act as a mirror of the plenary body, for which the United Nations multi-stakeholder process does not offer an adequate model?

¹⁴²Johnson and Crawford [2001]

¹⁴³UNICTTF [2002], 7

...

These three phases, then — determining the consensus of the plenary body on a particular issue, drafting any applicable recommendation or statement that may be required in response, and then seeking the assent of each stakeholder group — form the core of the consociational multi-stakeholder process by which the bureau represents the views of the plenary body. The phases may also be iterative. That is, if a stakeholder group determines to exercise its veto, this may indicate that:

- the bureau’s assessment of the consensus of the plenary body was imperfect, and should be carried out again (which may involve returning the issue to the plenary for further deliberation in light of the stakeholder group’s veto);
- the form in which the recommendation was drafted did not adequately conform to the consensus that had been assessed, which may require it to be brought back to the bureau for amendment until the veto can be overcome consistently with the plenary’s consensus; or
- the policy objective upon which rough consensus was reached in the plenary forum is not capable of reaching full consensus within the multi-stakeholder bureau, in which case the plenary will be required to find another mechanism by which to pursue that objective (such as through the decentralised collective action of a dynamic coalition).¹⁴⁴

...

11.2 Consent

What has yet to be examined however is exactly what processes should be employed to ensure that the bureau’s discussions actually are adequately deliberative, thereby fulfilling the democratic principle of consent which underlies its legitimacy. This is even more important in respect of the plenary body, for which there is no means of ensuring that it is proportionally representative (to the extent that proportional representation is even a meaningful concept for a multi-stakeholder body).

...

The main deficiencies of the IGF as a forum for democratic deliberation can also be stated in three points:

- as noted at the commencement of this section, there is an implementation gap between the openness of its structure and its actual accessibility to all affected stakeholders, particularly those who are disadvantaged;¹⁴⁵
- its lack of any structures or procedures for decision-making, particularly at the plenary level, effectively denies the IGF a policy-setting role, reducing it at best to a participatory democratic organ serving to inform external decision-makers, but disempowered from forming any position of its own; and
- even were it empowered to make recommendations, these would not be subjected to the test of public reason that characterises deliberative democratic discourse, because:
 - the fora within which discussion takes place, such as plenary sessions and workshops, are conducted in a seminar format that discourages participants from engaging with each other’s perspectives and working towards a consensus in which all those perspectives are rationally reconciled; and

¹⁴⁴See 9.

¹⁴⁵See 11.

- similarly, written contributions and submissions are prepared by stakeholders in isolation from one another, without the opportunity for their refinement through public analysis and debate to produce a balanced body of background material such as is employed in most institutional frameworks for democratic deliberation.

...

11.2.1 Democratic deliberation

...

As will shortly be seen, the specific processes best suited for adoption at a given layer of governance within the IGF, or at a given phase within each layer, will differ. Processes will also differ markedly between those applicable to participants present in person, and those participating online (though for present purposes, processes for online deliberation will be left aside, to be revisited under the heading of participation).¹⁴⁶ But despite this variance in detail, the underlying features of most institutionalised frameworks for democratic deliberation, as examined in Chapter 4, are common and relatively simple:

- deliberation takes place against a background of balanced briefing material, designed essentially to constitute the group as an informed public sphere in miniature; this material may take written form, or be presented in person by subject matter experts, or both;
- the group’s discussions are guided by one or more impartial moderators or facilitators, who are to endeavour to maintain the conditions of democratic deliberation (such as equality and orientation towards consensus), and in the case where a group is divided into smaller units, to coordinate between these and the larger group; and
- the group, and any smaller units into which it is divided, are to be of pluralistic composition, in order to ensure that as many different perspectives as possible are represented in the deliberation, each of which is to be debated against the others on an equal footing without recourse to claims of external authority.

Any of the similar large-scale structures for democratic deliberation that incorporate these features, including the 21st Century Town Meeting, citizens’ assembly, consensus conference and speed dialogue, have the potential to be applied directly to the IGF’s plenary body. Since speed dialogues came close to being trialled for the Rio IGF meeting, and have been successfully employed by the ITU in an analogous context, these seem the most natural choice of method to improve the deliberative character of the IGF’s plenary meetings.

... Ordinarily, speed dialogues are not used at the final stages of decision-making; unlike, for example, the 21st Century Town Meeting in which the closest to a rough consensus position that the groups achieves is put to a formal vote at the end of the meeting. However for the plenary body of the IGF, which as Nitin Desai is fond of noting has no defined membership, vote-taking is out of the question. Instead, it is for the bureau, with the assistance of the facilitators of the speed dialogue, to assess the state of the group’s progress towards consensus following a speed dialogue session, as a preliminary stage to the deliberation and more formal decision-making phase that is to occur within the bureau. More will be said of this process of assessment under the following heading.

...

¹⁴⁶See 11.4.

The use of speed dialogues as a framework for democratic deliberation has been put forward above only for the plenary body. For smaller groups within the IGF such as the multi-stakeholder bureau and dynamic coalitions, different techniques may be required. (For present purposes, the plenary body in open consultation can also be considered as one of these smaller groups, since the number of members in attendance is approximately an order of magnitude smaller than at the annual plenary meeting.)

Provided that it incorporates at least the three main features of the deliberative democratic frameworks identified above — the use of background briefing, the guidance of a moderator or facilitator, and the pluralism and equality of the group — there is no need to be prescriptive of the precise method by which democratic deliberation is institutionalised within the IGF’s smaller subcommittees.

In particular, insights from models of small group democracy such as that of Gastil,¹⁴⁷ those from the study of deliberative democracy such as the citizens’ jury, and those of consensus in small groups such as the Consensus Workshop, are all potentially applicable. It is a feature of the latter that defining the process to be followed forms the group’s first item of business; although to bootstrap the group into a form capable of deliberating upon its own processes (let alone anything else), these must at least initially be specified by hierarchical means, such as a constitutional document if one exists, by its chair, or through standing rules previously established by the group.

Without detracting from this latitude on matters of detail, some broad guidance for the processes to be adopted by the open consultation meetings, the workshops and dynamic coalitions, and the multi-stakeholder bureau does flow from the findings already made, particularly given that the structural relationship between these bodies requires their deliberative procedures to be coordinated to some degree.

Taking the open consultation meetings first, their main role is in shaping the structure and processes of the IGF and the agenda of its meetings, drawing on written submissions contributed by stakeholders and dynamic coalitions, and summarised in a synthesis paper prepared by the Secretariat. If that synthesis paper is to serve as a suitable input to democratic deliberation in accordance with the first of the three features identified above, then as in the case of the annual plenary meetings it should be prepared by the bureau rather than the Secretariat. This is because substantive judgment is involved in ensuring that a diversity of views is presented and that obvious factual inaccuracies are corrected, which is a responsibility that mirrors that of the mass media in the model of deliberation in the public sphere.

The second of the three main features of frameworks for deliberative democratic identified above — supportive moderation or facilitation — is also lacking in the case of the open consultation meetings, in that they are conducted in a format of round-robin presentations which is not conducive to engagement between stakeholders. Nitin Desai has acknowledged this deficiency, pleading with stakeholders (though largely in vain) in May 2007:

I would strongly urge people to, if possible, to [*sic*] comment on suggestions which have come from others, also, so that I get a sense of where people are. . . . because that will help us to move towards some form of [consensus on] what we will do with this forum.

However scholars of deliberative democracy and consensual decision-making teach that rather than simply expecting stakeholders to engage with each other spontaneously, it is the role of the moderator or facilitator to structure the discussion to specifically encourage this behaviour. . . .

¹⁴⁷See 3.2.2.

Like considerations apply to the workshops and dynamic coalitions (specifically those recognised as working groups), which have a similar but more specialised role to play in providing reasoned, multi-stakeholder input for the plenary body and the bureau in specific substantive issue areas. It is only if a workshop or dynamic coalition has been able to effectively deliberate in a democratic and multi-stakeholder fashion that its output should carry any greater weight with the plenary body or bureau than the submissions of individual stakeholders.

Criteria are already specified to ensure that workshops held at plenary meetings are of multi-stakeholder composition, but beyond that they do not specify that its proceedings should be democratic or consensual, and do not extend to dynamic coalitions. Whilst . . . it remains necessary for the bureau to develop further criteria by which dynamic coalitions can be assessed for their compliance with democratic as well as multi-stakeholder principles,¹⁴⁸ it is quite possible for their compliance with certain of those criteria to be assessed *ex post facto*. In other words, rather than requiring them to document in advance how their decision-making processes will be deliberatively democratic or consensual as a condition of their approval by the bureau, a dynamic coalition, or for that matter a workshop, seeking to formally present its output to the plenary body could be required to submit a report that documents the processes by which its recommendations were developed, and the extent of the consensus that was reached on them.¹⁴⁹

This leads to the final and most important subcommittee of the IGF whose processes fall for consideration: the multi-stakeholder bureau. The reports of workshops and dynamic coalitions effectively form part of the background briefing material for the bureau's deliberations on the IGF's formal output. So too does the input of any advisors and liaisons appointed to the bureau, along with the reports of any sub-committees established by the bureau, and indeed any consensus the plenary body itself may have reached either in open consultation or at its annual meeting.

The bureau, then, does not lack for briefing material upon which to deliberate. What it does lack, or rather what its precursor, the Advisory Group, lacks, is the ability to act upon this input. In its present form, members of the Advisory Group discuss their views, but take no formal decisions on them, whether by vote, consensus or otherwise. This sits at odds with the object of democratic deliberation, which is a process not merely for dialogue but for decision-making.¹⁵⁰

...

11.2.2 Assessing consensus

...

The most appropriate model for the assessment of consensus by the IGF's multi-stakeholder bureau is likely to be a hybrid of those of ICANN and APNIC. Like ICANN (only more so) the IGF is politically and culturally heterogenous, and therefore the thorough documentation of any consensus claimed to have been achieved by its plenary body at an annual meeting or open consultation will avoid the same suggestions of partiality being made of the bureau that some have made of the Secretariat and Advisory Group.¹⁵¹ The same applies to dynamic coalitions, who as noted above, ought in like manner to document the consensus that they reached on any recommendations being forwarded to the bureau for presentation to the plenary body.

Furthermore, as in APNIC's case, it is also desirable for the achievement of consensus to be confirmed at more than one level. The procedures already put

¹⁴⁸See 10.1.3.

¹⁴⁹This option will be explored further under the following heading.

¹⁵⁰See 3.2.1.

¹⁵¹For example, the Third World Network at the February and May 2007 consultations.

forward in this chapter ensure that this is so, as any consensus of the plenary body will be reconfirmed by consensus of the stakeholder groups within the bureau before it becomes a formal recommendation of the IGF. . . .

The example of APNIC also teaches that any consensus reached at a plenary meeting should remain subject for a short period to the input of those who were unable to participate in that meeting. This practice will be discussed further when considering the ways in which to accommodate online participation in the IGF's processes.¹⁵²

On this basis, a suitable initial process for the assessment of consensus by the multi-stakeholder bureau (subject, of course, to refinement through open consultation) would incorporate the following elements:

1. if a proposed recommendation, statement or the like originated in a workshop or dynamic coalition, it must first have achieved the consensus of that body, as recorded in a written report to the bureau, before being presented to the plenary body for deliberation;
2. in any case, a proposed recommendation or statement should be tabled in draft on the IGF's Web site ahead of the meeting at which it is intended that it be deliberated upon by the plenary body;
3. if the bureau considers that consensus was reached by the plenary body, this should be recorded in its report of the meeting, along with the grounds for its conclusion that any opposition to the recommendation was limited in scope and intensity, was unreasoned, or did not stem from those specially impacted by it;
4. the report of the meeting should be subject to an open comment period; and
5. in deliberating upon the appropriate form in which to formalise a proposed recommendation or statement, the bureau should consider any comments received during the comment period and respond to them in the minutes of the meeting at which a decision is made.

11.3 Transparency and accountability

One example has just been given of a circumstance in which the mechanisms of accountability are needed to guard against the subversion of democratic processes by those in power; in that case, the bureau's power to influence the substantive programme of the IGF through its subjective assessment of the consensus of its plenary body. But numerous other examples can be given of circumstances in which transparency and accountability are as important as structure and process in ensuring that the IGF does not lapse into oligarchy.

11.3.1 Transparency

...

It is difficult to reconcile the Advisory Group's non-compliance with even the most fundamental requirements of democratic transparency, such as the publication of minutes of its meetings, with the UN Secretary-General's promise at the outset that "the Advisory Group will carry out its work in an open, inclusive and transparent manner, and will seek to make the best possible use of electronic working methods, including online consultations."¹⁵³

¹⁵²See 11.4.

¹⁵³of the Secretary-General [2006a]

...

However the Advisory Group's self-imposed seclusion, whilst incongruous, matches that of one other notable institution of Internet governance: ICANN's GAC (though even the GAC, unlike the Advisory Group, generally issues communiqués to the media following its private meetings).¹⁵⁴ This is, of course, no coincidence, and points to the principal explanation for each body's lack of transparency: that governmental representatives are reticent about speaking freely and on the record during intergovernmental negotiations.

...

Thus the democratic transparency of the Advisory Group has been traded off against the concerns of governments (and perhaps other stakeholders) to avoid the risk of diplomatic embarrassment and loss of face associated with an open democratic process. Whilst this can, perhaps, be justified on the pragmatic grounds that only by making such a trade-off will those stakeholders be persuaded to participate at all, in the absence of a conceptual justification, it could only legitimately have been agreed by multi-stakeholder, democratic means — which it was not.

Having said that, the Secretariat has also attempted, though with limited success, to incorporate at least two other concessions to the concerns of governments into the Advisory Group's processes:

- Following the example of WGIG, its meetings are held subject to the “Chatham House Rule,”¹⁵⁵ which allows the meeting's participants to use and disseminate any information received so long as they do not reveal the identity of its source.¹⁵⁶ However whilst in theory this would allow the Advisory Group to open up its meetings at least to the media and to stakeholders who have agreed to abide by the Rule, in fact this has not occurred; leaving the group's effective transparency subject to the whim of the meeting's participants (and in practice, almost entirely opaque).
- It might also have been thought that the appointment of members in their personal capacities would allow governmental representatives to speak freely without being taken to be stating government policy. However again, in practice this appears to have made no difference to the transparency of the Advisory Group in comparison to the GAC, whose members act in a representative capacity. Moreover, as already noted, the appointment of members as individuals dissociates them from the capacity in which they represent their stakeholder group, which defeats the purpose of appointing a multi-stakeholder body in the first place.¹⁵⁷

The failure of these measures to be reflected in the level of the Advisory Group's transparency in practice indicates that a more radical approach to the problem of governmental participation is called for in the case of the proposed multi-stakeholder bureau.

...

11.3.2 Accountability

Therefore whilst the Secretary-General may retain his formal role of oversight at least in the short term for political reasons, it is desirable that the IGF meanwhile develop an additional and more legitimate layer of top-down accountability. Even

¹⁵⁴See <http://gac.icann.org/web/communiqués/index.shtml>.

¹⁵⁵According to correspondence from an Advisory Group member on file with the author.

¹⁵⁶See <http://www.chathamhouse.org.uk/about/chathamhouse-rule/>.

¹⁵⁷See 10.2.2.

without any appropriate transnational governance institutions to exercise such oversight, the IGF can design internal hierarchies (or networks) of its own to provide a structure for accountability, much as the accountability of a liberal democratic state is furthered by the system of mutual checks and balances between its legislative, executive and judicial branches.

...

How then can the IGF's processes incorporate top-down accountability whilst avoiding the errors drawn from the lesson of auDA? First, dynamic coalitions should be accountable to the bureau not only for their output, but also for their processes. As suggested above, this can be done by requiring them to document the processes by which their recommendations were reached, to ensure that they are multistakeholder and democratic.¹⁵⁸

Second, there should be a clear separation between the formal decision-taking role of the bureau and the policy development role of the plenary body. Such a separation is enshrined in the structure and processes proposed in this chapter, whereby the bureau has no authority to make recommendations other than in accordance with its assessment of the consensus of the plenary body as a whole. An additional benefit of the separation of formal authority from the plenary body is that this is more conducive to free and open deliberation than the fusion of authority and deliberation, which tends to politicise discussion.

A third recommendation for enshrining top-down accountability in the IGF, although only fleetingly suggested in the discussion of auDA above, is that there should be a power of review, such as that exercised by the judicial branch of government that balances the legislative and executive powers of the liberal state. This would allow for the multi-stakeholder bureau to be made accountable for the misuse of its power with more immediacy than through its ouster by the next nominating committee.

...

11.4 Participation

...

The IGF's limited mindshare reflects its failure to engage with the Internet community in its native element: that is, online. It is oddly anachronistic that the IGF, whilst seeking to become a key institution of Internet governance, was conceived from its genesis as an annual meeting held in person, with online tools as a mere adjunct. This contrasts with many of the institutions of Internet technical coordination and standards development reviewed in Chapter 2 (most obviously the IETF) for which online mechanisms are the primary mode of engagement. Indeed this is typical of decentralised transnational organisations of the Internet age, including a number of others examined throughout this thesis such as the ASF, APNIC, Debian and Wikipedia.

...

In Chapter 4, a distinction was drawn between two conceptions of the democratising role of online processes.¹⁵⁹ The first, described (though not canonically) as e-democracy, is very much that which has informed the approach of the IGF Secretariat. In this conception, online participation serves essentially as an extension of the physical meeting. That is, it is largely concerned with providing a channel of communication (generally passive and one-way) between remote participants and those present in person at IGF meetings. It does not involve independent online deliberation, save in a form strictly secondary to, and tightly integrated with, that which takes place face-to-face.

¹⁵⁸See 11.2.2.

¹⁵⁹See 3.4.

Although the e-democratic model has its limitations, this is not to suggest that its programme is not important in its own right. On the contrary, given the prohibitive cost of international travel particularly for disadvantaged stakeholders, streamlining communications between physical meetings and remote participants is essential if those meetings are to be adequately inclusive and diverse.

However the second conception of online or digital democracy, termed Internet democracy in Chapter 4, is equally important in broadening participation in the fulfilment of the IGF's mandate, yet has been entirely neglected by the IGF's Secretariat. On this conception, parallel online processes should supplement rather than merely supporting the physical meetings, in order that they might redress some of the limitations inherent in the latter.

11.4.1 e-democracy

Even granted that its approach has been limited to the former conception, the IGF's implementation of e-democratic mechanisms has been as deficient from a deliberative democratic standpoint as its structure and processes are. The four categories of tools for online democratic deliberation discussed in Chapter 4 were those for synchronous and asynchronous discussion, document preparation and decision making.¹⁶⁰ However since the IGF has been structured simply as a discussion forum, without the capacity to fulfil its policy-setting role, the only online mechanisms that have been put in place for the IGF have been those to facilitate discussion; that is, the first two of these categories.

...

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¹⁶⁰See 3.4.1.

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