Minilateralism and Internet Governance

JEREMY MALCOLM

Minilateralism is a neologism reflecting the configuration of overlapping and competitive global and regional governance institutions that characterizes the Internet age. It refers, in a nutshell, to the rise of smaller groupings of states to address problems that increasingly seem to elude the efforts of more inclusive multilateral bodies. Just as the rise of ridesharing companies like Uber has disrupted the established business model of taxi industries around the world, so we can view the advent of minilateralism as offering a nimbler 21st century challenge to moribund 20th century approaches to global governance.

Appropriately then, we might also consider whether minilateralism has anything to offer for governance of the Internet itself, given that there are a number of seemingly intractable Internet governance issues which have not been amenable to resolution by other, more inclusive, means. Could a minilateral approach help to break these deadlocks? Or is Internet governance, in which strong multi-stakeholder process norms apply, thereby separated from other global governance regimes in which multilateralism remains more firmly entrenched, rendering minilateralism the wrong solution?

A.   Defining minilateralism

Before addressing these questions, a few further words of explanation of the term 'minilateralism' and its origin are in order. The term is generally considered to have been coined by Moisés Naím, Editor in Chief of *Foreign Policy*, who in a 2009 article bemoaned how the world was unable to make significant progress on major global issues such as climate change, nuclear proliferation, terrorism and trade protectionism, through the multilateral institutions that had been established to address these issues after World War II. He went on to outline his proposed remedy:

> To start, let's forget about trying to get the planet's nearly 200 countries to agree. We need to abandon that fool's errand in favor of a new idea: minilateralism.

> By minilateralism, I mean a smarter, more targeted approach: We should bring to the table the smallest possible number of countries needed to have the largest possible impact on solving a particular problem. Think of this as minilateralism's magic number.[1]

Thus minilateralism is an eminently pragmatic response to the need to address pressing transnational public policy issues, in an environment where the effectiveness of fully multilateral global governance institutions has broken down and can no longer produce timely results. Evidence of this trend exists across a range of policy domains; for example:

---

[1] Moisés Naím, 'Minilateralism. The Magic Number to Get Real International Action,' *Foreign Policy* (2009), http://www.foreignpolicy.com/articles/2009/06/18/minilateralism.

- Since its establishment by 154 nations at the 1992 Earth Summit, the United Nations Framework Convention on Climate Change (UNFCCC) has failed to secure legally binding obligations on developed and developing countries to reduce their greenhouse gas emissions. In comparison, the smaller 17-member Major Economies Forum on Energy and Climate (MEF), which represents the economies responsible for a majority of global emissions, is considered by experts to have made more tangible progress.[2]

- Central to the success of what became the World Trade Organization (WTO) in the landmark Uruguay Round talks from 1986 to 1994 was its 'Single Undertaking' platform – that 'nothing is agreed until everything is agreed'.[3] But this has also been the impediment to the conclusion of any further rounds of negotiations since then, notably the stalled Doha round that began in 2001.

  In place of further progress at the WTO have been a raft of smaller agreements, which have made much steadier progress – these include the Trans-Pacific Partnership (TPP) between the United States and eleven other Pacific rim states, the Trans-Atlantic Trade and Investment Partnership (TTIP) between the United States and Europe, and the Trade in Services Agreement (TISA) between 50 participants that represent 70 percent of the world's trade in services.

In few of these cases are these smaller coalitions or agreements presented as a replacement for a larger, more inclusive multilateral process; indeed, usually the contrary claim is made. As Naím wrote, 'agreements reached by the small number of countries whose actions are needed to generate real solutions can provide the foundation on which more-inclusive deals can be subsequently built.'[4] Thus for example the announcement of the MEF is self-described as aiming to produce the political leadership to achieve a successful outcome amongst the broader UNFCCC;[5] the TPP is presented by the broader Asia-Pacific Economic Cooperation (APEC) group as a stepping stone towards a future Free Trade Area of the Asia-Pacific;[6] and the stated objective of TISA is to 'achieve an ambitious outcome, compatible with the GATS, that would attract broad participation and that could be multilateralized in the future.'[7]

Another important point to note is that simply being small is not enough to secure the success of a minilateral initiative. Sometimes a body that is already 'smaller-n' (ie. smaller than a 'large-n' multilateral body) can fail because it does not have the *right* participants. In these cases either a smaller or perhaps even a larger group may be required in order to reach the

---

[2]Robyn Eckersley, 'Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?' *Global Environmental Politics* 12, no. 2 (2012), 33.

[3]Robert Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor,' *Journal of International Economic Law* 12, no. 4 (2009), 835–858.

[4]Naím, 'Minilateralism. The Magic Number to Get Real International ActionError: Reference source not found.'

[5]See http://www.majoreconomiesforum.org/about/descriptionpurpose.html.

[6]APEC Policy Support Unit, *The Mutual Usefulness between APEC and TPP* (Singapore: APEC, 2011).

[7]See http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_serv_e.htm.

'magic number' that will be both agile enough to produce results, and contain the right members that those results matter. For example:

- For decades the finance ministers of the Western world took a lead in coordinating the economic and financial policies of the industrialized world through what was, as of 1976, the G7, and became the G8 with Russia's accession in 1997. But when the global financial crisis of 2007-2008 hit, many large economies outside of this select group were seriously affected. The G20, which contained a balance of large developed and developing economies together responsible for about 85% of world trade, quickly responded to the crisis in a way that neither the unrepresentative G8, nor the multilateral International Monetary Fund (IMF) or World Bank could or did.[8]

- The United Nations Security Council has always been a select group of fifteen members, with five permanent seats allocated (for historical but otherwise arbitrary reasons) to Russia, the United Kingdom, the United States, France and China. Whilst a number of important peacekeeping operations have been authorized by the Security Council, particularly in the post-Cold War period,[9] the veto held by its permanent members prevented its from acting in many other cases.

  Most notoriously, in the face of Russia and France threatening to veto a Security Council resolution authorizing the invasion of Iraq, George W Bush announced at the November 2002 meeting of the North Atlantic Treaty Organization (NATO) that 'should Iraqi President Saddam Hussein choose not to disarm, the United States will lead a coalition of the willing to disarm him'; which it indeed proceeded to do the following March.[10]

Thus minilateralism is intended as a workaround for a dysfunctional international system, in which the post-war architecture of global governance has become no longer fit for purpose. It recognizes the practical benefit of smaller-n collaborations or clubs of countries (whether bilateral, trilateral, regional or plurilateral) coming together to address particular public policy issues that are transnational in impact, and that cannot be solved without the cooperation of at least those countries. It is adaptive, shifting its configuration from one issue area to another, in a 'G-Zero world' in which no single power or group of powers has global leadership.[11]

Whilst a world of overlapping issue-specific or region-specific minilateral fora is not as 'clean' as a world in which a single multilateral forum holds sway in a given area of global public policy, the argument that making some progress towards addressing pressing public policy issues through minilateral fora is better than remaining at an impasse in multilateral fora, is at

---

[8]G S Smith, 'G7 to G8 to G20: Evolution in Global Governance,' *CIGI G20 Papers* 6 (2011).

[9]David Malone, *The UN Security Council: from the Cold War to the 21st Century* (Boulder, Colo.: Lynne Rienner, 2004).

[10]John Yoo, 'International Law and the War in Iraq,' *American Journal of International Law* (2003), 563–576.

[11]Ian Bremmer, *Every Nation for Itself: Winners and Losers in a G-Zero World* (New York: Portfolio/Penguin, 2012).

least superficially quite compelling.

B.   Multilateralism in Internet governance

How does this concept relate to Internet governance? The need for international cooperation, at least, is the same. One of the most noteworthy and earliest multilateral Internet governance institutions (not overlooking the ITU, which will be referred to below) was the World Summit on the Information Society (WSIS), which was convened in 2003 partly in recognition that

> the Information Society is intrinsically global in nature and national efforts need to be supported by effective international and regional cooperation among governments, the private sector, civil society and other stakeholders[12]

A few of the notable issues on which the international community has called for such cooperation include:

• Cybersecurity

   The First Committee of the United Nations General Assembly on on Disarmament and International Security began addressing the issue of cybersecurity back in 1998 when the first resolution on 'Developments in the field of information and telecommunications in the context of international security' was introduced by the Russian Federation.[13] Since then there have been ongoing calls – heightened following the Estonian cyber-attacks of 2007 – for the development of an international treaty for the control of cyber weapons.[14]

• Child online protection

   If security is one issue often used to illustrate the need for international cooperation online, then online child protection is another – and on this topic a good number of states (121, as of October 2014) are signatories to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography adopted on 25 May 2000, which requires states to criminalise the dissemination of child pornography, including by online means.

• Internet naming and numbering

   Although a less emotive issue (for some), longstanding calls for the globalisation of the oversight of Internet naming and numbering functions came to a head last year with the commencement of a process for the transition of those functions from the National Telecommunications & Information Administration of the United States

---

[12] W S I S ,   ' D e c l a r a t i o n   o f   P r i n c i p l e s '   (2 0 0 3) , http://www.itu.int/wsis/docs/geneva/official/dop.html, para. 60.

[13] See http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/53/70.

[14] Edward M Roche, 'International Convention for the Peaceful Use of Cyberspace,' *Orbis* 58, no. 2 (2014), 282–296.

Department of Commerce (NTIA) to a global community.[15]

- Intellectual property

The World Intellectual Property Organisation (WIPO) established its so-called Internet Treaties as early as 1996, when the commercial Internet was in its relative infancy, on the basis of a perceived

> need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments.[16]

Cutting across the above issue spaces (and others), the Internet & Jurisdiction Project was established in 2012 aiming towards the elaboration of a transnational due process framework to handle the digital coexistence of diverse national laws in shared cross-border online spaces.[17] So there has been no paucity of recognition of issues that affect the governance of the Internet, and which call for international cooperation.

But if the need for global cooperation on particular topics affecting Internet governance is broadly accepted, and parallels the need for such cooperation in other global governance domains, so too does the increasing failure of large-n multilateral bodies to adequately meet that need. The work of the First Committee on cybersecurity referenced above, for example, has gone nowhere fast, principally due to a deep division on the topic between Russia and the United States on the need for an international instrument addressing the topic.[18] The most recent follow-on resolution of the General Assembly[19] merely affirms the mandate of a smaller Group of Governmental Experts 'to continue to study, with a view to promoting common understandings, existing and potential threats in the sphere of information security and possible cooperative measures to address them'.

A more vivid illustration of the paralysis of multilateral bodies on Internet governance issues is the fate of the International Telecommunication Regulations (ITRs) at the most recent World Conference on International Telecommunications (WCIT) in 2012. Following a concerted campaign of developed countries, Internet companies and some civil society groups against any extension of the authority of the multilateral International Telecommunications Union (ITU) over the Internet, 55 ITU member states were persuaded that the new ITR revision would do exactly that, and voted against accepting the new text. They were divided

---

[15]For some, this too could once have been a subject for treaty law, though today that is very unlikely: David Drissel, 'Internet Governance in a Multipolar World: Challenging American Hegemony,' *Cambridge Review of International Affairs* 19, no. 1 (2006), 116.

[16]WIPO Copyright Treaty, 20 Dec 1996.

[17]See http://www.internetjurisdiction.net/.

[18]Tim Maurer, *Cyber Norm Emergence at the United Nations – An Analysis of the UN's Activities Regarding Cyber-security*, (Cambridge, MA: Belfer Center for Science and International Affairs, 2011), 20.

[19]See http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/243.

against the other 89 member states who supported the new revision, resulting in an unprecedented failure to accept the new ITRs by consensus.[20]

This does not mean that there is no remaining role for multilateralism in Internet governance. Where the First Committee has stalled, others of the six Committees of the UN General Assembly have made some progress on issues within their respective remits. Notably the Second Committee has had oversight of the continuation of the WSIS process, and initiated the December 2015 high-level WSIS+10 meeting at which the mandate of the Internet Governance Forum (IGF) was renewed, whilst the Third Committee has issued substantive resolutions on human rights and free expression online (including a landmark resolution on 'The right to privacy in the digital age' during the sixty-eighth session in 2013[21]), supporting resolutions made by the smaller United Nations Human Rights Council.[22]

But such non-binding resolutions aside, multilateral rulemaking has not generally been a successful mechanism for the governance of the Internet. In part, this is for the same reason that has accounted for the rise of minilateralism in other domains: that there is simply too little common ground amongst the world's 196 countries on most Internet governance issues for an inclusive multilateral accord to be reached. As Stewart puts it,

> No single UN treaty could simultaneously regulate cyberwarfare, counter cybercrime, and protect the civil liberties of Internet users. Liberal and authoritarian regimes disagree on the definition of 'cybersecurity' and how to achieve it, with the latter generally seeing the free exchange of ideas and information not as a core value but as a potential threat to their stability, and there are various practical hurdles to including cyberweapons in traditional arms control and nonproliferation negotiations. So a piecemeal approach to governance in cyberspace seems more realistic.[23]

But since WSIS, there is also another reason for the failure of multilateralism in Internet governance that is more peculiar to that particular domain: that multilateralism – large n or otherwise – is not accepted as a legitimate process for Internet governance policy development in most issue areas, and that multi-stakeholder policy development is normatively preferred.[24] As we will see, the success of various minilateral Internet governance

---

[20]Arguably this failure again largely reflects differences between the United States and its allies on the one hand, and other rising world powers on the other, on the desirability of the use of treaty instruments in Internet governance, more so than the actual content of the instrument proposed (Richard Hill, 'WCIT: failure or success, impasse or way forward?' *I. J. Law and Information Technology* [2013], 313–328).

[21]See http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/167.

[22]Such as on 'The promotion, protection and enjoyment of human rights on the Internet' (A/HRC/RES/26/13), at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/13.

[23]Patrick Stewart, 'The Unruled World,' *Foreign Affairs* (2013), http://www.foreignaffairs.com/articles/140343/stewart-patrick/the-unruled-world.

[24]For example the United States Congress last year affirmed its policy 'to preserve and advance the successful multi-stakeholder model that governs the Internet' (Bill HR 1580 – To affirm the policy of the United States regarding Internet governance, available at https://www.congress.gov/bill/113th-congress/house-bill/1580), and the OECD in 2011 agreed

initiatives has therefore been rather dependent on how they address not only one, but both of the deficits of inclusive multilateral approaches.

C.   Minilateralism in Internet governance

It has been seen that there are a number of Internet policy issues that require international cooperation for their effective governance, but where a fully multilateral approach towards doing so has been ineffective. This suggests that we might look to minilateralism, given that it has been touted as especially useful for the governance of a global commons,[25] which the Internet has often been described as being.[26] At least on one account the use of soft law is also a defining feature of minilateral arrangements,[27] and this too is also characteristic of the Internet governance regime where hard law has generally been shunned in favour of softer mechanisms of governance.[28]

Thus Internet governance appears to be a good candidate for minilateral arrangements. If this is so, how many states should be a part of those arrangements? Or to rephrase the question using the language used by Moisés Naím in his seminal article on minilateralism, what is the 'magic number' of states to address Internet governance problems?

Since Internet governance is not a single issue area but a broad domain that includes a range of issues ranging from resource allocation, to content regulation, to international security, no simple answer can be given. The magic number will depend upon the issue area concerned, which in turn requires an individual analysis of the interests of each state in the topics in dispute in that area. It will also depend upon what tools the minilateral arrangement is aiming to employ: if soft law, then in general more participants can be included without overburdening the process. If the desired outcome is hard law, then fewer participants can be supported before straining its effectiveness.

These principles can be seen these in practice when we turn to look at how minilateral arrangements have actually been employed in the Internet governance regime. Here we will consider as examples three issue areas in which minilateral groupings of states have emerged: cybercrime and cybersecurity, intellectual property, and so-called Internet freedom.

---

to 'encourage multi-stakeholder co-operation in policy development processes' (OECD, 'Communiqué on Principles for Internet Policy-Making' (2011), http://www.oecd.org/dataoecd/40/21/48289796.pdf).

[25]Stewart, 'The Unruled WorldError: Reference source not found.'

[26]Mark Raymond, 'The Internet as a Global Commons?' (2012), http://www.cigionline.org/publications/2012/10/internet-global-commons.

[27]Chris Brummer, *Minilateralism: How Trade Alliances, Soft Law, and Financial Engineering are Redefining Economic Statecraft* (New York: Cambridge University Press, 2014), 18.

[28]These include the private contractual arrangements utilised by ICANN, the non-binding standards of the IETF and W3C, and statements of norms such as the NETmundial Multistakeholder Statement, which was the outcome of the Global Multistakeholder Meeting on the Future of Internet Governance held in São Paulo on 23-24 April 2014.

In the case of cybercrime and cybersecurity, mention must be first made of the Council of Europe's Convention on Cybercrime, which was opened for signature in 2001. The Convention was developed ostensibly to harmonise laws dealing with computer-related crimes, and to improve the effectiveness of international coordination in the investigation and prosecution of such crimes. But Weber argues that

> The Convention on Cybercrime is best understood as a potential tool for establishing a hegemony in Internet regulation and exporting that hegemonic regulatory scheme to the rest of the world, rather than as an effort to harmonize the cybercrime laws of current members of the Convention.[29]

As noted earlier in the introduction of minilateralism, and will be seen again below when turning to the area of intellectual property, this phenomenon – where a core group coalesces around a shared value, with the objective of accreting additional supporters over time – is very common in minilateral arrangements. Since an important objective here is to build a global enforcement network, the interests of the participants are well served if a relatively high number of their peers participate. Balanced against this, the need to develop a hard law treaty points towards beginning with a relatively small group of core states. Thus the magic number in this instance currently stands at 43, being those who have ratified the Cybercrime Convention as of October 2014, including six non-members of the Council of Europe.

In the field of international cybersecurity, perhaps by analogy to the UN Security Council, we might imagine that the participation of a smaller number of states is key. Thus we have seen initiatives such as the NATO Cooperative Cyber Defence Centre of Excellence, which currently has fifteen participants[30] – though since it does not produce hard law outcomes, perhaps an even lower number of states would be the 'magic number' for a cybersecurity treaty. Given that one key division is that between between the United States and Russia is indeed on the very question of the need for such a treaty, Prakash and Baruah have suggested that this may result in that issue devolving to a bilateral agreement between those very two countries – or a trilateral agreement, adding China. They write:

> This 'G3' mechanism, which may be along the lines of conventional arms control regimes, can have implications on the rest of the international community. Without an alternative, the international community may have to adhere to these rules. Despite the sharp differences and divergent interests of the three parties, such a scenario is possible. The Arms Trade Treaty is an example where alignment of interests of a few nations has led to the creation of a legally binding document accepted by most of the international community.[31]

What about in the case of intellectual property (IP)? Here, as with cybercrime, there is an interest particularly of states who are net IP exporters (notably the United States and Japan) to

---

[29]Amalie M Weber, 'The Council of Europe's Convention on Cybercrime,' *Berkeley Tech. L.J.* 18 (2003), 445-446.

[30]See http://ccdcoe.org/about-us.html.

[31]Rahul Prakash and Darshana M Baruah, 'The UN and Cyberspace Governance,' *ORF Issue Brief* 68 (2014), 6-7.

have as many other countries as possible support their initiatives, balanced against the known antagonism of developing countries towards these aspirations, that could thwart a multilateral accord. This tension has been very clearly evident in recent years, bringing multilateral negotiations at the World Intellectual Property Organisation (WIPO) to a WTO-like standstill, vividly illustrated by the almost complete failure of its 41st General Assembly held in 2014 to make progress on any substantive issues.[32]

The paralysis at WIPO has been addressed through a range of minilateral initiatives some of which, like the Cybercrime Convention, follow the pattern of initiating a 'docking agreement' between a small number of partners, to which additional partners are later encouraged to join. A good example is the Anti-Counterfeiting Trade Agreement (ACTA), which was announced in 2007 by the United States and Japan, and which also counted the European Union, Canada, Mexico, New Zealand, South Korea, and Switzerland as its initial partners.[33] By the time negotiations were completed in 2011 Australia, Morocco and Singapore had also joined ACTA, though ultimately it failed to reach the threshold of ratifications that it required to take effect, largely due to an effective international civil society campaign against the agreement.

The United States had stated explicitly that 'the goal is to set a new, higher benchmark for [intellectual property] enforcement that countries can join on a voluntary basis.'[34] Even more frankly the European Commission explained in an informal Q&A document:

> The EU considers that the approach of a free-standing agreement gives us the most flexibility to pursue this project among interested countries. We fully support the important work of the G8, WTO, and WIPO, all of which touch on IPR enforcement. The membership and priorities of those organizations simply are not the most conducive to this kind of path breaking project.[35]

Thus ACTA is almost a paradigm example of minilateralism – the United States even

---

[32]The response of the International Federation of Library Associations and Institutions (IFLA) was to ask rhetorically (but very pointedly for present purposes), 'Is it still possible to work successfully on copyright issues in a multilateral forum in an age of closed-door bilateral and trade agreements?' (IFLA, 'Libraries and archives leave international copyright discussions empty handed after countries again fail to reach agreement,' (2014), http://www.ifla.org/node/8759). Beyond anecdotal observation, WIPO's governance problems were also recently the subject of a 2014 UN Joint Inspection Unit (JIU) report on WIPO's Management and Administration (Gennady Tarasov and Jorge Flores Callejas, 'Review of Management and Administration in the World Intellectual Property Organization,' (2014), http://www.unjiu.org/en/reports-notes/JIU%Products/JIU_REP_2014_2_%20English.pdf, 5-8).

[33]Peter K. Yu, 'Six Secret (and Now Open) Fears of ACTA,' *Southern Methodist University Law Review* 63 (2010), 4-7, http://ssrn.com/paper=1624813.

[34]United States Trade Representative, 'Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes,' (2007), http://www.ustr.gov/ambassador-schwab-announces-us-will-seek-new-trade-agreement-fight-fakes.

[35]European Commission, 'Q&As on the Anti-Counterfeiting Trade Agreement (ACTA),' (2009), http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142040.pdf.

described it in similar terms, as a 'plurilateral' rather than a 'multilateral' agreement.[36] The TPP, referred to in the introduction above, also contains a chapter on intellectual property, and has been pursued on a similar basis to ACTA, having already expanded from an original group of four negotiating countries into a current partnership of twelve. ACTA and (adjusting for its regional focus) the TPP are of comparable size to the 'Group B' bloc of industrialised countries at WIPO, and may be an approximation of the magic number for effective minilateral discussions around intellectual property that are directed towards a hard law outcome.

Moving to our final example are minilateral initiatives to advance the cause of 'Internet freedom'. This inexact phrase typically denotes the division between states that promote a decentralised, multi-stakeholder model of Internet governance guided by loose principles such as respect for universal human rights, and states that advocate for more traditional intergovernmental arrangements for Internet governance. The states who supported and those who rejected the revised International Telecommunication Regulations at the 2012 ITU WCIT have been characterised (although simplistically) as representing each side of this divide.[37] Recalling that there were 55 states that rejected the new ITRs, this roughly circumscribes the extent of membership of a minilateral initiative for the promotion of Internet freedom.

The clearest example of a minilateral initiative to advance Internet freedom is probably the Freedom Online Coalition, a partnership of 23 governments who commit to the principle that the human rights people have offline are the same online, and who engage in a range of joint activities – often in partnership with non-governmental stakeholders – in pursuit of this principle.[38] Although it does not produce hard law outcomes, members have recently reached consensus on a soft law recommendation, the Tallinn Recommendations for Freedom Online.[39] Such a recommendation would probably not have so easily issued from a more inclusive institution such as the ITU, or (assuming it had the institutional capacity to do so[40]) the IGF.

Other select groupings of states, often regional in focus, have also come together from time to time to issue soft law recommendations, declarations or statements or principles on Internet governance – these include the G8, the IBSA Trilateral, the OECD, the Council of Europe and

---

[36]Charles R. McManis, 'The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty,' *Houston Law Review* 46, no. 4 (2009), 1236, fn 3, http://www.houstonlawreview.org/archive/downloads/46-4_pdf/6_McManis.pdf.

[37]Alexander Klimburg, 'The Internet Yalta,' (2013), http://dragon-report.com/Dragon_Report/Home/HOME_files/The%20Internet%20Yalta.pdf.

[38]See https://www.freedomonlinecoalition.com/.

[39]See https://www.freedomonlinecoalition.com/wp-content/uploads/2014/04/FOC-recommendations-consensus.pdf.

[40]Jeremy Malcolm, 'A Perspective from Civil Society,' in William J Drake and Monroe Price (eds.) *Beyond NETmundial: The Roadmap for Institutional Improvements to the Global Internet Governance Ecosystem* (Philadelphia: Centre for Global Communication Studies, 2014), 38.

the European Commission.[41] Whilst the proliferation of these competing visions may seem 'untidy', they have emerged in very same minilateral spirit that stimulated similar profusion in other issue areas such as global trade. They are a relatively fast, lost cost and low-friction stepping stone to what may become broader agreements in the future – or if not, they are a pragmatic concession to the fact that in particularly contentious areas of global public policy, reaching an agreement between a few willing states may be as good as it gets.

D.   Minilateralism and multi-stakeholderism

So much is clear – that minilateralism, in the Internet governance domain as in any other, is a concession to pragmatism in a world where multilateralism has become too hard. But on the other hand, surely the structures of global governance ought not to be determined by what is most expedient, but rather by what is most just. After all, under the United Nations Charter, all countries are supposedly committed 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. A first precept of multilateralism is that all sovereign states are equal, and that international governance is most legitimately exercised by consensus between all of them.

To the extent that minilateralism allows some countries to purport to establish rules for the world, through force of their economic and political power, is this anything other than naked hegemony? Evidence of this hegemonic influence in the exportation of minilateral norms is not difficult to find. For example, the United States and Great Britain were founding members of the 1988 Basel Accord, a minilateral arrangement concluded by central bank regulators, without any parliamentary mandate or reporting. Japan at first refused to meet the same standards, threatening the effectiveness of the arrangement. It took strong bilateral pressure applied by the founding countries upon Japan before the latter was finally forced to join the Accord.[42]

The realist would answer that this kind of global hegemony is nothing new, and the liberal may go further and attempt to justify it. There have long been calls for narrower groupings of democracies that would take a lead in global affairs, such as an 'Alliance of Democratic States', which would quite self-righteously discriminate between states based on their internal political organisation:

> The idea of sovereign equality reflected a conscious decision governments made 60 years ago that they would be better off if they repudiated the right to meddle in the internal affairs of others. That choice no longer makes sense. In an era of rapid globalization, internal developments in distant states affect our own well-being, even our security.[43]

[41]Jeremy Malcolm, 'Arresting the Decline of Multi-Stakeholderism in Internet Governance,' in Jeremy Malcolm (ed) *Consumers in the Information Society: Access, Fairness and Representation* (Kuala Lumpur: Consumers International, 2012), 167-172.

[42]Brummer, *Minilateralism: How Trade Alliances, Soft Law, and Financial Engineering are Redefining Economic Statecraft*, 101.

[43]Ivo Daalder and James Lindsay, 'An Alliance of Democracies,' (2004),

Such groupings indeed already exist. What else, other than an alliance of Western liberal democratic states with designs to lead the world, is the G8, for example?

Yet for others, the exclusion of non-participants from minilateral arrangements is indeed a significant weakness that affects the legitimacy of that mode of ordering.[44] This is especially so when considering that it most often tends to be developing countries who are the non-participants or regime-takers, and the developed countries the regime-makers. Developing countries argue, with justification, that minilateral initiatives driven by developed countries are often self-serving and elitist, serving only to perpetuate existing wealth and power divides.[45]

In response, Eckersley has defined a more equitable variant of minilateralism based on ensuring that the composition of any minilateral body would meet standards of 'common but differentiated representation'. In the specific area that she examines, which is climate change, she proposes a Climate Council that would make recommendations to the Conference of the Parties (COP) of the UNFCCC. The Council would include representation by the most capable states (generally, the leading developed economies), the most responsible states (those causing the greatest volume of emissions), and the most vulnerable states (those who are most at risk from the effects of climate change).[46]

More generally, the underlying concept that Eckersley presents draws on Habermasian discursive or communicative justice theory, which holds that:

> wider and more diverse representation is always better because it will enable a greater range of standpoints and discourses to be aired, provide a better chance of producing decisions that promote generalisable rather than self-serving interests and therefore ensure the autonomy of the many rather than the few.[47]

The fact that the same theory has been used in support of multi-stakeholder governance as a normative procedural standard for the Internet governance regime[48] points to an interesting

---

http://www.brookings.edu/research/opinions/2004/05/23globalgovernance-daalder.

[44]Brummer, *Minilateralism: How Trade Alliances, Soft Law, and Financial Engineering are Redefining Economic Statecraft*, 169-173.

[45]During a meeting at the World Trade Organisation in 2010, for example, Brazil voiced its opposition to the ACTA negotiations by stating:

> Brazil favors multilateralism and multilateral solutions. In intellectual property matters, multilateral fora that have the legitimate credentials are the WTO and WIPO, whose deliberations are not only open to more than 140 member countries, but are also conducted in as transparent a way as possible, including representatives from civil society and NGOs. (Thiru Balasubramaniam, 'Brazilian intervention at TRIPS Council: ACTA,' (2010), http://keionline.org/node/999)

[46]Eckersley, 'Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?, 15.

[47]Eckersley, 'Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?, 5.

[48]A Michael Froomkin, 'Habermas@discourse.net: Toward a Critical Theory of Cyberspace,'

convergence between Eckersley's 'inclusive minilateralism' and the idealised models of multi-stakeholder Internet governance expressed in instruments such as the Tunis Agenda for the Information Society[49] and the NETmundial Multistakeholder Statement.[50] The latter provides:

> Internet governance should be built on democratic, multistakeholder processes, ensuring the meaningful and accountable participation of all stakeholders, including governments, the private sector, civil society, the technical community, the academic community and users. The respective roles and responsibilities of stakeholders should be interpreted in a flexible manner with reference to the issue under discussion.

This Statement, consistent with the discursive justice model, recognises the need for involvement of all affected stakeholder groups ('[a]nyone affected by an Internet governance process', as a later paragraph puts it). Where it falls down is that whereas it acknowledges that civil society and the private sector may be further divided into smaller, sometimes cross-cutting constituencies (namely the technical and academic communities), governments are still treated a unitary stakeholder group, when very clearly, in certain issue areas, they may not be.

Nonetheless the NETmundial Statement is flexible enough to accommodate a more nuanced understanding of the involvement of governments as stakeholders in multi-stakeholder processes, in its acknowledgement that there is no fixed list of stakeholder groups who must be involved across all issues under discussion (the reference to 'all stakeholders, including…'), and that neither are there fixed roles and responsibilities that those stakeholders ought always to carry in those discussions. A gloss on the NETmundial definition that allows for governmental stakeholders to be divided into separate constituencies where necessary renders this model of multi-stakeholderism fully consistent with the ideals of inclusive minilateralism espoused by Eckersley.

Notably, this formulation of multi-stakeholderism does not require that *everyone* be represented in Internet governance processes; just *anyone affected*. This is why, for example, only the affected government needs to have a say in decisions relating to the administration of its own country code top level domain,[51] and why the absence of governments altogether from technical standards processes does not undermine their legitimacy.[52] After all, multi-stakeholderism ultimately derives from much more fundamental norms of democratic

---

Harv LR 116 (2003), 444-449; Jeremy Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum* (Perth: Terminus Press, 2008), 444-449.

[49] WSIS, 'Tunis Agenda for the Information Society,' (2005), http://www.itu.int/wsis/docs2/tunis/off/6rev1.html, para. 35.

[50] See http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf, along with other similar expressions expressions of multi-stakeholder process principles by the bodies cited in the final paragraph of the preceding section.

[51] Tunis Agenda, para. 63

[52] Per paragraph 69 of the Tunis Agenda, governments do not have a role 'in the day-to-day technical and operational matters, that do not impact on international public policy issues'.

representation – that those affected by a decision are those who ought to have a say in it.[53] And unlike in a representative democracy where everyone is entitled to be represented, in a discursive (or deliberative) democratic forum, it is more important that all affected perspectives are represented, rather than all affected individuals.[54]

Inclusive minilateralism is distinguished from multilateralism in much the same way as multi-stakeholder discursive democracy from representative democracy – in that it requires only that the perspectives of those whose interests are significantly affected be represented in the dialogue; not that all the world's 196 countries be so represented. In other words, if minilateralism is 'the smallest possible number of countries needed to have the largest possible impact on solving a particular problem', then minilateral multi-stakeholderism is *the smallest possible number of stakeholders that include the perspectives of all those responsible for, significantly affected by, or capable of solving a particular problem* – and who together have the largest possible shared interest in addressing it.

How might this play out in practice in the Internet governance regime? In some issue areas, it might be that new multi-stakeholder minilateral bodies or working groups could be formed to tackle emerging or disputed issues. In a written submission to the NETmundial meeting, members of the Best Bits civil society coalition wrote:

> For some specific issues that are not being adequately addressed in the current framework we propose that these should be resolved through ad hoc multi-stakeholder working groups developed on a case by case basis, bringing together relevant actors. The above-mentioned co-ordinating function would aid stakeholders in identifying gaps in the current framework so that ad hoc working groups would only be formed when there is an actual need and help forge collaboration between existing institutions and disband once the issue is addressed.

> These groups could, but not necessarily, work within the IGF framework or through flexible, open and inclusive processes and that are consistent with the guiding principles outlined above. Innovative methodologies of broad consultation and participation could be looked into as alternatives when necessary.[55]

In other areas, it may be that rather than creating a new body or working group, an existing multilateral body could make use of a smaller minilateral council, analogous to Eckersley's proposal for a Climate Council within the COP of the UNFCCC. An example of this is the present author's proposal that the Internet Governance Forum be augmented by the addition of a Multi-stakeholder Internet Policy Council, that would be sufficiently small yet sufficiently inclusive that it could efficiently develop soft law recommendations by consensus,

---

[53]Robert Dahl, *Democracy and its Critics* (New Haven, CT: Yale University Press, 1989), 129.

[54]Malcolm, *Multi-Stakeholder Governance and the Internet Governance ForumError: Reference source not found*, 249-250.

[55]See http://bestbits.net/netmundial-roadmap/.

through a deliberative democratic process.[56]

Indeed, the permutations for operationalising multi-stakeholder minilateralism are endless. But they are not completely novel. Outside of the Internet governance regime there are enough other examples of multi-stakeholder minilateral bodies to suggest that this form of governance may indeed by a workable way forward in a world where state-based multilateralism has stumbled.

The Joint United Nations Programme on HIV/AIDS (UNAIDS), for example, is guided by a multi-stakeholder Programme Coordinating Board consisting of representatives of 22 governments (including those most affected by HIV/AIDS as well as those best placed to dedicate resources to its eradication), 11 specialist bodies of the United Nations, and 5 representatives of civil society organisations.[57] By integrating civil society representatives into the organisation's governing organ, UNAIDS actually goes further than minilateral Internet governance bodies, such as the Freedom Online Coalition, in which civil society representatives generally exercise a consultative role only.

This is not to say that UNAIDS offers a perfect model. The NETmundial Statement requires that the selection of participants in multi-stakeholder Internet governance processes should be open, democratic, and transparent, allowing stakeholder groups to self-manage their selection processes based on inclusive, publicly known, well defined and accountable mechanisms. The civil society participants in the UNAIDS initiative are not so selected. Nonetheless, such institutional innovations point the way towards the development of future multi-stakeholder minilateral bodies which more perfectly accord with the expectations of stakeholders as encapsulated in the NETmundial Statement.

E.   Conclusion

This chapter opened by asking whether minilateralism might offer a way of breaking deadlocks that exist over a number of intractable Internet governance issues which have not been otherwise capable of resolution. For example, would a hand-picked group of states be able to produce a solution to contested questions of cybersecurity, where more inclusive multilateral institutions have failed? Or is this simply the wrong approach, because of the imperative that Internet governance be conducted on a multi-stakeholder basis?

The answer is yes on both counts. Initiatives that are restricted by design to a limited number of states are, *ipso facto*, much more likely to produce agreement than those conducted on an inclusive multilateral basis. But equally, if they exclude any of those who have a significant interest in their subject matter, this will contravene the democratic underpinnings of multi-stakeholderism to which a broad range of governmental and non-governmental stakeholders in the Internet governance regime have made a normative commitment.

---

[56]Malcolm, 'A Perspective from Civil SocietyError: Reference source not found,' 46.

[57]See http://www.unaids.org/en/media/unaids/contentassets/documents/pcb/2014/PCB_Members_2 3April2014_en.1.pdf.

The results of minilateral initiatives that exclude either particular affected countries, or indeed other affected stakeholder groups such as civil society, will not carry weight amongst those stakeholders who subscribe to these multi-stakeholder process norms. The ultimate rejection of ACTA at the European Parliament, in the wake of street protests involving thousands of citizens, provides ample evidence of this if any were needed.[58]

On the other hand there may be scope for the Internet governance regime to accommodate a softer 'inclusive minilateralism' whose participants are not simply selected on the basis of political expediency, but rather with a view to including the viewpoints of all of those who are significantly affected, and no more – including, crucially, not only all affected governments, but also all affected non-governmental stakeholder groups. Such groupings need not include all individual governments – this is a point well taken from minilateralism. It can also be taken from the NETmundial Statement that they may not include all of the same stakeholder groups, and that those stakeholder groups will not always bear the same roles and responsibilities from one issue area to another.

Such a model of minilateral multi-stakeholderism combines the flexibility of minilateralism with the procedural justice of multi-stakeholderism. It also currently lacks a paradigm example. Going forward we can expect that if minilateral arrangements are to figure more prominently in the overall Internet governance ecosystem, it will be under a different and more inclusive model than those we have seen to date. Whilst these are still early days in the development of global Internet governance arrangements, researchers and policy advocates can play an important role in guiding the evolution of those arrangements by demonstrating both the conceptual as well as the political deficits in existing minilateral arrangements – such as ACTA and the TPP – that fall within the Internet governance regime yet fail to meet stakeholders' normative expectations.

---

[58]Kimberlee G. Weatherall, 'Three Lessons from ACTA and Its Political Aftermath,' *Suffolk Transnat'l L. Rev. 575* 35 (2012), 575.