STAKES ARE HIGH:

Essays on Brazil and the Future of the Global Internet

Edited by: Ellery Roberts Biddle, Ronaldo Lemos, and Monroe Price

With essays from Markus Kummer, Wolfgang Schulz, Markus Beckedahl, Juliana Nolasco, Richard Hill, Ronaldo Lemos, and Ellery Biddle

CENTER FOR **GLOBAL COMMUNICATION STUDIES**

INTERNET POLICY OBSERVATORY

Annenberg SCHOOL FOR COMMUNICATION UNIVERSITY *of* PENNSYLVANIA

Stakes are High: Essays on Brazil and the Future of the Global Internet

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The Internet Policy Observatory (IPO) is a program tasked with researching the dynamic

technological and political contexts in which internet governance debates take place. The IPO serves serve as a platform for informing relevant communities of activists, academics, and policy makers, displaying collected data and analysis. The Observatory encourages and sponsors research and studies ongoing events, key decisions and proposals, on Internet policy.

The IPO seeks to deepen understanding of the following:

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- The legal, political, economic, international and social factors that influence the implementation, or

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- The relationship between national efforts and international policy formations;
- The role of civil society in domestic Internet policy processes and control.

To learn more about the project or to inquire about research collaborations with the IPO, please visit globalnetpolicy. org or email internetpolicy@asc.upenn.edu.

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Introduction

By Monroe Price

This workbook is designed to help the gathering multitude, as they converge on São Paulo, further understand the stakes involved in NETmundial. For many, these stakes include the future of the internet—a relatively recent phenomenon that has fundamentally changed the structure of speech, altered the power of states, disrupted long-standing institutions, and provided new opportunities for creativity, commerce, education, and innovation.

The internet is young, ubiquitous, full of further promise, and a proven agent of social change. It is a miracle of both governance and non-governance. The challenge is to determine, against all odds, whether this apparent miracle can be sustained—whether the miracle, if it exists, can be more broadly extended and the internet's benefits more widely distributed. But the internet is not only a miracle; it is a riddle, a riddle of contested jurisdiction, both universal and sovereign. As far as governance issues are considered, the principles that could be said to be "universal" in terms of guiding the internet's growth, and how these principles should be determined, are among the difficult issues facing participants at the NETmundial conference.

One of the goals of NETmundial is to demonstrate that multistakeholder discussions can end in concrete achievable goals or steps— showing that summits do not just lead to fora and fora to regional conclaves. In part, NETmundial is the product of impatience, impatience with digital division, impatience with the continuation of what were once thought to be provisional arrangements, and impatience and anger at existing practices of surveillance and vast compromises of privacy. But there will also be those who consider the virtues of inertia where it is not clear what the consequences of particular changes might be.

The way in which NETmundial works to help establish universal principles and a roadmap for governance is ambitious both in substance and in process. It occurs at a historical junction—one where the very geopolitics of internet governance are at issue; and the geopolitics of the internet overlap with major changes, if it can quaintly be put this way, outside the internet. Questions of hegemony and control mix with philosophies of participation. NETmundial is, therefore, a complex effort to redefine and redesign what constitutes legitimacy, favoring one set of efforts or recommendations as "law" or "universal."

What provides legitimacy to one group of universal principles rather than another? On the one hand, it is the intrinsic merit of the principles. Do they capture and refine an otherwise tangled set of conflicting interests? Has the final document produced a serviceable consensus while recognizing that not every issue can suitably be addressed? And while there may be a rough consensus of those around the table, what of those who do not agree? Consensus is made easier when dissonant and dissident voices are at bay. This is always a danger, but its magnitude will be seen through a rear view mirror.

In this sense, part of the challenge is negotiating between concrete clarity and the comforting envelope of vagueness and generality. Broad cushions can smother difference. Here too finding the right balance is tricky. For example, how should the commitment to human rights be articulated? Of course, considerations of privacy should prevail, but naming the circumstances that define privacy and when it can be waived will be sometimes required.

Legitimacy arises from the substance of what is presented, but it also arises from process. Legitimacy within a state can be achieved through parliamentary action or the ukase of a leader. But legitimacy in an international domain is far more difficult to define. Legitimacy often comes from treaty or decisions between leaders. Here is where NETmundial becomes so interesting and important. Because NETmundial is part of a long and painful effort to rethink models of involvement and because the value of that effort is being challenged, how *process* emerges from São Paulo is of great significance.

So many deliberate and careful efforts have been undertaken in the run-up to this meeting: the struggle to pass and make into law the Marco Civil—a turning

point for lawmaking in Brazil and a robust potential model for other countries to follow; innovative steps at ICANN; the establishment of a calculated organizing committee with the desire to represent multistakehold-erism in a new way. All of this and more constitutes steps to bolster the event's legitimacy.

In this workbook, we have tried to provide some back-ground to NETmundial, including the history of the meeting and the Marco Civil process in Brazil; some background on the environment in Germany—with particular attention to the link between the meeting and the Snowden case; questions of legitimacy surround-ing open processes for lawmaking; and comments on the material presented to the organizing committee by official and unofficial commenters.

This workbook is a project of the Internet Policy Obser-vatory at the Annenberg School for Communication at the University of Pennsylvania. A steering committee included Ellery Roberts Biddle of Global Voices, Ronaldo Lemos of the Rio Institute for Technology and Society, and Monroe Price of Annenberg. They were assisted by Laura Schwartz Henderson, Briar Smith, and Alexandra Esenler. Funding for the Observatory and this project comes from the Annenberg School and a grant from the United States Department of State.

Monroe Price is director of the University of Penn-sylvania's Center for Global Communication Studies (CGCS) at the Annenberg School for Communication, where he works with a wide transnational network of regulators, scholars, and practitioners in Europe, Africa, Latin America, and Asia, as well as in the United States. Price also founded the Programme in Comparative Media Law and Policy at Oxford Uni-versity and remains a research fellow there. He also chairs the Center for Media and Communications Studies at Central European University.

Enter Brazil: NETmundial and the Effort to Rethink Internet Governance

By Ronaldo Lemos

In 2014, the World Wide Web celebrates its 25th birthday. So far, it has proven a momentous year for the web. On March 14, the United States Government announced that it would transition the IANA contract to ICANN by a deadline of September 2015. On March 25, the Brazilian House of Representatives passed the "Marco Civil da Internet," a piece of legislation that Sir Tim Berners-Lee hailed as an example of how to answer his call for creating a "Magna Carta" for the internet. Brazil is the first country in the world to heed that call: The Marco Civil effectively creates a bill of rights for the Brazilian internet, a first for the world.

Brazil's announcement of hosting the NETmundial meeting could not be timelier. This short essay describes the NETmundial meeting, provides some context for the event, and speculates on what it could achieve.

The Forces Behind NETmundial

As the other essays in this compilation demonstrate, there are several internet governance processes currently in place. I do not aim to describe them here – researchers Deborah Brown, Joana Varon, and Lea Kaspar have created a visualization[1] of the existing global internet governance ecosystem that provides a good glimpse into their complexity.

Amidst ongoing processes led by UNESCO, the ITU, and other non-UN entities, Brazil has stepped into the picture. The timing could not be better. The origins of NETmundial are closely connected with the Snowden revelations. As Brazilian president Dilma Rousseff was personally affected by the NSA espionage, the case stirred a great deal of political furor, and the Brazilian government moved quickly to respond. This resulted in her cancellation of a state visit to the US and her now famous speech before the UN. During the Rousseff´s remarks at the opening of the 68th UN General Assembly in September 2013, [2] she stated that the espionage "affects the international community itself and demands a response from it." She also announced that Brazil would develop proposals for the establishment of a "civilian multilateral framework for the governance and use of the internet."

In October, Rousseff met with ICANN CEO Fadi Chehadé in Brasilia, Brazil's capital. Shortly thereafter, the two announced that Brazil would host an "international summit of government, industry, civil society and academia" in April 2014. The term "summit" was later replaced by "conference," avoiding the connotation that it would be exclusively a governmental meeting.

The organizational efforts for NETmundial followed suit, with further arrangements and negotiations taking place during the Internet Governance Forum in Bali (October 2013), and at the ICANN meeting in Buenos Aires (November 2013). A clear sign that Brazil was increasing its participation in internet governance processes was the attendance of high-level governmental officials at these meetings, including Minister of Communications Paulo Bernardo, members of the Brazilian Telecommunications Agency, and the Ministry of Foreign Relations.

In November, the Brazilian Internet Steering Committee (CGI.br) released further details indicating that the conference would be organized by CGI.br in partnership with 1Net, an "open platform" that emerged out of the efforts to draft the "Montevideo Statement on the Future of Internet Cooperation,"[3] released on October 7, 2013 after a meeting of several multistakeholder technical standards organizations (IETF, W3C, ICANN and others). CGI.br also identified the two principal objectives of the conference:

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1   http://www.gp-digital.org/publication/Internet-governance-processes-visualising-the-playing-field/

2   Dilma Rousseff, "Remarks by Dilma Rousseff at the UN 68th General Assembly," Voltaire Network, September 24, 2013, http://www.voltairenet.org/article180382.html.

3   "Montevideo Statement on the Future of Internet Cooperation," ICANN, October 7, 2013, https://www.icann.org/en/news/announcements/announcement-07oct13-en.htm.

(a) the elaboration of a set of international principles of internet governance;

(b) to propose a roadmap for future developments of the internet governance ecosystem.

Unlike other processes, NETmundial does not intend to be a recurring, ongoing effort. In principle, it is intended to take place only once – it is something of an experiment. Even if one cannot find it in the official documents, another goal of the conference is to demonstrate in practice a set of "multistakeholder" examples, and to articulate how they could be implemented in other internet governance fora going forward.

A good example of this experimental approach is the co-organization of NETmundial in partnership with 1Net. This has led to some degree of criticism, including debates about the organization's legitimacy to effectively represent the full diversity of "civil society." In support of 1Net, academics such as Milton Mueller have claimed that the organization "is not a movement, but a platform for coordinating the diverse groups in a single place." Without delving deeper into the controversy, such debates demonstrate the challenges of building a balanced and legitimate process that accounts for the issue of agency and representation, an issue that largely remains unresolved in multistakeholder processes.

As Brazilian internet pioneer and CGI.br member Carlos Afonso put it: "The Brazilian government or the group organizing NETmundial will not, of course, be able to reach everyone on a proactive basis. But they are very open, very open, to receive all the suggestions, all the proposals."[4]

What is NETmundial Trying to Achieve?

As mentioned above, the two objectives of NETmundial are the elaboration of a set of international principles of internet governance, and the proposition of a roadmap for future developments of the internet governance ecosystem.

Regarding the elaboration of a set of international principles, Brazil has been involved in an effort similar to this at the national level for quite some time. In 2009, the CGI.br approved an important document called "Principles for the Governance and Use of the Internet."[5] This document created a list of 10 principles, including "freedom, privacy and human rights," "democratic and collaborative governance," and "neutrality of the network."

It is no coincidence that President Rousseff articulated similar principles in her remarks at the UN General Assembly, namely:

1. *Freedom of expression, privacy of the individual and respect for human rights.*
2. *Open, multilateral and democratic governance, carried out with transparency by stimulating collective creativity and the participation of society, Governments and the private sector.*
3. *Universality that ensures the social and human development and the construction of inclusive and non-discriminatory societies.*
4. *Cultural diversity, without the imposition of beliefs, customs and values.*
5. *Neutrality of the network, guided only by technical and ethical criteria, rendering it inadmissible to restrict it for political, commercial, religious or any other purposes."*[6]

Moreover, the Brazilian House of Representatives passed the Marco Civil in March 2014. If the bill is also passed by the Senate, it will be a clear effort to turn those principles into law. Brazil's experience can serve as an inspiration – and a policymaking roadmap – for other countries, beginning with the NETmundial meeting.

It is likely that Brazil will try to project the local experience to the international level. One important aspect in that sense is that Article 24 of the Marco Civil sets forth that internet governance in Brazil must be "governed by multistakeholder mechanisms that are transparent, collaborative and democratic, with the participation

4   Audio recording from ICANN meeting, November 2013, http://audio.icann.org/meetings/buenosaires2013/chehade-ig-20nov13-en.mp3.

5   "Principles for the Governance and Use of the Internet," Brazilian Internet Steering Committee, 2009, http://www.cgi.br/regulamentacao/pdf/resolucao-2009-003-pt-en-es.pdf. Available in English, Portuguese, Spanish.

6   Dilma Rousseff, "Remarks by Dilma Rousseff at the UN 68th General Assembly," Voltaire Network, September 24, 2013, http://www.voltairenet.org/article180382.html.

of the government, the business sector, civil society, and the academic community." This is precisely the governance structure of the CGI.br (Brazilian Internet Steering Committee) itself, which is governed by the same directives, and the organizer of NETmundial.

With NETmundial, one of the goals of the Brazil meeting is to demonstrate that an open approach regarding participation is not only desirable but necessary for internet governance processes. The country adopted this approach in drafting the Marco Civil itself, which was built collaboratively by means of an open online and offline process. It also sets the example for internet governance at the local level, by means of the governance model actually adopted by the CGI.br. This expanded multistakeholder approach is also desired and supported by a number of civil society organizations.[7]

From an international perspective, the NETmundial efforts constrain the Brazilian position regarding the transition of the IANA functions. As the likely origin of the world's first comprehensive "bill of rights" for the internet, and as the host of this meeting, Brazil has distanced itself from the possibility of having the IANA functions undertaken by the International Telecommunication Union, an idea that the country has entertained in the recent past. Brazil is now committed to supporting a transition that points in the direction of an organization that operates within the "global multistakeholder community." It is worth mentioning that this was the expression used by the US Commerce Department to announce its intent to transition the internet domain name (IANA) functions.[8] With NETmundial, Brazil takes a step in the direction of the US, even if the objective is to later propose a "third way." This impression was reinforced by Secretary John Kerry's tweet about the conference that states, "Thanks to Gvt of #Brazil for inviting U.S. to co-host #NETmundial in Sao Paolo. Everyone has a stake in #Internetgovernance."[9]

The State of Play Right Before the Conference

The open call for proposals launched by NETmundial received 188 contributions from 46 different countries. The countries with the largest number of contributions are the United States (31 contributions), Brazil (16), United Kingdom (7) and India (7).

The breakdown of the different sectors contributing is as follows: 31% civil society, 23% business, 15% government, 11% academic community, and 8% technical community.[10] It is important to note that some criticism has emerged regarding the small number of contributions/participation on the part of governments and the technical community.

From the practical perspective, there are concerns about how much of the meeting will be devoted to the discussion of internet principles, seen as a long-term goal, and how much of it will be devoted to the transition of the IANA functions, a short-term goal. Such concerns arise regarding the possibility that the discussion about principles might cast a shadow over the more urgent discussion about the role of ICANN.

In this regard, the Internet Governance Project launched a proposal led by scholars Milton Mueller and Brenden Kuerbis that focused specifically on the transition of IANA. The goal of the proposal is "to resolve the 15-year controversy over the United States government's special relationship to the Internet Corporation for Assigned Names and Numbers (ICANN)." The already controversial[11] proposal "involves removing root zone management functions from ICANN and creating an independent and neutral private sector consortium to take them over."[12] It states that it "will be … formally submitted to NETmundial." This promises to be one of the most important practical debates during the NETmundial event.

7   "Civil society representatives welcome NTIA announcement on transition of key internet domain name functions," *Best Bits Network*, March 16, 2014, http://bestbits.net/ntia-announcement/.

8   "NTIA Announces Intent to Transition Key Internet Domain Name Functions," National Telecommunications and Information Administration, US Department of Commerce, March 14, 2014, http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-Internet-domain-name-functions.

9   Tweet from verified account of John Kerry. Unique link: https://twitter.com/JohnKerry/status/431467951116398592

10   "Submissions to NETmundial," Knowledge Commons, http://www.knowledgecommons.in/brasil/en/internet-governance-meeting-in-brasil-23-24/submissions-to-netmundial/.

11   Monika Ermert, "Privatize, Don't Internationalise, Internet Oversight, Academics Say," *Intellectual Property Watch*, March 4, 2014, http://www.ip-watch.org/2014/03/04/privatize-dont-internationalise-Internet-oversight-academics-say/.

12   Brenden Kuerbis, "A Roadmap for Globalizing IANA," *Internet Governance Project*, March 3, 2014, http://www.Internetgovernance.org/2014/03/03/a-roadmap-for-globalizing-iana/.

In summary, NETmundial is a promising event, but its success will be measured by how much of its discussions and goals will be undertaken by other fora. Ideally, the efforts of NETmundial should become part of the next IGF meetings. But for that to be effective, the IGF itself must evolve. It needs, for instance, the ability to set recommendations going forward. The evolution of IGF may be a critical topic for discussion at NETmundial, as part of its goal is to set the "roadmap for future developments of the internet governance ecosystem."

Ronaldo Lemos is the director of the Rio Institute for Technology & Society, and professor at the Rio de Janeiro State University's Law School. He is member of the Mozilla Foundation Board, and the Access Now Board, among others. He was one of the architects for the "Marco Civil da Internet", a law establishing a bill of rights for the internet in Brazil. Ronaldo earned his LL.B. and LL.D. from the University of São Paulo, and his LL.M. from Harvard Law School. He is currently a non-resident visiting scholar with the MIT Media Lab.

The Ever Evolving Landscape of Internet Governance

By Markus Kummer

NETmundial, to be hosted by the Brazilian govern-ment in late April, will be an opportunity to address some basic questions and concerns governments and users alike have been asking, in various ways, for over a decade. While it may not be possible to provide answers to all open questions and concerns, the Brazil debate will nevertheless be a signal to the world that the multistakeholder community is seeking to fulfil its commitment towards gaining a better understanding of all the different dimensions of internet governance. This will be important as without a clear signal in this regard, the pressure to move to more traditional, top-down inter-governmental arrangements will increase. Ultimately, those who seek a different outcome have to answer the question of how to move to a new consensus. NETmundial can be the beginning of gaining a better understanding of what a new international consensus might look like.

I. Internet Governance at a Crossroads

The internet was built on basic libertarian and demo-cratic axioms; it was developed and deployed outside the sphere of government influence, with the academic and technical communities playing the leading role. Their distributed, informal, and bottom-up decision-making process challenges the traditional world of governments, which is based on the principle of national sovereignty, as enshrined in the UN Charter. Since the 1648 Peace Treaties of Westphalia, national sovereignty has been the cornerstone of how govern-ments envision and conduct global governance and participate in international affairs. Developing countries in particular have a young national identity and attach great importance to the fundamental principle of national sovereignty. Some of these countries wish to "extend national sovereignty into cyber-space," which to many developing countries makes more sense than the abstract notion of multistakeholder governance. In many ways it is a debate between the traditional concept of national sovereignty and the cyberlibertar-ian vision of the world that is best embodied in David D. Clark's famous words "We reject: kings, presidents and voting. We believe in: rough consensus and running code"[13] and in John Perry Barlow's "Declaration of the Independence of Cyberspace."[14] These two visions have dominated the debate on internet governance since its inception more than ten years ago.

2014 will be a pivotal year as the future of the internet and internet governance is at a crossroads. The open question is whether there will be an international consensus on the multistakeholder internet governance model or a shift towards a more intergovernmental model. The internet as a network of networks has enabled the creation of collaborative human networks based on trust. This trust was shared by internet users.[15] Last year's disclosures of pervasive govern-ment surveillance programs were akin to a seismic shift in the internet governance landscape. The large-scale nature of these programs made internet users realize that the chain of trust - which is essential to the proper functioning of the internet - had been broken. This realization created a sense of urgency to review current internet governance arrangements. Major conferences are taking place in 2014 and 2015, providing opportuni-ties to restore trust in the internet and its governance. However, these conferences also pose a threat to the open, global, and interoperable internet, as some gov-ernments will be tempted to impose top-down internet governance arrangements, which could ultimately endanger the internet's openness and lead to its frag-mentation.

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13 In a presentation given at the 24th meeting of the Internet Engi-neering Task Force (IETF).

14 John Perry Barlow, "A Declaration of the Independence of Cyberspace, February 8, 1996." (1996) https://projects.eff.org/~barlow/Declaration-Final.html.

15 The term user refers to all stakeholders – governments, private sector, civil society, academic and technical communities and individual users belonging to all these categories.

II. The History of the Debate

The debate on how best to deal with internet governance has a long history. The internet is now a global resource and a key factor contributing to today's globalized world. It is therefore not a surprise that more and more governments, businesses, and people, including ordinary users, take an interest in issues related to the internet. The internet is no longer exclusively a medium for academic and scientific communities, and today it has huge social and economic impacts for most countries. The internet has become so important that governments consider it to to be part of their critical infrastructure and want both to know how it is being run and to have a say in its governance.

Discussions about how to administer the commercial internet started in the 1990s, but these talks were confined to a circle of insiders. Without delving too deep into the history, it is worthwhile to recall that the Clinton Administration decided that a traditional inter-governmental set-up would be sufficient for the rapidly evolving technology. This was one of the elements that led to the establishment of the Internet Corporation of Assigned Names and Numbers (ICANN) in 1998. Since then, the US Government has retained different levels of oversight over some core internet governance functions. Meanwhile in 1998 in Ottawa, Canada, the Ministers of the Organisation of Economic Cooperation and Development (OECD) met and came to the conclusion that there was no need for any regulation on e-commerce, as regulation might stifle the further evolution of the underlying internet technology. In the same year, the 2nd Ministerial Meeting of the World Trade Organization, held in Geneva, Switzerland, came to a similar conclusion and decided to impose a moratorium on any e-commerce regulation.

While ICANN was being formed and governments were agreeing to take a hands-off approach to the internet, in 1998 the International Telecommunication Union (ITU) held its Plenipotentiary Conference in Minneapolis and agreed to hold a World Summit on the Information Society (WSIS). This proposal was very much in line with traditional UN summits on major issues that face the global community. The underlying motivation of these traditional UN summits is to provide a forum for governments to come together in search of global solutions for major challenges. In short, the objective for WSIS was to apply the traditional governance model to information and communication technologies (ICTs), driven by the internet.

This push for a more regulated internet came to the fore during the preparatory phase of the first phase of WSIS, held in Geneva in 2003, when the term 'internet governance' first emerged. WSIS in 2003 adopted the Geneva Declaration of Principles[16] and introduced the notion of multistakeholder governance. However, the words used in these principles mean different things to different people. For instance, to most governments the term "mulitlateral" refers to classical intergovernmental cooperation, however, non-governmental actors would like to redefine multilateral as multistakeholder cooperation.

At the second phase of WSIS, held in Tunis in 2005, heads of state and governments recognized that the current distributed, bottom-up, multistakeholder internet governance arrangements based on voluntary cooperation between many different organizations were well suited to the underlying distributed technology. WSIS confirmed that "the existing arrangements for internet governance have worked effectively to make the internet the highly robust, dynamic and geographically diverse medium that it is today."[17] The working definition of internet governance, as contained in the Tunis Agenda, was also a major step forward towards the recognition of the legitimacy of multistakeholder processes.[18] In short, one essential conclusion of WSIS was that multistakeholder cooperation at all levels is a precondition for sound and good internet governance and that international coordination cannot work if there is no coordination at national and regional levels. While this was a significant outcome of the WSIS process, governments also made it clear that there was room for improvement. In essence, governments wanted to

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16 *Geneva Declaration of Principles*, (ITU, 2003), para. 48, http://www.itu.int/wsis/docs/geneva/official/dop.html. *"The 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. It should ensure an equitable distribution of resources, facilitate access for all and ensure a stable and secure functioning of the internet, taking into account multilingualism."*

17 *Tunis Agenda for the Information Society* (ITU, 2005), para. 55, http://www.itu.int/wsis/docs2/tunis/off/6rev1.html.

18 "A working definition of internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the internet." Ibid., para. 34.

know how the internet was being run and they wanted to have a say in it.

WSIS did not mark the end of the debate; it was more a kind of truce. It was the beginning of what has become a more intense debate about the future of the internet and what kind of society we want. WSIS took the debate on how to run and manage the internet out of a circle of insiders and put it in the limelight of an international policy debate.

The debate since Tunis has grown in importance because the internet has also grown. Between Geneva and Tunis the internet broke the mark of 1 billion users. Today, there are 2.5 billion users online, and many applications that were in their infancy in the early 2000s are now part of users' everyday experiences. The greater its economic, social, and political weight, the more attention governments will pay to the internet.

III. A Multidimensional Debate

The debates during WSIS and in the IGF show that there are several dimensions to internet governance.

The first dimension concerns issues of polity. The role of governments in managing the internet and the relationship between governments, the private sector, and other stakeholders are key to the debate. Those who defend the traditional intergovernmental approach would like to see governments at the top of the pyramid, while some governments, mainly western democracies, are happy to take a back seat and let the non-government actors take the lead. While the internet community advocates for an open, inclusive, and bottom-up approach to internet governance, it must be recognized that current governance arrangements are very different from the basic architecture and traditional design of international cooperation. The challenge therefore is to reconcile the concept of national sovereignty with the internet model and its borderless nature. While there is no easy way to do this, one way forward could be an evolving concept of "shared sovereignty"[19] over a common public good or,

as termed by WSIS, a "global facility available to the public."[20]

Second, there is a geopolitical dimension with many countries, developing countries in particular, feeling uncomfortable about the role of the US Government, which, for historical reasons, has the ultimate authority over some of the internet's core resources. Critics of the status quo assert that this authority should be shared with the rest of the world, as they consider the internet a global good. Specifically, they compare the situation to the world of telecommunications, which is regulated by the International Telecommunication Union (ITU) where all countries have an equal say through a "one-country, one-vote system." In their view, the same model should apply to the internet. On the other hand, non-governmental stakeholders from all parts of the world make it clear that they feel left out of classical intergovernmental arrangements and prefer that the internet run in a bottom-up collaborative way.

Third, there is a strong developmental dimension to this debate. This has two components: a digital divide issue as well as a participation issue. Developing countries want cheap internet access. Broadband access at a subscription rate of 50 USD/month may seem like a reasonable cost for users in developed economies, but this can be an unsurmountable burden in a country where an average salary may hardly exceed 200 USD. Developing countries, with their limited human and financial resources, also find great difficulty in making their voice heard in distributed governance arrangements and feel marginalized.[21] They feel more at home in the traditional intergovernmental approach of UN processes. What is more, due to the complex fragmented nature of the various internet governance mechanisms, developing countries find it difficult to determine what is going on, which institution is dealing with what aspect of governance, and what possibilities they have to contribute meaningful input to ongoing processes. Despite this, developing countries would like to have a seat at the table and take part in discussions on the internet, as they see the internet as a powerful tool to help them reach objectives for their economic and social development.

19 Sherrill Brown Wells and Samuel F. Jr Wells, "Shared Sovereignty in the European Union: Germany's Economic Governance," *Yale Journal of International Affairs* 3 (2008): 30–43, http://yalejournal.org/wp-content/uploads/2011/01/083203wells.pdf.

20 Ibid.

21 Don MacLean et al., *Louder Voices: Strengthening Developing Country Participation in International ICT Decision-Making*, Report (Panos Institute, February 26, 2009), http://panos.org.uk/wp-content/files/2011/03/louder_voicesGjJeXx.pdf.

Fourth, there is an economic dimension, which, by and large, is also part of the developmental dimension. As in the off-line world, economic dynamics are dominated by multinational players in the Global North. Developing countries find this unfair, and again compare the situation with the telecommunications sector and would like to change charging arrangements and adapt them to the telecom model, i.e. share the cost of international leased lines and move to a "settlement" of internet traffic. This view is also shared by some incumbent telecom operators in developed economies, however, it is rejected by major internet players who see such a model as an antithesis to the architecture of the internet. These players point out that a large amount of the connectivity costs are locally generated and that the right regulatory environment, with liberalized markets and increased competition, will bring down prices. In addition, there is a link to the linguistic and cultural aspects. Internet charges are also linked to local content as users prefer local content when local content exists. In connection with Internet Exchange Points (IXPs), the access to local content will also reduce international charges. In general, it is felt that that the most appropriate level to address issues of access is the national level and that the main locus for policy development and implementation is at the national level.

Fifth, there is the technological dimension. The internet is a new technology based on packet-switching. It took time for regulators familiar with telecommunications to adapt to this new technology. These regulators are used to solutions aimed at a different technology, circuit-switching, and they may be tempted to rely on solutions that are not adapted to the internet's technology.

Finally there is a sixth social and cultural dimension. Human rights in general and freedom of expression in particular rank high in this debate. Western media see the debate on internet governance as an opportunity for authoritarian governments to attempt to stifle the medium and to gain control over its content. This is seen as an attack on the very essence of the internet which from its beginning has been an extraordinary medium of empowerment, providing new levels of access to information and knowledge, irrespective of borders and unprecedented in history. Culture and linguistics are also prominent parts of this debate that strongly link to developmental and political dimensions. The internet developed as a medium based on the English language and as a vehicle for the English language. Many non-native English speakers resented, and still resent, this and take it as another sign of the cultural dominance of the English language. They want to make use of their own language on the internet. Major European languages also based on Latin script had the means to quickly develop their own content and digitalize their written heritage, making it accessible through the internet. But even these languages took some time in developing domain names that are compatible with their own spelling. For languages not based on Latin script, the problem is more complex. Chinese, Japanese, Korean, and Arabic are languages in which huge progress has been made with the introduction of Internationalized Domain Names (IDNs) as these languages have a critical mass to generate their own content. However, languages that are spoken by fewer people face a more arduous up-hill struggle. Their market may be too small for developing commercially viable software that allows the transcription of the language for computer use. This mix of one language's dominance, a perceived better deal for some languages (primarily from rich and developed countries), linked to the absence of their own language from the internet , can lead to a feeling of marginalization, if not alienation for developing non-English countries.

IV. Growing Discontent

The inconclusive debate that dominated WSIS has been simmering in the background since 2005 and continued in the broader UN context. 'Enhanced cooperation' became one of the buzzwords that remained unresolved. Discussions about 'enhanced cooperation' – one of the "WSIS leftovers" – remind us that some governments see limitations in existing multistakeholder processes. Simultaneously, the internet found its way into the discussions of the General Assembly's First Committee that deals with disarmament, global challenges, and threats to peace.

During the World Conference on International Telecommunications (WCIT) in 2012, the debate rekindled and made news headlines. WCIT, in many ways, brought the economic dimension of internet governance to the fore. However, the economic dimension of the WCIT debate overlooked that the best argument in favor of the multistakeholder internet model was the internet's ability to foster creativity, innovation, empowerment, economic growth, and job creation. There is economic evidence that underpins this argument. The Organisation for

Economic Cooperation and Development (OECD) has already unequivocally recognized the internet's economic weight, as have various consultancies.[22] The OECD Internet Economy Outlook 2012[23] highlights the spread of the internet throughout the economy and expects that the internet will continue to expand while businesses, individuals, and governments will find new innovative ways to leverage its potential. Governments also need to be made aware of the underlying philosophy of standards development, based on the Open Standard Paradigm,[24] by the leading standard developing organizations. The approach of "innovation without permission" has fostered the internet's development.

At the same time, WCIT was also very much a wakeup call that revealed many unanswered questions and concerns that developing countries had with respect to the internet. There is no doubt that developing countries face a multi-faceted problem, and that there is no simple solution to solve it. It is an issue that is part of the "digital divide" nexus. However, developing countries may also need assistance to start setting up their IXPs and regional backbones, and developing their local content. WCIT was a very complex negotiation, and it would be oversimplifying to divide the world in two camps, those who signed the treaty and those who did not, as there were some strong supporters for the internet model amongst countries that signed the treaty.

The geopolitical dimension of the internet governance debate was an undercurrent at WCIT. This undercurrent was swept to the surface by the disclosures of the pervasive government surveillance programs in June 2013. Although the surveillance programs had nothing to do with the authority over the IANA functions, critics of the role of the United States conflated the two issues and used these revelations to renew their calls for further globalization of internet governance arrangements. As called for in the Montevideo statement,[25] issued by the leaders of the organizations responsible for the internet's technical infrastructure, the key to the further globalization of internet governance arrangements is a globalization of the IANA functions.

V. The IGF as a Defense Line of Multistakeholderism

The main pillar of the complex internet governance debate after WSIS is the Internet Governance Forum (IGF). In Tunis, heads of state and governments felt there was a need to continue the dialogue on internet governance in a new setting. They gave a mandate to the Secretary-General of the United Nations to convene a new multistakeholder forum for public policy dialogue– the IGF. The IGF mandate is very broad and allows for discussing almost any policy subject related to internet governance. It is also clear, insofar as it states, that the IGF is not a decision-making body.

The IGF and all the national and regional IGF initiatives are the foremost multistakeholder venue that familiarizes governments with the internet model. It is also the only place that touches on all the dimensions of internet governance.

The IGF was meant to provide a platform for a dialogue between governments and the internet community.[26] It was in many ways the beginning of a dialogue between these two different cultures: on the one hand the private sector and the internet community's informal processes and culture of "rough consensus," and on the other hand the more formal, structured world of governments and intergovernmental organizations. In this respect it was a learning process in which both cultures took their first steps towards working with each other.

Quite unlike traditional United Nations processes, the IGF serves to bring people together from various stakeholder groups as equals, but not to make decisions or negotiate. Rather, they discuss, exchange information, and share best practices with each other. While the IGF may not have decision-making abilities, it informs and inspires those who do. The forum facilitates a common understanding of how to maximize internet opportunities, use them for the benefit of all nations and peoples, and address risks and challenges that arise.

22   McKinsey, Boston Consulting
23   *OECD Internet Economy Outlook 2012* (OECD Publishing, 2012), http://www.keepeek.com/oecd/media/science-and-technology/oecd-internet-economy-outlook-2012_9789264086463-en#page1.
24   "Principles," *Open Stand*, n.d., http://open-stand.org/principles/.
25   "Montevideo Statement on the Future of Internet Cooperation," *Internet Society*, October 2013), http://www.internetsociety.org/news/montevideo-statement-future-internet-cooperation.

26   UN Secretary-General Kofi Annan in his address at the inaugural IGF meeting.

From its first meeting in Athens in 2006 to its most recent one in Bali in 2013, the IGF has continuously evolved, and the quality of the dialogue has progressively matured. The IGF has created a sense of community that allows challenging issues to be discussed in an open and frank manner. Part of the value of the multi-stakeholder approach is both agreeing and disagreeing on various issues and encouraging participants to show respect and listen to each other's arguments, positions, and needs.

The lack of decision-making power should not be seen as a weakness, but rather as the strength of the IGF. Nobody needs to be afraid of the IGF. It will not be able to make "the wrong decision." It has no power of redistribution. For example, it will not be able to decide that from now on institution X should no longer be in charge of function B, which should be taken care of by institution Y, and so on. However, the IGF has the power of recognition. It can identify issues that need to be dealt with by the international community, and it can shape the decisions that will be taken in other fora. The governance model of the IGF is built on 'soft governance' and 'soft power.'[27] The IGF uses a 'soft governance' approach to the internet by shaping and informing the decision-making processes of other institutions and governments, and preparing the ground for negotiations that will take place in other fora and not at the IGF meetings themselves. It can identify issues of concern and put them on the international policy agenda. Paradoxically, the apparent weakness may be the comparative advantage of the IGF. In this sense, the IGF can serve as a laboratory, a neutral space, an enlightened space for debate, where all actors can raise issues. Nothing they say at the IGF can be held against them.

It should also be noted that some see the IGF as a model for other international policy areas.[28] In a broader context, the IGF model of bringing all stake-holders together to discuss, on an equal footing, issues of mutual concern can be of interest to other fora. The progressive empowerment of non-governmental actors points to the conclusion that world politics are much more than the sum of relations between governments.

Globalization, fuelled by the rapid development of ICTs with the near instantaneous diffusion of information, makes politics a more complex trans-national process.

VI. Strengthening the IGF

The NETmundial conference comes at a critical juncture. Its focus on principles and the roadmap for the evolution of internet governance should allow for constructive and forward-looking proposals to materialize and reaffirm the basic principles of the multistakeholder model. It will feed into other processes such as the UN process of 'enhanced cooperation'[29] or the ITU's Plenipotentiary Conference. However, these processes are intergovernmental in nature and lack the input and expertise of all the other stakeholders.

This leaves IGF 2014 in September well placed to consider the outputs from NETmundial and all the other processes, and to discuss how best to move forward to rebuild online trust. The IGF has matured sufficiently to take an additional step towards producing more tangible takeaways and the time has come to enable the IGF to assume enhanced responsibilities.

The IGF was not created to provide solutions, but to provide a space for dialogue, to identify problems, and explore possible solutions. In this respect, the IGF has exceeded expectations, it has proved to be a space for discussions that could not have taken place anywhere else. For those who attended the 2006 IGF meeting in Athens, the discussions held in Bali would have been unimaginable. Discussions then were tense, unstructured, and there was much mistrust between stakeholders. The IGF is still evolving and coming into its own, and the shape it will eventually settle into lies in the hands of its stakeholders.

The Bali meeting once again proved the IGF's worth as a "go to place" where the community gathers to share experiences and exchange information. In many ways, it was a defining moment. It lived up to the challenge created by government surveillance and focused on the need to rebuild the trust of internet users. By tackling surveillance head-on, the proverbial elephant

27   Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (PublicAffairs, 2004).

28 John Mathiason, *Internet Governance: The New Frontier of Global Institutions* (Routledge, 2008), 149.

29 Markus Kummer, "Internet Governance: What Is Enhanced Cooperation?," *Internet Society Blog*, July 2, 2012, http://www.internetsociety.org/blog/2012/07/internet-governance-what-e-nhanced-cooperation.

in the room, and by allowing for an open and frank discussion of government surveillance and monitoring, it proved its value. The IGF facilitated this difficult debate and proved that it had matured and lived up to the expectations of participants who wanted to voice their concerns. The underlying theme in Bali was the necessity to rebuild internet users' trust in the Internet, its function, and how it fits into society. There was a general agreement that the IGF was the privileged place to pursue these discussions and that the multistakeholder format was the only way forward.

Discussions about internet principles have been high on the IGF agenda since 2010. At the 2010 IGF meeting in Vilnius, Brazilian internet principles were proposed as a possible model for adoption. While these principles found broad support, the IGF was not ready to take the next step. Similar discussions also took place at subsequent IGF meetings in Nairobi and Baku. In Bali, the IGF was ready to take the discussion forward towards points of convergence.

The IGF has matured and it is now ready take it a step further, towards more tangible outputs or outcomes, as was suggested by the Working Group on IGF Improvement, convened by the Commission on Science and Technology for Development (CSTD).[30]

Given the current challenges and given the necessity to restore trust and confidence in the internet, it is essential to involve all stakeholders, from developed as well as developing countries, in discussions on the future evolution of the internet. The IGF is best placed to take the discussions forward as it provides protection, legitimacy, and credibility to the multistakeholder model, since it is the only truly open and inclusive multistakeholder platform under the UN umbrella. The IGF protects the multistakeholder model by acting as a dam that prevents the discussion from moving into a more traditional intergovernmental setting. It has the legitimacy through its link to the Secretary-General of the United Nations as its convenor and, last but not least, it has the credibility derived from its open and inclusive multistakeholder approach that allows for the input of expert opinions on all issues under discussion.

The IGF so far has very limited resources. For the IGF to respond to current challenges and to strengthen the IGF to enable it to play a more prominent role in the internet governance landscape, it is necessary to put it on a more stable and sustainable financial basis.[31] Reforms will be necessary and one perceived need is for the IGF to produce more concrete take-aways, whatever form they may take. The Internet Society suggests seeking inspiration from the Internet Engineering Task Force (IETF) in terms of producing outcome documents based on voluntary adoption and starting substantive intersessional work.[32]

The NETmundial meeting and the concerns that led to its creation were part of the discussions during the IGF in Bali. Other processes are considering similar questions, such as the Working Group on Enhanced Cooperation of the UN Commission on Science and Technology for Development (CSTD), the WSIS+10 Review as well as the ITU's World Telecommunication Development Conference (WTDC) and Plenipotentiary Conference.

The 2014 IGF Istanbul meeting could be the starting point for such an evolution and take the discussion from NETmundial forward on the long path towards creating a new chain of trust for the internet. This will be a long process, and all stakeholders need to work together in this endeavor. In getting this process started, there is a need to focus on some concrete issues, such as ethical data handling, data protection, and a right to privacy, as essential building blocks in restoring online trust.

2014 will be a crucial year for internet governance going forward. The international community is called upon to reflect what kind of internet we want and how we want to answer the many open questions related to its governance. The many meetings dealing with the internet will strive to find answers, and it is hoped that the community will be able to align itself and find a new international consensus on multistakeholder internet governance. International consensus on internet policies and principles is unlikely to come from only one source; instead it is likely to be derived from the

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30 See recommendations by the CSTD Working Group on Improvements to the IGF, March 16, 2012, http://unctad.org/meetings/en/SessionalDocuments/a67d65_en.pdf.

31 Communication by the European Commission, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=4453.

32 Internet Society, "IGF 2014- Request for Public Input Submission by the Internet Society," February 10, 2014, http://www.internetsociety/sites/default/files/IGF-2014Request-for-Public-Input.pdf.

voluntary adoption of compatible principles developed in different fora. The IGF and its national and regional meetings could play a preeminent role in this regard.

Markus Kummer is the Internet Society's Vice-President for Public Policy. He has extensive experience with Internet policy at the global, regional, and national levels. Before joining the Internet Society in February 2011, he was the Executive Coordinator of the Secretariat supporting the United Nations' Internet Governance Forum. In February 2013, he was appointed by the United Nations as Interim Chair of the Open Consultations and meetings of the IGF Multistakeholder Advisory Group preparing the 2013 IGF annual meeting.

Collaborative Lawmaking as a Knowledge Problem

Lessons learned from Internet Regulation in Brazil and Germany

By Wolfgang Schulz

I. Introduction

The Brazilian "Marco Civil" is a remarkable project with regards to lawmaking in the knowledge society in at least two respects: First, it attempts to create a comprehensive legal framework for the basic information infrastructure of the knowledge society – the internet. Secondly, the process of drafting the law has been highly participatory.[33] Considering that from the beginning the internet has been associated with the promise of participation, it is interesting to observe that this piece of internet legislation has also become a test case for participation by means of internet communication.[34] In this regard, the Marco Civil process is also significant as to how it reconstructs and seeks to change elements of legitimacy. Legitimacy is key to the acceptance of laws and regulations by those affected including citizens, NGOs, governments, and corporations.

In this short essay, I aim to demonstrate the special nature of the current debate about multistakeholderism as a new way for framing issues of legitimacy. Moreover, I wish to describe another way in which the Marco Civil process is innovative, namely as a process for the production of knowledge. Lawmaking – and changes in lawmaking brought about by the internet – tend to be discussed mainly within a paradigm of empowerment.[35] However, the aspect of changes in the knowledge ecology has been neglected. This article addresses lawmaking as a problem of knowledge and attempts to outline what might be considered as "good lawmaking" when looking through this lens. Taking that as a starting point, I share some observations on the Marco Civil process from an outsider's perspective and reflect on some experience gained by policymakers in Germany as they have charted a path towards an internet-adequate regulatory framework.

II. Lawmaking in the Knowledge Society

1. Data, Information and Knowledge

Before we dive into lawmaking and its knowledge aspects we should clarify our understanding of knowledge. Conceptually, knowledge is closely linked to information and data. Gregory Bateson, who is associated with a semiotic approach to information, generally understands information as "a difference that makes a difference."[36] This approach has its roots in the idea of the single difference being the elementary unit of data.

Information in a social sense must make a difference to a sensing being – to us as humans, who are living and communicating in social formations. Based on that, knowledge appears as information that is organized, accumulated, and embedded within a social context.[37]

33 Fabro Steibel, "Designing online deliberation using web 2.0 technologies: drafting a bill of law on internet regulation in Brazil," In *Proceedings of the 6th International Conference on Theory and Practice of Electronic Governance,* 38-43, ACM, 2012.

34 Yair Amichau-Hamburger, Katelyn Y.A. McKenna, and Samuel-Arzan Tal, "E-empowerment: Empowerment by the Internet." *Computers in Human Behavior*, 24, no 5 (2008): 1776-1789; Stephen Coleman, and Jay g. Blumler, *The Internet and Democratic Citizenship: Theory, Practice and Policy*, (Cambridge: Cambridge University Press, 2009).

35 "European e-Participation: Summary Report," European Commission, November 2005, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1499, p. 5,

36 Gregory Bateson, *Steps to an Ecology of Mind*, (New York: Ballantine, 1972; Northvale, New Jersey: Jaron Aronson Inc., 2009) p. 460.

37 Helmut Willke, *Systemisches Wissensmanagement*, From Systemic Knowledge Management. 2nd ed. (Stuttgart: Lucius & Lucius, 2001) p. 11.

Neither information nor knowledge is a resource that can be put into procedures such as organizational management or lawmaking. It has to be constructed by the knowledge-processing individual or organization; however, the creation of context generates a design for the process of learning.

2. The Knowledge Aspect of Lawmaking

Lawmaking is first and foremost a political matter. In a democracy, the definition of what might be considered a social problem and which regulatory means should be applied to solve it, should be designed as a process of "public reasoning".[38]In representative democracies it is, on the one hand, the main task of the parliament to convey democratic legitimacy. On the other hand, the parliament remains the main actor in the process of lawmaking. Notwithstanding the importance of participatory instruments for citizens, multistakeholder forums, and other means of preparing legislation in representative democracies, current procedures are designed in such a way that the decision of the parliament constitutes the transfer of legitimacy.

The "Governance Turn" in regulatory theory has not changed that. The Governance approach merely shows that if one analyses the normative structure in a given field, it is not enough to construe the applicable state-set laws.[39] Aspects such as private ordering or regulation by "code" have to be considered as well. The state gradually may be losing its status as the main organizing actor, yet that does not mean that the state loses its role as the primary entity that sets binding rules which can be seen as the self-legislation of a society.

Coming back to the role of the parliament, in modern democracies the government undertakes both the designing of the actual law and the lawmaking. Meanwhile the function of the parliament is basically to control the actions of government, even though formally the parliament is the main actor in lawmaking.[40]

Against this background we can formulate a first set of criteria for the quality of lawmaking: Are there mechanisms in place that ensure that the lawmaking can in fact realize the will of the people? The above-mentioned practice, that the government is in fact drafting most of the laws, can already be seen as a challenge to this set of criteria for lawmaking. It is plausible to assume that, the more complex the deliberations of lawmaking are, the more likely it is that the government will dominate the parliament as far as knowledge about the actual structures of the field which the law intends to impact.

This leads to a second set of criteria against which the quality of laws can be measured: Good laws have to be functionally adequate, effective, efficient, and implementable.[41] This set of criteria is specifically associated with knowledge problems, and can be illustrated by examples taken from the internet sphere, though similar examples could easily be drawn for biotech or energy regulation as well as other complex fields of society. Examples from the internet domain include: Which aspects of the internet are relevant for the internet's potential to foster innovation? Which policy approaches affect those factors and might, therefore, put the internet economy at risk? Is it technically possible to make the internet "forget" personal data?

If we can assume that, at least generally speaking, there is an information asymmetry between the government and a parliament, then there is an inherent tension between the first set of quality criteria and the second set. To put it differently: a knowledge society

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38 Immanuel Kant, "Beantwortung der Frage: Was ist Aufklärung? [An Answer to the Question: What is Enlightenment?]" *Berlinische Monatsschrift* 12 (1784):pp. 481-494. An English translation can be retrieved from: http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html

39 Gunnar Folke Schuppert, "Governance – auf der Suche nach Konturen eines „anerkannt uneindeutigen Begriffs [Governance – looking for outlines of an "admitted ambiguous term"]," Schuppert/Zürn (eds.), *Governance in einer sich wandelnden Welt. Wiesbaden* 41 (2008): 13-40; Robert O. Keohane, and Joseph S. Nye Jr., "Power and interdependence in the information age," *Foreign Affairs* (1998): 81-94.

40 John Locke, *Second Treatise of Government*, Macpherson Ed. (Indianapolis and Cambridge: Hackett Publishing Company, 1980) http://www.gutenberg.org/files/7370/7370-h/7370-h.htm; Helmuth Schultze-Fielitz, "Theorie und Praxis parlamentarischer Gesetzgebung – besonders des 9. Deutschen Bundestages (1980 – 1983) [Theory and practice in parliamentary lawmaking – especially of the 9th German Bundestag (1980 – 1983)]," (Berlin: Duncker &Humblot, 1988) p. 292; Denis Kibirige Kawooya, "Act of Parliament: The Role of Parliament in the Legislative Process: A Commonwealth Perspective," *European Journal of Law Reform* 12 (2010): 32-57.

41 Helmuth Schultze-Fielitz, "Wege, Umwege oder Holzwege zu besserer Gesetzgebung durch sachverständige Beratung, Begründung, Folgenabschätzung und Wirkungskontrolle [Ways, Detours or wrong tracks to better lawmaking through authorized experts counsel, explanatory statement, impact assessment and outcome control]," *Juristische Zeitung* (2004): 862-871.

must solve the problem of how complex collective decision making – especially, but not restricted to, lawmaking – can be both democratically legitimized and functionally adequate to regulate the internet or other complex fields of society.

There is, however, a third category of quality criteria regarding lawmaking. These revolve around aspects such as transparency and regulatory fit into the existing legal framework. These more formal aspects of good lawmaking are, generally speaking, not affected by the problem discussed here.[42] However, there are interdependencies. Transparency of the lawmaking process can enable other stakeholders to bring in their views as well as their knowledge and their interpretation of reality.

It is plausible to assume that the parliament as an institution faces difficulties in meeting the second set of quality criteria outlined above. There is in fact a group of knowledge brokers ready to fill the informational gaps the parliament has, and those are the lobbyists. Lobbyism is an important factor in the knowledge ecology of modern democracies. However, since not all interests present in a society have the same resources to lobby their interests, there is an inherent tension with democratic principles when the parliament is cognitively dominated by lobbyists.[43]

Lobbyism can be construed as the attempt to regulate regulation; therefore it can make use of all traditional regulatory resources like power, money, and knowledge.[44] If we can assume that the scarce and therefore vital resource in modern democracies is knowledge, it seems rational to deploy a knowledge-based strategy of lobbyism. In helping the politician to understand this complex reality, a lobbyist can try to give any issues the "proper" spin, e.g. as regards cause-and-effect patterns or leading opinions.

3. Multistakeholderism and the Knowledge Problem

The situation becomes even more complex if we consider multistakeholder decision-making environments such as the ecosystem we find in global internet governance. The scope of this article will not discuss the problem of multistakeholder governance seeking for legitimacy.[45] However, we can state that in the absence of formal democratic means of attaining legitimacy, multistakeholder concepts do not necessarily have the above-mentioned tension between conditions that guarantee adequate problem-solving and conditions that ensure democratic legitimization. Conversely, organizations governed by multistakeholder concepts can enhance their legitimation basis through adequate means of knowledge processing. Insofar as traditional lawmaking is one aim of the multistakeholder process, the process itself can be part of the above-mentioned solution to the knowledge problem. Additionally, insofar as an organization involved in the stakeholder-process becomes parliament-like, it can face similar problems as mentioned above.

The working document drafted by the Panel on Global Internet Cooperation and Governance Mechanisms (2014) reflects the knowledge problem at least to some extent. The suggested "expert communities" especially reflects the need for collective learning as an internet governance enabler. Furthermore, the "desirable properties" discussed at the panel's 2013 London meeting include the "exchange of knowledge and expertise" as a property. However, the working document, like other similar documents in this context, does not reflect the knowledge-perspective as a specific issue. This may be due to the fact that the whole process tends to lose touch with the actual problem-solving and decision-making within the governance structure, and contents itself with discussing the governance structure as such. Online participation may have the potential to be at least part of the solution to the knowledge problem. It is through this lens that we now look to the Marco Civil process and the German experience.

42 "Recommendation of the Council on Regulatory Policy and Governance," OECD, pp 4-6, http://www.oecd.org/gov/regulatory-policy/49990817.pdf.

43 Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress - and a Plan to Stop It,* (New York, NY: Twelve/Hachette, 2011); Marc Abélès, "Rethinking NGOs: The Economy of Survival and Global Governance," *Indiana Journal of Global Legal Studies* 15 no. 1 (2008): 241-258.

44 Wolfgang Hoffmann-Riem, "Regulierungswissen in der Regulierung," University of Hamburg, 2012, p. 2, http://www.jura.uni-hamburg.de/public/personen/hoffmann-riem/4.pdf.

45 Jeremy Malcolm, *Multistakeholder Governance and the Internet Governance Forum*, (Terminus Press, 2008) 68-70, 323-333; Joseph S. Nye Jr., and Robert O. Keohane, "Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy," KSG Working Paper No. 01-004, February 2001.

III. Brazil – The Marco Civil Experience

From an outsider's perspective, and focusing on the knowledge aspect of lawmaking, the Marco Civil appears to be remarkable in various aspects.

Regarding the content of the law, it is noteworthy that the regulatory approach is basically using principles to govern the internet. The law does not try to address different regulatory goals by addressing legal cases rather, it seeks to formulate principles. The law takes into account the internet's potential as a field for communication (Art. 3 I) and innovation (Art. 4 III). This technique of regulation can be viewed as a way to deal with knowledge problems. As the internet is an extremely complex sociological entity, it is nearly impossible to define the scope of a rule in a fashion that is not outdated with changes in technology or social practice.

The process of lawmaking has been remarkable as well. It began with collaboration between the Ministry of Justice and a group of professors from the Getulio Vargas Foundation's Center for Technology and Society (CTS-FGV). Including academics in the process of drafting laws significantly changes the knowledge ecology compared to traditional forms of lawmaking. In this case, the team working on the draft law had considerable experiences and remarkable relationships with colleagues abroad, which meant that they could incorporate aspects of laws from other countries, thus ensuring that a Brazilian law would meet international standards on human rights such as the freedom of expression. Most of the academics involved in the initial drafting of the law remained active in the lawmaking process that followed, which interspersed academic knowledge at all stages of the process.

Of course the most discussed aspect of Marco Civil's lawmaking process was the decentralized and open consultation, followed by the debating and drafting of the regulatory framework. This took place in two stages: First in October 2009, experts focused on principles and aspects possibly missing in the initial draft of the law. This process was followed by a second stage where individuals, civil society organizations, and domestic and foreign companies commented on the draft law.

This kind of participatory lawmaking is often discussed in context of "empowerment," neglecting the aspect of knowledge. In drafting internet laws of this nature, the lawmaker has to anticipate the effects different solutions for a regulatory problem can have in different fields of society, in this case especially regarding free speech or economic innovation. In fact, many of the contributions to the Marco Civil draft law focus on the potential effects that bill may have, providing the cognitive basis for lawmaking. Will a specific form of liability be likely to create chilling effects? What means of circumvention are available? What are the most likely reactions of multi-national providers facing regulation? To answers these questions one needs complex, internet-specific knowledge. This wisdom-of-the-crowd effect in lawmaking should be examined more closely in the academic discourse.

The Marco Civil process also demonstrated that the risk of participatory procedures being "high jacked" by interest groups is not a mere phantasm. Individual remarks on the draft from one particular IP address have raised suspicions of political astroturfing.[46]

IV. Experience Gained in Germany – Enquete Commission

Parliaments already have various instruments at their disposal to solve the knowledge problem. There are possibilities for getting insights from stakeholders as well as independent experts in hearings. Furthermore, some parliaments have internal research bureaus that vary greatly in manpower and resources, including the Congressional Research service of the US Congress, the Science and Technology Options Assessment of the European Parliament, the Parliamentary Office of Science and Technology (POST) in Great Britain, the Comitato per la Valutazione delle Scelte Scientifiche

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46 Caroline W. Lee, "The roots of astroturfing," *Contexts* (Winter 2010): 73-75, http://dspace.lafayette.edu:8080/bitstream/handle/10385/638/Lee-Contexts-vol9-no1-2010.pdf?sequence=1; Jacob Ratkiewicz, Michael Conover, Mark Meiss, Bruno Goncalves, Alessandro Flammini, and Filippo Menczer, "Detecting and Tracking Political Abuse in Social Media," *International AAAI Conference on Weblogs and Social Media* (2011): pp. 297-304, http://www.aaai.org/ocs/index.php/ICWSM/ICWSM11/paper/viewFile/2850/3274; Kurt Thomas, "The Role of the Underground Economy in Social Network Spam and Abuse," University of California, Berkeley, 2013, p. 65, http://www.eecs.berkeley.edu/Pubs/TechRpts/2013/EECS-2013-201.pdf.

e Tecnologiche (VAST) in Italy, the Research Department in Estonia, the Service des Etudes et de la documentation of the French National Assembly, and the Research Services ("Wissenschaftlicher Dienst") of the German Bundestag. Additionally, the staff of the parliament itself plays a pivotal role in the knowledge ecology of parliaments.

Some parliaments have additional means at their disposal to tackle structural knowledge problems. The so-called "Enquete Commission" used by parliaments in Germany and Austria is one such tool. The Enquete Commission is a special parliamentary committee commissioned by the parliament to give advice on specific issues, which are outlined in the resolution that authorizes the commission's appointment.[47] The German Bundestag can establish such a commission under Article 56 of the rules of internal procedure to prepare decisions on particularly relevant and extensive fields of decision-making. The idea is to institutionalize a learning process that crosses the line between the territory of the parliament and other organizations. Enquete Commissions are composed of a number of members of parliament and external experts.

Knowledge sociology teaches that diverse perspectives within a committee can produce a specific brand of knowledge that cannot be substituted in any other way.[48] In May 2010, the German parliament established an Enquete Commission on the issue of "Internet and Digital Society." The commission produced suggestions in several volumes of its final report that touched on issues such as data protection, copyrights, media literacy, public sphere and culture, science, and technology.

The impact of these suggestions has so far been limited, however, some suggestions made it into the coalition treaty of the new German government in the fall of 2013. One suggested creating a permanent parliamentary committee on digital society issues, an idea that was put into action in February 2014.

Within the commission, the old rule was upheld: "Who drafts the paper wins the day." Thus, committee members with a back office could deliver more input than those experts who had to do draft papers single-handedly with more limited resources at their disposal. The German Enquete Commission on "Internet and Digital Society" is worth studying because it represents a specific set of different perspectives within the formal framework of a parliamentary commission. The Commission tried to make its work a kind of test case for participation, however, this endeavor was only partly successful.[49] Since I have had the honor to serve on this committee I would like to share some observations from the participation process:

It was not easy to convince the administration of the German parliament that it was not enough for the commission, who was examining the potential of the internet, to be restricted to email communication.

It took some months to establish a feedback platform specifically designed for the Enquete Commission. Additionally it was, and is still, not possible to integrate this platform into the official parliament website, which only had a link to the external platform where citizens were invited to give input. The platform made it possible for citizens to suggest topics for the Enquete Commission and to comment and vote on suggestions others had made for the Commission.

In terms of actual participation not as many citizens as expected really made use of the possibilities the Enquete Commission platform offered them.[50] The general amount of people who participated was rather low, however, some topics were obviously of higher interest than others and received more proposals and ideas. For example, the copyright and interoperability, standards, and free software group received in total 60 sets of comments. The group on education and research received 36 long posts. The group on data

47   Susanne Linn, and Frank Sobolewski, "The German Bundestag: Functions and Procedures. Organization and working methods. The legislation of the Federation." *Rheinbreitbach: Neue Darmstädter Verlagsanstalt* (2010): 42, https://www.btg-bestellservice.de/pdf/80080000.pdf.

48   Volker Born, "Problemorientiertes Wissensmanagement in der Automobilindustrie [Problem oriented Knowledge Management in the automotive industrie],"(Leipzig: Gabler Edition Wissenschaft, 2008), p 35.

49   Katharina Große, "E-participation – the Swiss army knife of politics?" in *Conference for E-Democracy and Open Government*, Parycek, P. and Edelmann, N. (Ed.). (Austria: Donau- Universität Krems, 2013) pp. 45, http://www.diva-portal.org/smash/get/diva2:660884/FULLTEXT01.pdf#page=46.

50   Viktor Mayer-Schönberger, and Zarino Zappia, "Participation and Power: Intermediaries of Open Data," Draft Paper in *1st Berlin Symposium on Internet and Society- October 26-28*, 2011, http://berlinsymposium.org/sites/berlinsymposium.org/files/participation_and_power.pdf.

protection and personal rights had the most contributions, 95 in total.[51]

Additionally, despite the low number of participants, the quality of input – at least in parts – was extremely high. Some suggestions came in the shape of elaborate legal text. The promise of participation was fueled by the fact that the parliament called the participating citizens the "18th expert," putting them on the same level as the 17 external experts in the Enquete Commission. The input could have been even more meaningful if the knowledge aspect had been more in focus. To take an example, the Commission did not ask whether consumers already had come across violation of net neutrality; thus the Commission was restricted to the one case where there had been a complaint filed with the regulator.

All the sub-committees of the committee published drafts of the reports, but there was a major problem that could not be addressed until the end of the working phase of the Commission – this was a problem of timing. To make a credible promise of participation, the whole procedure should have been designed so that the sub-committees could really integrate the feedback given by the members of the public. Since this was not the case, it was sometimes not possible to make use of the public's input. The Commission has documented all the input and made it available for further research, but the impression was, at least partly, that the work of the public had been neglected. This appears to have led to some consternation among the public – one comment on the participation platform suggested that the platform was a placebo and therefore should be abolished.

V. Conclusions

When considering national lawmaking process, even in a multistakeholder environment, the parliament still plays a major role. If we assume that regulation in complex fields, such as the internet, becomes increasingly a knowledge problem, we should not neglect the procedures that organize the gathering, production and construction of knowledge in the process of lawmaking. These case studies demonstrate ways to do this. At

first glance, the Marco Civil process and the Enquete Commission in Germany appear to have very little in common. Both procedures, however, make use of a structural coupling of academic expertise and lawmaking. In Brazil, it was the cooperation with academics when writing the first draft of the Marco Civil. In the German case, the construction of the Commission forced external experts and MPs to work together and create a knowledge base for recommendations to the German parliament. Both instruments – mixed commissions as well as laws drafted by academics – belong to the same toolbox of instruments parliaments can use to gain access to academic knowledge.

Furthermore, the cases demonstrate how important it is to design the whole procedure in a way that enables participation – an attempt that was successful in Brazil but only partly so in Germany. However, the German example reveals that a small number of inputs can make a difference to the knowledge base for decision-making.

To fill this toolbox with more useful instruments and find better, more dynamic ways to use them, we need to do the following:

• Map the variety of instruments which parliaments all over the world use to address the knowledge problem

• Identify best practices

• Better understand the process of construction of knowledge and the development of interpretative paradigms in lawmaking

• Explore ways that the internet can help solve the knowledge problem

• Define rules for lawmaking and especially participation, considering the effects on the knowledge ecology

The development described in this essay will inevitably lead to a more prominent role of academics in the lawmaking process. This must be addressed in reflections on the role of academics and their professional ethics, giving academics a specific role distinguishable from lobbyists and civil society groups. Thus the knowledge ecosystem of law is in need of new rules and self-reflection. When these preconditions are

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51 German Bundestag, "Schlussbericht der Enquete-Kommission Internet und digitale Gesellschaft [Final Report of the Enquete-Commission Internet and Digital Society]," 2013, http://dip21.bundestag.de/dip21/btd/17/125/1712550.pdf.

given, new forms of participation will have the potential to mediate resilient democratic legitimacy for international multistakeholder governance processes.

Wolfgang Schulz holds the university professorship in "Media Law and Public Law including Theoretical Foundations" at the Faculty of Law at the University of Hamburg, which is a joint placement with the Hans Bredow Institute. Previously, Professor Schulz acted as deputy business director as well as head of the Hans Bredow Institute's area of media and telecommunications, and has been a member of the board of directors since 2001. Since 1997, he has taught the optional special subject on information and communication in the Department of Law at the University of Hamburg; he has been also a member of the state office for legal examinations since January 2000. In February 2012 he was also appointed director at the Humboldt Institute for Internet and Society in Berlin.

YES, WE SCAN! Salvaging Public Trust in a Post-Snowden Germany

By Markus Beckedahl

More than half a year has passed since Edward Snowden first revealed the all-encompassing, global surveillance programs of the US National Security Agency. Since then, hardly a day goes by without journalists uncovering further details of a system in which Western intelligence agencies of so-called 'democracies' go far beyond the limits of their own constitutions to spy on people, organizations, and businesses without specific cause. On some days, new disclosures come hourly. Thanks to Snowden, we now know the answer to the question of whether we are being surveilled, but pressing questions remain: How often and by whom is data collected or transferred? Where is it stored? Is it saved forever? And most importantly, how is it used against us?

These questions will be central at the upcoming NETmundial, where tensions between the domestic and international policy realms will be brought to bear as governments and civil society advocates debate the broader implications of the revelations for global internet governance. The primary items on the agenda for NETmundial include developing a set of international principles for the internet and a "roadmap" for the future of global internet governance.

It is difficult to conceive of any "international principle," with integrity, that has not acknowledged and come to grips with the issue of mass surveillance. Consensus on multistakeholderism, on net neutrality, and passages about an "open and free" internet are all built on sand if there is no clear understanding of the workings of surveillance and its consequences.

Germany has occupied a critical position in the global surveillance debate since the Snowden leaks became public. Interestingly, there has been a sharp divide between the reactions of the public and the political elite. As Germany is a key stakeholder in NETmundial, and capable of playing a central role in shaping policy outcomes from the meeting, it is critical to take this divide into account when observing the German government response to the surveillance issue. In this essay, I want to provide some background on these questions—from the perspective of Germany—and explain how various approaches to the issues intersect with the NETmundial agenda.

Civil Liberties and Memories of a Surveillance State in Germany

There are few countries in which the Snowden disclosures have caused as large a reaction as in Germany. Since June 2013, politicians, mass media, civil society organizations, and citizens have discussed its effects nearly daily. Issues such as data protection have triggered great interest and concern in Germany – recent history has made it easy for Germans to imagine that repressive structures could be reintroduced in the country. Given the nature of new digital communication infrastructure, there is wide recognition that future repressive structures could be far more dangerous than any repressive structure of the past. The experience of two dictatorships over the last eighty years has likely generated strong public recognition of the need for civil liberties, and a deep understanding of the importance of data protection and the private sphere as a basis for democracy.

If people fear that everything they communicate might be used against them, they will become cautious in what they say and think. This kind of self-censorship or anticipatory obedience heavily affects freedom of opinion and speech. If people fear retribution for participation in public demonstrations, the freedom of assembly will be affected.

We are fortunate that German civil society has taken stock of these dynamics and developed a strong network of advocacy and resistance to state control. A large community of hackers, bloggers, and activists has successfully fought against laws such as those introducing internet filtering, the ACTA trade agreement, and the EU's data retention directive. Though it currently faces serious problems, the Pirate Party generated

hope for a political overhaul through the internet a few years before. Moreover, Berlin is becoming a safe haven for activists or journalists around Snowden such as Sarah Harrison, Jacob Appelbaum or Laura Poitras who cooperate closely with the weekly newspaper *Der Spiegel*.

The debate surrounding a global system of surveillance conducted by Western intelligence agencies is not new. About fifteen years ago, the "Echelon" disclosures led the European Parliament to set up a board of inquiry. In its final report in 2001, the board described a global system for the interception and inspection of private and commercial communications transmitted via telephone calls, fax, e-mail, and other data traffic by the so-called 'Five Eyes Network' – consisting of the intelligence agencies of Australia, Canada, New Zealand, the UK, and the US.[52]

Unfortunately, the report fell into oblivion immediately after 9/11. Beset by a securitization mania in the name of counter-terrorism, Western states passed one piece of surveillance legislation after another. Although the issue remained a topic seriously discussed at yearly German conferences such as the Chaos Communication Congress and on blogs like netzpolitik.org, critics found it difficult to voice their concerns publicly without being categorized as paranoid conspiracy theorists. Then, in summer 2013, Edward Snowden began to speak.

The German State Responds to the Snowden Leaks

In the weeks following Snowden's disclosures of the international surveillance programs, it was revealed that the German foreign intelligence agency BND ('Bundesnachrichtendienst') had, within a month, transferred 500 million pieces of communications data to the NSA.[53] This news sent shockwaves through the political scene. The Federal Government first reacted

by attempting to downplay the importance of the issue. It stated that these data did not affect any German citizen, but that they were collected as part of intelligence operations in states like Afghanistan.

Ronald Pofalla, then Minister of the Chancellery and Angela Merkel's coordinator for the oversight of German intelligence agencies, declared that any "millionfold violation of basic liberties in Germany" did not exist. He referred to written assurances from the US and the UK governments, according to which both states remained "within rights and law in Germany" and did not conduct any mass surveillance.[54] Doubts arose quickly, especially concerning the choice of phrases such as "in Germany." After all, the US operates the so-called "Dagger Complex," a military base near Darmstadt, from which they can surveil outside of the gaze of German authorities.

The former Minister of the Interior, Hans-Peter Friedrich, travelled to the US and returned defending their surveillance programs. He stated publicly that the US would not spy on Germany due to its status as a "friendly nation," and that all related processes would be in accordance with US law. The German government thereby considered the affair to be over.

Shortly thereafter, it became known that German intelligence agencies had made use of the NSA analysis software "XKeyScore."[55] The agency's defense, that it was only testing the software, was roughly as believable as Bill Clinton's claim that he "didn't inhale" when asked if he had ever smoked marijuana.

As more information was revealed, the government's original narrative crumbled – officials gradually arrived at the realization that their political resilience would depend on their ability to protect citizens' privacy under the law.

The Merkel administration presented the idea of a "No-Spy Agreement" which would be negotiated with the US government to ensure that nobody in Germany

52 *Report on the Existence of a Global System for the Interception of Private and Commercial Communications (ECHELON Interception System)* (European Parliament, July 2001), http://cryptome.org/echelon-ep-fin.htm.

53 Hubert Gude, Laura Poitras, and Marcel Rosenbach, "Mass Data: Transfers from Germany Aid US Surveillance," *Spiegel Online International,* August, 5, 2013, http://www.spiegel.de/international/world/german-intelligence-sends-massive-amounts-of-data-to-the-nsa-a-914821.html.

54 "NSA Spy Scandal: Merkel Aide Says 'Data Protection Being Upheld,'" *Spiegel Online International,* July 25, 2013, http://www.spiegel.de/international/world/ronald-pofalla-germany-did-not-illegally-support-nsa-activity-a-913216.html.

55 "'Prolific Partner': German Intelligence Used NSA Spy Program," *Spiegel Online International*, July 20, 2013, http://www.spiegel.de/international/germany/german-intelligence-agencies-used-nsa-spying-program-a-912173.html.

would be surveilled by the US or German governments from then on.[56] The Minister of the Interior even went so far as to suggest that citizens should protect their privacy on their own. Unfortunately, neither any form of public education nor any sponsorship of necessary programs for digital self-defense were introduced.

To react to the problem at the international level, two initiatives were introduced in the arena. Initially, the German government sought to enshrine digital privacy in a human rights treaty by drafting an additional protocol to the International Covenant on Civil and Political Rights (ICCPR), a legally binding international treaty.[57] The intention was to update its provision on the right to privacy (Article 17) for the digital age. It was supported by Germany, Austria, Hungary, Switzerland, and Liechtenstein, among other nations. The US did not support the initiative and likely would not have signed it.

Shortly thereafter, the Brazilian government proposed drafting a UN resolution calling for the right to privacy in the digital age, with the intention of ending excessive electronic surveillance and considering illegal collection of personal data to be a highly intrusive act. Though the US managed to weaken important components of the resolution before its adoption by the UN General Assembly in December 2013, the US ultimately signed the resolution. German media reacted positively: An optional protocol to the ICCPR would have questioned the general applicability of Article 17 on the right to privacy, but instead it automatically applies to privacy issues in the digital age. Although the resolution is unfortunately not legally binding, it is perceived as an important diplomatic shield against uncontrolled mass surveillance.

The support of both initiatives by the German government can be interpreted as an emergency political reaction: After all, the Federal Government was unable to react adequately to the heavy public criticism caused by Snowden's revelations without taking the risk of upsetting its "friend and partner," the US. By pushing for a reaction at the international level, the government could demonstrate its capacity to act while simultaneously deferring a potential solution to the future.

Post-Snowden Political Fallout

In the midst of the coalition negotiations, new information surfaced: The United States had spied on Chancellor Angela Merkel, along with numerous other political elites, from its embassy in Berlin. The federal government reacted with surprise. According to media reports, Merkel had a private talk with Barack Obama in which she drew a comparison between the ongoing US surveillance programs and the former surveillance apparatus operated by the so called "Stasi," the internal state security and surveillance service of the GDR, where Merkel herself grew up.[58]

Yet the federal government was unable to explain to the public why surveillance of Merkel's cell phone constituted a scandal while the comprehensive surveillance of the entire population was no problem. Officially, the government was still convinced that there was no evidence for mass surveillance apart from media reports.

It remains unclear precisely where the gap lies. Were the responsible parties in the government and intelligence agencies incredibly naive and – despite the "Echelon" scandal and the surrounding debates – unaware of the practices of intelligence agencies, or are German intelligence agencies much more embedded in the NSA surveillance-network than previously expected?

The role of our own German intelligence agencies remains unclear. The world's largest internet exchange point, the DE-CIX, is located in Frankfurt, in the middle of Germany. Under current law, the German foreign intelligence agency BND is allowed to automatically surveil up to 20 percent of communication flows through the DE-CIX. The implementation details remain secret and may not be publicized. A small "G10 Commission" supervises the activity without adequate control capacities, resources, or even technical expertise.

56 Severin Weiland, "Troubling Questions: No-Spy Pact Backfires on Berlin," *Spiefel Online International*, August 13, 2013, http://www.spiegel.de/international/germany/merkel-chief-of-staff-pofalla-announces-german-us-no-spy-pact-a-916353.html.

57 "International Covenant on Civil and Political Rights," United Nationa Human Rights, December 16, 1966, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

58 Ian Traynor, and Paul Lewis, "Merkel compared NSA to Stasi in heated encounter with Obama," *The Gaurdian,* December 17, 2013, http://www.theguardian.com/world/2013/dec/17/merkel-compares-nsa-stasi-obama.

Disclosures suggest that the 20% of communications could have been reinterpreted by the agency so that it surveils significantly more internet traffic than previously expected.

There are also suspicions that the European intelligence agencies surveil each others' citizens under the mantle, "you surveil our citizens, we surveil yours, and afterwards we will legally trade this information with one another." Proven instances of such an exchange between the NSA and the GCHQ supports presumptions that this occurs between other intelligence agencies as well.

In its coalition agreement, the new federal government dealt with the surveillance scandal by promising some form of clarification and an advancement of technical protection possibilities by creating and supporting a national IT security industry, as well as the re-introduction of data retention, which appeared in the coalition agreement document, a non-binding contract in which the political parties proposed an agenda for their future government. The six-month long retention of all communication metadata had already been established in legislation passed between 2008 and 2010. But, after roughly 34,000 citizens brought a class-action lawsuit to the federal constitutional court (the largest class action in the court's history), the court ruled the law unconstitutional.[59] Unfortunately, the ruling only concerned this particular legislation, rather than the practice itself. It explicitly left open a means by which data retention could be re-introduced in accordance with constitutional law.

"Schengennetz" and Other Solutions

While Snowden revealed that the NSA had essentially built up a global data retention system, the new federal government evidently believed that the proper response to the issue was to build a national data retention program. The answer to surveillance came in the form of additional means for conducting more surveillance by which all citizens would be placed under general suspicion without cause. Their communication data – the identity of communicating citizens, the place, the time, and the means of their communication – would be stored for, as of now, an unknown number of months.

At the same time, the former telecommunications monopoly Deutsche Telekom came up with the idea of a national, and then later European, solution of so-called "Schengenrouting."[60] Inspired by unrestricted European border traffic within a certain area with strong external borders, data packets on data links within the EU would not be routed through external countries, in an effort to prevent them from being intercepted, stored, or analyzed. The federal government around Angela Merkel enthusiastically embraced the idea and is currently pushing for its implementation on the EU level together with France and others. The idea certainly has benefits; however, there has not been sufficient discussion about the possible collateral damage that such a program could bring.

There is a risk that the "Schengennetz" may not lead to the objective of less surveillance but may rather shift corresponding powers to the various national intelligence agencies. By intercepting and analyzing data transmission in Europe exclusively on their own, chances are good that European intelligence services can strengthen their negotiation position vis-a-vis the NSA when it comes to data exchange. Another risk is the de-facto abolition of net neutrality. In the months prior to Snowden, Deutsche Telekom was heavily criticized after announcing its intention of ending network neutrality and introducing a regime of "managed services," wherein partner corporations could privilege their own services. Critics claim that the idea of a Schengennetz would lead to a solidification of this "managed services" regime in Europe and become a means of solidifying the market position of the largest European service providers. Further criticism suggests that this routing could reawaken ideas such as block lists and other forms of censorship.

In the meantime, the new coalition has taken the reins of the federal government and is now arguing with the opposition in the Bundestag about the establishment of an NSA board of inquiry. The dispute concerns which area ought to be explored. While everyone agrees that the practices of the NSA and the company call for clarification, the governing coalition is blocking any attempt at scrutinizing the practices of the German intelligence

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59 "Constitutional Court Overturn Data Retention Directive," *Linklaters*, March 17, 2013, http://www.linklaters.com/Publications/Publication1403Newsletter/20100317/Pages/Germany%E2%80%93ConstitutionalCourt.aspx.

60 Jan-Peter Kleinhans, "Schengen-Routing, DE-CIX und die Bedenken der Balkanisierung des Internets," *Netzpolitik.org*, November 13, 2013, https://netzpolitik.org/2013/schengen-routing-de-cix-und-die-bedenken-der-balkanisierung-des-internets/.

agency. If we want to have an honest and progressive discussion that will move the country forward, we need to know: Who knew which details during the largest surveillance scandal in human history? And when exactly did they come to know them?

Challenges for Society

Civil society will not tire of debating these questions. Last fall, roughly 20,000 people gathered in Berlin for the "Freedom not Fear" demonstration.[61] Not a month passes without a petition from influential groups such as writers, lawyers, or NGOs demanding clarification and political consequences and amassing large amounts of media attention.

Above all, the entire scandal is sorely missing any commensurate political consequences. The most important witness in this surveillance scandal, Edward Snowden, remains trapped in Moscow. He would be the right person to help clarify some of this story's many facets. Germany should provide him protection, a safe stay, and question him as a witness.

While nobody outside of the federal government believes that a No-Spy agreement with the United States could actually exist, especially given that this idea has been vetoed numerous times by the Obama Administration, various EU-US data exchange programs should be up for debate. Foremost among these is the so-called "Safe Harbor" agreement that regulates data exchange between the EU and the US. "Safe Harbor" was negotiated under the premise that the same data protection standards concerning personal data of European citizens would be upheld in the US as in the EU.[62] That this is not the case in reality ought to be clear through the practices of Google, Facebook, and others, whose subjection to secret FISA courts connects them directly to the surveillance apparatus. There are other agreements too. Through the Passenger Name Record agreement, US authorities can access flight data. The same holds true in the "SWIFT" agreement that governs the transfer of financial data. Since all of these agreements were clearly negotiated under false pretenses, and since it is

becoming increasingly clear that intelligence agencies are using this data for economic espionage and surveillance of EU citizens, there is only one evident option: the immediate cancellation of these treaties and an end to all unwarranted surveillance.

We are facing a great challenge.

Do we want to accept that the entirety of our digital communications are surveilled, analyzed, and retained? Do we still live in a democracy if we conform our life to this reality and moderate our own communication in anticipatory obedience and sometimes even abstain from speaking our opinions? Or do we already partially live in a surveillance society?

As democratic societies we need to remain active and display a long-standing commitment to these issues. We need to explain the problem, place new disclosures into context, and continue to apply critical public pressure so that we can finally get clarification on these questions: Who exactly is being surveilled? How can we find technical and political solutions that will allow us to regain our private sphere? Above all, we need to prevent these revelations from becoming a study in the feasibility of further surveillance measures. Edward Snowden sent us a warning. We should take it and thank him for the wakeup call.

Currently, German politics are trapped between a historic alliance with the United States and US allies on the one hand, and its own political experiences that gave rise to a fundamental appreciation of civil and political liberties on the other. German politicians must now admit to the supremacy of these freedoms. The international process surrounding NETmundial constitutes an opportunity for Germany to act as a leader in the global establishment and enforcement of human rights in the digital age.

Markus Beckedahl is the founder and head of the blog netzpolitik.org. He is the co-founder of the annual Re:Publica conference in Berlin and of Digitale Gesellschaft (Digital Courage), a Berlin NGO concerned with the defense of digital rights. As an expert on civil liberties in the digital age, he has testified before parliamentary commissions on several occasions.

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61 "Thousands rally in Berlin to protest NSA Internet surveillance," *United Press International,* September 10, 2013, http://www.upi.com/Top_News/Special/2013/09/10/Thousands-rally-in-Berlin-to-protest-NSA-Internet-surveillance/UPI-68021378785720/.

62 "U.S.-EU Safe Harbor Agreement," Export.gov, http://export.gov/safeharbor/eu/eg_main_018476.asp.

Building the Marco Civil: A Brief Review of Brazil's Internet Regulation History

By Juliana Nolasco Ferreira

Is it possible to develop a regulatory framework for the internet that promotes innovation, access to knowledge, and personal privacy? Can this be done while simultaneously upholding legitimate governments' need to defend state and citizen security online? The upcoming NETmundial meeting in São Paulo, Brazil will bring together government representatives, technology companies, legal advocates, academics, and members of the technical community to discuss pressing questions about the future of global internet governance. Brazil is a uniquely appropriate location for such a meeting, as, for nearly six years, internet stakeholders have been debating these very questions under the mantle of the much-heralded Marco Civil da Internet (Civil Framework for the Internet).

Concern surrounding internet regulation gained force in 2008, when Congressman Eduardo Azeredo proposed new text for the Bill on Cybercrime (PL Azeredo[63]), a draft law that had been in legislative limbo since 1999. The bill aimed to establish new criminal offenses that could be, "[committed] by the use of an electronic, digital or similar system, networked computers, or that are applied against devices or communication systems and the like." Debates surrounding the bill reflected a common idea that Brazil needed internet regulation and control, and that this bill could serve that purpose. Supporters also argued that the bill would render Brazil compliant with the Budapest Convention on Cybercrime, an agreement that sought to establish international norms on cybercrime. Although there is some doubt as to whether or not the law actually met the standards of the Convention, signing and complying with the Convention was seen by many as an important step in Brazil's efforts to assert its leadership on technical policy issues both within Latin America and internationally.

Nationally, debates around the bill triggered substantial criticism and fueled a redefinition of a desired framework for internet regulation. One of the first critical papers was a 2007 article by Brazilian legal scholar Ronaldo Lemos,[64] which proposed that, in the interest of promoting innovation in the country, prior to criminalizing online practices there should be a civil regulatory framework for the internet.

June 2008 saw a wave of protests against Azeredo's proposal. Shortly before the bill was to be considered on the Senate floor, André Lemos, professor of Communication at the Federal University of Bahia (UFBA); João Caribé, a digital activist; and Sergio Amadeu, a sociologist and advocate of free software in Brazil, wrote and distributed an online petition in an effort to "veto the Cybercrime Bill - in defense of freedom and the development of knowledge on the Brazilian internet." The petition, which received over 160,000 signatures, emphasized the benefits of an open internet for economic and social development in Brazil. It also highlighted existing problems with the Azeredo Bill, urging legislators to vote against it. The petition read:

> "On the internet, the freedom to create content feeds and is fed by the freedom to create new forms of media, new programs, new technologies, new social networks. Freedom is the basis of knowledge creation. And it is the basis for the development and survival of the internet. [...] [The text] proposed by Senator Eduardo Azeredo would block creative online activities and effectively attack the Internet…it could require all Internet service providers surveil their users, framing each user as probable criminal. It would mean suspicion, fear and the failure of net neutrality. If the bill is approved, thousands

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63 "BRASIL. Projeto de Lei n.º 84, de 1999," February 1999, http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=15028

64 Ronaldo Lemos, "Internet brasileira precisa de marco regulatório civil [The Brazilian Internet needs a civil regulatory framework]," *UOL Noticias*, May 2007, http://tecnologia.uol.com.br/ultnot/2007/05/22/ult4213u98.jhtm.

of internet users will be transformed…into [potential] criminals."[65]

Grassroots networks compared the Draft Law on Cybercrime to "Institutional Act 5"[66](AI-5), one of the toughest acts of Brazil's military regime which enshrined state censorship and surveillance. From this moment forward, the debate gained a popular dimension, departing from the legal discourse of the legislative universe.

In August 2008, a public petition was referred to the Congress requesting a public hearing to discuss the social, economic, political, legal, technological, and scientific impacts of the Cybercrime Bill. Parallel to this, the former Minister of Justice Tarso Genro defended the Brazilian signing of the Budapest Convention. The following year, the Ministry of Justice began drafting a bill intended to replace the law proposed by Senator Azeredo.

Public outcry around the Azeredo bill, and indeed any legislation geared towards reducing online crime, still persisted. In April 2009, organized civil society groups of Rio Grande do Sul – including the Labor Party, various labor unions, and the Free Software Association – sent a letter to the Minister of Justice demanding the discontinuance of the Azeredo Bill. The letter stated that:

"A significant proportion of civil society organizations of Rio Grande do Sul are extremely concerned about the possible approval of the Cybercrimes Bill, proposed by Senator Eduardo Azeredo (PSDB-MG). Just when we debate and fight for a radical democracy in the country, and strive so that there is no electoral discontinuity of our democratic and popular government at the

Federal level, the threat of a law that represents a 'Digital AI-5' emerges. The Azeredo Bill will criminalize common practices on the internet; make our Digital Inclusion projects more expensive; prohibit open networks; worsen legislation regarding intellectual property; legalize surveillance; disrupt collaborative content sites; frontally attack individual privacy and provide mechanisms for political persecution, as there was in the days of dictatorship. We will have a controlled internet, worse than in countries like Saudi Arabia, Nigeria and China. Thus, we claim: Archiving the 'substitute' text organized within the Ministry of Justice; Support for non-approval of PL Azeredo, especially through the deletion of Articles 285-A, 285-B, 163-A and 22, and the constitution of a committee of members from the civil society to draft a proposal for a regulatory civil framework for the internet."[67]

In response to the letter, Genro recognized the public debate, as well as the critiques and problems brought by the Cybercrime Bill. For him, the letter "[...] took the discussion of the bill to a new level, more technical and political and less passionate.[68]" The Minister also softened the text debated within the Ministry of Justice, assuring the agency's commitment to correcting the problems created by the Cybercrime Bill and guaranteeing the participation of civil society in the process.

On June 4, 2009, Special Advisor to the President of the Republic Cezar Alvarez arranged a meeting between President Lula and representatives from various social movements and digital inclusion projects, with the intention of discussing cybercrime issues. This represented the first of various federal government efforts to facilitate and participate in internet regulation discussions, in order to build an alternative to the bill that would satisfy the increasingly firm demands of civil society.

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65 "Pelo veto ao projeto de cibercrimes - Em defesa da liberdade e do progresso do conhecimento na Internet Brasileira [Promoting a veto of the cybercrime bill -- in defense of freedom and progress of knowledge on the Brazilian internet]," *Comunidade de Cibercultura*, 2008, http://www.petitiononline.com/veto2008/petition.html.

66 The Ato Institucional Número 5 (Institutional Act Number 5) was the fifth of seventeen major decrees issued by the military dictatorship in Brazil. One of its consequences was the preliminary censorship of music, films, theater and television (a work could be censored if it was understood as subverting political and moral values) and the censorship of the press and of other means of mass communication.

67 "MINISTRO DA JUSTIÇA RESPONDE A REINVIDICACOES SOBRE PL AZEREDO [Ministry of Justice Responds to Concerns about PL Azeredo]," *blog Direito a Comunicação*, May 2009, http://www.direitoacomunicacao.org.br/content.php?option=com_content&task=view&id=4927

68 "MINISTERIO DA JUSTICA CRITICA LEI SOBRE CRIMES NA INTERNET E QUER VETO A ARTIGOS [Ministry of Justice Criticizes and Wants to Veto Some Articles of Law on Internet Crime]," *Site Jus Brasil*, June 2009, http://direito-do-estado.jusbrasil.com.br/noticias/1060525/ministerio-da-justica-critica-lei-sobre-crimes-na-internet-e-quer-veto-a-artigos.

From Criminal law to a Civil Framework

In June of 2009, President Lula attended the 10th International Free Software Forum in Porto Alegre. Accompanied by Cezar Alvarez, then Secretary of State Dilma Rousseff, and Minister of Justice Tarso Genro, he was greeted by many free software activists, among them Marcelo Branco,[69] a leading activist and organizer of the Forum. In his opening speech, Lula recognized the discontent of the social movement and acknowledged the symbolic precedent that the Cybercrime Bill would promote online censorship. Lula stated:

"So I think that we are living in a revolutionary moment for humanity, in which the press no longer has the power that it had a few years ago, in which information is no longer a selective thing where the owners of information can stage a coup d'état, in which information is no longer a privileged thing. The evening newspaper is already old in the face of the internet, or of the radio broadcast; if it doesn't come out live, if it comes out recorded, it's already gotten out of date compared to the internet. The newspaper is coming to seem very old compared to the internet, and it's getting so old that all the newspapers have created blogs to report on the whole world together with the internet users. Well, these things, these things -- none of us knows where they're going to stop, we don't know, do we? (…) This law here, this law here, it doesn't aim to fix the abuse of the internet. It really tries to impose censorship. What we need, Tarso Genro, my friend, who knows, might be to change the Civil Code, who knows, it might be to change anything. What we need is to make the people who work with the digital issues, with the internet, responsible. We need to create responsibility but not to forbid or punish. It's the police's interest in making a law which lets people go into people's homes to see what people are doing, even confiscating their computers. It's not possible, it's not possible."[70]

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69 Marcelo Branco was also Campus Party Brazil director for three years and the person responsible for President Dilma's Digital Campaign in 2010.

70 "Full Speech of President Lula at Fisl10," *Software Livre Brasil blog,* June 2009, http://softwarelivre.org/portal/fisl10/veja-escute-e-leia-na-integra-o-discurso-do-presidente-lula-no-fisl-10.

Lula's speech marked a critical turning point in the national debate about internet regulation. From this moment forward, it became clear that the President saw the connection between the Azeredo Bill and censorship and the related, requisite need of guaranteed rights on the network.

After Lula's speech, the Ministry of Justice, entrusted with the task of proposing a framework of civil rights for internet regulation in Brazil, approached and signed an agreement with the Centre for Technology and Society at the Getulio Vargas Foundation (CTS-FGV) to design and organize a debate around the issue. Lemos' 2007 article offered a preliminary conceptual framework for the type of law they hoped to develop.

Given the novelty of the theme, the Ministry and CTS-FGV opted for a public consultation that would take shape through two phases. The first phase was an open, online call for comments that allowed participants to submit comments through an open blogging platform or via Twitter. In the second phase, the Ministry of Justice presented a draft law for comments. The consultation was carried out via digital tools because the leaders of the process were committed to making the debate truly inclusive for all internet users in Brazilian society.

The execution of the public consultation depended on the participation of the Ministry of Culture. During this process, all formal public debates surrounding the construction of the bill took place within the Brazilian Digital Culture Forum, the platform created by the Ministry of Culture to bring together people interested in debating the development of public policies and regulatory frameworks for the digital world.

Thus the Marco Civil da Internet began to develop, and a pivotal debate about what Brazilian society wanted for the internet ensued. In the first stage of consultation, the Ministry of Justice proposed a base text divided into three strands representing the key stakeholders: citizens (in response to the debate raised by PL Azeredo, focusing on freedom of expression, withdrawal of content, access and privacy); companies (in response to discussions about intermediary liability in respect of third party content and net neutrality), and government.

The debate on the Marco Civil attracted a community of experts and a broad swath of civil society, leading

to a total of 1,168 comments, countless contributions via Twitter, and numerous mentions in blogs and news. The public consultations allowed society to discuss the issue in a transparent way. The process fused different elements into a coherent response that could be presented as a unified social demand. The process continued until May 2010, when the Ministry of Justice developed a final draft of the bill. In August 24, 2011, President Dilma Rousseff sent the final draft to the Brazilian Congress.

New questions and controversy surrounding the internet debate surfaced in May 2012, when nude photos of famous Brazilian actress Carolina Dieckmann leaked on the net and were widely shared on blogs and news websites. A police investigation launched, and the story rapidly became a hot topic for public gossip. In November of that year, a computer crimes law that called for "…the definition of computer crimes and other matters" was approved and rapidly became known as Carolina Dieckmann Law.[71] Articles were added to the Criminal Code which defined crimes committed in the digital environment, and criminalized such behaviors with penalties of one to five years' imprisonment and a fine.

Later that month, the Azeredo Bill was approved in a condensed version with many of its most controversial points removed, though it added credit card falsification and treason to the criminal code and proposed the creation of a police infrastructure to fight cybercrime. There was some probability that, in the same week, the Marco Civil da Internet would come to a vote. However, due to lack of consensus and doubts around the bill, it was postponed.

Edward Snowden and the Resuscitation of the Marco Civil

In July 2013, on the heels of the initial Edward Snowden disclosures concerning surveillance programs run by the US National Security Agency, Glenn Greenwald published an article in the Brazilian newspaper *O Globo* confirming that Brazil was also a target of US surveillance. The Brazilian government did not hesitate

to react – diplomatic representatives in both the US and Brazil demanded an explanation. In an official statement, Foreign Minister Antonio Patriota wrote:

"The Brazilian Government has received with serious concern the news that the electronic and telephone communications of Brazilian citizens would be the subject of espionage agencies of U.S. intelligence. [...] The Brazilian Government has requested clarification from the U.S. government through the Embassy of Brazil in Washington as well as the United States Ambassador in Brazil. [...] The Brazilian government will promote, within the International Telecommunication Union (ITU) in Geneva, the development of multilateral rules on telecommunications security. In addition, Brazil will launch in the UN initiatives designed to prohibit abuses and to protect the privacy of users of virtual communication networks, establishing clear rules of conduct of States in the field of information and telecommunications to ensure cyber security that protects citizens' rights and preserve the sovereignty of all countries."[72]

On September 24, during the 68th General Assembly of the United Nations in New York, President Dilma Rousseff criticized the actions of espionage in Brazil and indicated that the country would present a multilateral regulatory framework for the internet, encompassing principles such as:

"1 - Freedom of expression, privacy of the individual and respect for human rights.
2 - Open, multilateral and democratic governance, carried out with transparency by stimulating collective creativity and the participation of society, Governments and the private sector.
3 - Universality that ensures the social and human development and the construction of inclusive and non-discriminatory societies
4 - Cultural diversity, without the imposition of beliefs, customs and values.
5 - Neutrality of the network, guided only by technical and ethical criteria, rendering it inadmissible to

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71 Isabela Fraga, "Brazilian lower house approves two cyber crime bills but postpones vote on Internet Bill of Rights," *Knight Center for Journalism in the Americas*, November 8, 2012, https://knightcenter.utexas.edu/blog/00-12025-brazilian-lower-house-approves-two-cyber-crime-bills-postpones-vote-internet-bill-righ.

72 "AS DENÚNCIAS DE ESPIONAGEM E A ATUAÇÃO DO ITAMARATY [Reports on Espionage and Practices of Itamaraty]," *Diplomacia Pública blog*, July 2013, http://diplomaciapublica.itamaraty.gov.br/13-brasil-estados-unidos/29-as-denuncias-de-espionagem-e-a-atuacao-do-itamaraty.

restrict it for political, commercial, religious or any other purposes.

Harnessing the full potential of the internet requires, therefore, responsible regulation, which ensures at the same time freedom of expression, security and respect for human rights[73]".

As a result of Snowden revelations, the issue of internet regulation again became a priority for the Brazilian government. The government realized that the Marco Civil could be an eloquent response to the surveillance issue and position Brazil as a global leader in internet governance and regulatory debates. On September 11, 2013, President Dilma Rousseff appointed a regime of constitutional urgency to the bill, preventing Congress from voting on any other issues until the Marco Civil vote was completed. While this did not happen during the fall, in December 2013 the Marco Civil da Internet locked the agenda of the National Congress – no other vote could take place until the Chamber of Deputies (the lower house of Congress) voted on the bill. On March 25, 2014, the bill was approved by the Chamber of Deputies, and currently, at the time of this essay, the bill is awaiting review by the Senate.

Final Considerations

Over the last six years, Brazilian civil society has developed an acute and globally unique consciousness about the need for a legal framework for the internet that matches the social, economic, and cultural reality of the country. The public and many government officials recognize that promoting access to knowledge and culture will be crucial to the development of the nation.

The subject of internet regulation remains controversial worldwide. Issues surrounding freedom of speech, innovation, and illicit acts online continue to challenge existing legal frameworks, which are increasingly insufficient in providing answers to phenomena in the virtual world. The Brazilian experience in the face of this challenge saw the debate transform from a proposed cybercrime law, which could criminalize many ordinary online activities, to a civil framework of internet rights. During this process, organized civil society played an important role in shaping the debate around desirable forms of regulation, and mobilizing a dialogue with the government. This resulted in changes in the way internet regulation was seen and prioritized, and facilitated the proposal of regulation alternatives.

It is important to note that the issue of internet regulation gained prominence in Brazil when the internet became widely used in the country and part of daily life. In a way, opposition to the Cybercrime Bill was highlighted because society perceived that it would affect their lives. Widespread public use of the internet as an economic, educational, and cultural tool was a breakpoint in this regard.

Similarly, the accumulation of knowledge around the subject inside the government resulted in new alternatives to internet regulation. Over the ten years of debates surrounding internet regulation in Brazil, the country has seen a dramatic intensification of the internet's use.

Finally, the Marco Civil da Internet was conceived through extensive debates and public consultations. If approved, the bill will be innovative, built through a radical democratic process with broad popular participation, and cover issues concerning technological innovation, digital opportunities, and the creation of a more democratic information society.

Juliana Ferreira Nolasco is a graduate student in Public Administration and Government at the Getulio Vargas Foundation and researcher at Group Research and Education in Innovation (Gepi) of Law FGV (FGV-SP). She worked as the General Coordinator of the Cultural Economy and Cultural Studies of the Ministry of Culture.

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73 "Statement by H. E. Dilma Rousseff, UN 68th General Assembly," GA Debate, United Nations, September 24, 2013, http://gadebate.un.org/sites/default/files/gastatements/68/BR_en.pdf.

An Analysis of the NETmundial Inputs and Draft Output

By Richard Hill[1][*]

1   * President, Association for Proper Internet Governance <www.apig.ch>. The first four sections of this paper have been previously published by Intellectual Property Watch <http://www.ip-watch.org/2014/03/20/quantitative-analysis-of-contributions-to-netmundial-meeting/>.

Summary

A quantitative analysis of the positions expressed with respect to certain issues in the contributions submitted to the The Global Multistakeholder Meeting on the Future of Internet Governance (NETMundial) reveals the following:

•   There is broad support for: improving security; ensuring respect for privacy; ensuring freedom of expression; and globalizing the IANA function.

•   There is no consensus on the proper role of governments, that is, whether the roles as outlined in the Tunis Agenda are appropriate, or whether governments should have equal status with other stakeholders.

•   There is significant support for increasing the participation of developing countries in discussions of internet governance.

•   There is some support for: ensuring universal access; strengthening the Internet Governance Forum; interventions to foster infrastructure development and deployment; and interventions to ensure network neutrality.

A leaked version of an early draft of a proposed output document appears to fairly reflect the input documents, but some participants might be uncomfortable with some portions of that draft. The final output might of course differ significantly from the leaked draft.

1. The NETmundial Meeting

According to its website, NETmundial will focus on crafting internet governance principles and proposing a roadmap for the further evolution of the internet governance ecosystem.

A total of 187 contributions were submitted to the meeting. Most of them agreed that certain key principles should apply to the internet and its governance. That consensus can be summarized as follows:

•   Offline rights apply equally online.
•   The internet should remain a single, universal, interconnected, interoperable, secure, stable, resilient, sustainable, free, and trusted network.
•   Internet governance should involve all stakeholders from all parts of the world and be open, transparent, accountable, and bottom up.
•   Policies should create a stable and predictable environment that fosters investment and favors innovation.

These, however, are general, high-level principles, whose implementation is open to interpretation.

For example, while there is consensus that free speech must be protected online as well as offline, there is no consensus regarding whether restrictions that exist in some particular countries violate existing human rights laws.[74]

Similarly, there is no agreement on how best to foster investment in broadband infrastructure, in particular, whether net neutrality regulations should be imposed. In order to gather more information from the rich set of data provided by the 187 contributions, we have analyzed them to determine what position each takes with respect to certain key issues that have been discussed for the past ten years.[75]

74   For a more detailed discussion, see section 2 of Richard Hill, "The Internet, its governance, and the multistakeholder model." *Info*, 16 (2014): 16-46, http://goo.gl/ejIk4Y.   An early version is available online as "Internet as a paradigm" at http://goo.gl/qA4Zzi.
75   For a summary of this issue, see Richard hill, "UN Internet Governance Discussion: Why Did It Fail To Agree And Why Will

These key issues are:

• asymmetric role of the US government with respect to the management of internet domain names and addresses,
• financial issues related to the increasing use of the internet, and
• issues related to the relative lack of security of the internet, including lack of privacy.

Another issue has recently emerged: whether the roles and responsibilities outlined in the Tunis Agenda for the different stakeholders are still valid (in particular that policy authority for internet-related public policy issues is the sovereign right of States) or whether all stakeholders should have equal status (also referred to as equal footing).

The following issues were also mentioned in several contributions:

• freedom of expression,
• demilitarization of the internet (cyberpeace),
• whether new international agreements or organizations are needed,
• net neutrality and government intervention with respect to infrastructure,
• universal access,
• increased participation by developing countries in internet governance discussions, and
• strengthening the IGF.

Each of the contributions was coded according to its source (e.g. government, private sector, civil society, academia) and geographic origin (e.g. developed countries, developing countries). Then each contribution was examined to determine whether it expressed a clear position with respect to the issues outlined above. Then, we counted the number of contributions that expressed a clear position with respect to each of these issues. The full set of data can be found at http://www.apig.ch/Quant%20Netmundial.xls.   It is important to note that in some cases, it was not clear whether the contribution was really expressing a clear position. Further, some coding errors may have been made, thus the data should be treated as indicative,

not definitive. But, as we will see below, a few coding errors are not likely to have affected the overall results of the analysis.

It must be stressed that this is a partial analysis of the contributions, in the sense that many did not address any of the specific issues outlined above. Those contributions are of course valuable and this analysis should not be taken to imply otherwise.

2. Results of the Analysis

The issues that were most frequently mentioned in the contributions were, in order:

• security (86)[76]
• privacy (74)
• freedom of expression (73)
• globalization of IANA (55)
• role of governments (52) – though there was no consensus on what that role should be
• better developing country participation (42)
• universal access (35)
• strengthening IGF (29)
• infrastructure intervention (29)
• net neutrality (26)

There were relatively few mentions of the other issues outlined above, namely:

• new international agreements (16)
• new organizations (10)
• financial issues (13)
• tax issues (6)
• cyberpeace (7)

While not tabulated in this workbook, the following are worth noting:

• Several contributions called on states to limit the liability of intermediaries. Such measures would be significant restrictions of national sovereignty, and such restrictions are usually negotiated internationally, for example as treaties. The contributions in question, however, did not call for negotiation of new treaties.
• A few contributions from the private sector called on states not to impose local data storage require-

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Discussions Continue?" *Intellectual Property Watch,* March 3, 2014, http://goo.gl/hQclfq. For more details, see section 5.1.2 of Richard Hill, "The Future of Internet Governance: Dystopia, Utopia, or Realpolitik," February 2013, http://goo.gl/6Ja66f.

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76 The number after the issue indicates the number of contributions that mentioned the issue.

ments, that is, to allow the free flow of data across borders.

- Two contributions called for the creation of competitive roots for the domain name system, to be used in parallel with the current root managed by ICANN. One contribution called for continuing with a single root.

3. Role of Governments

Regarding the role of governments, 32 contributions favored the role outlined in the Tunis Agenda, while 30 took the view that governments should have equal status (or equal footing) with other stakeholders. Thus there is no consensus on this issue.

It is instructive to see which sources, or stakeholders, favored which position. In essence, the roles as outlined in the Tunis Agenda were favored by governments, while the private sector favored equal status. Civil society was divided on this issue, with US organizations favoring equal status, while developing country organizations favored the Tunis Agenda; developed country organizations expressed split views.

The divergence of views on this issue between governments and the private sector would appear logical, for the reasons outlined in 5.1.2 of "The Future of Internet Governance: Dystopia, Utopia, or Realpolitik?."

4. Other Comments

The following are other note-worthy takeaways from our analysis.

Universal access, infrastructure and net neutrality

The universal access issue was mentioned mostly in contributions from civil society, with some support from developing country governments. The same holds for infrastructure intervention and network neutrality.

Financial issues

Thirty-five (35) contributions mentioned universal access, but only 13 mentioned financial issues. Yet it is widely understood that the relatively high cost of accessing the internet in developing countries is an impediment to universal access (see for example section 2.1.2 of "The Future of Internet Governance: Dystopia,

Utopia, or Realpolitik?"). The financial issues were mentioned primarily in contributions from civil society.

Taxation

Fifteen (15) developed country governments submitted a contribution, but only one mentioned the taxation issue. Yet the St. Petersburg G20 declaration states that there is a need to identify the main difficulties that the digital economy poses for the application of existing international tax rules and to develop detailed options to address these difficulties.[77] The taxation issue was mentioned almost exclusively in contributions from civil society.

Other issues

The cyberpeace issue was mentioned primarily in contributions from civil society. The need for new international agreements was mentioned in some contributions from governments, civil society, and academia. The need for new organizations was mentioned primarily in some contributions from civil society, with some support from the technical community.

5. Output Document

On April 8, 2014, a draft version of the proposed output document of the meeting was leaked.[78] Careful reading of that draft indicates that it does largely reflect the input papers, even if some particular points could perhaps be added. In particular, I am of the view that the following should be added:

- Add one new item to the Human Rights catalog under II on page 3:

  "Democracy: everyone shall have the right and opportunity to take part in the conduct of public affairs and public policy decisions, directly or through freely chosen representatives."

- At the end of the second paragraph of 4 of III, on page 9, add:

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77 See G20 Leaders, "Tax Annex to the St. Petersburg Declaration," G20, 6 September 2013, Annex, Action 1, http://goo.gl/Q9m7ZH.

78   Executive Stakeholder Committee, "NETmundial Executive Stakeholder committee (EMC) Outcome Document." *Wikileaks*, April 8, 2014, http://www.wikileaks.org/netmundial-outcome/.

"The operational aspects must not be subject to the law of any one country, that is, they must benefit from immunity of jurisdiction."

Another analysis of the draft output, produced by Knowledge Commons Brasil, also agrees that the leaked document generally reflects the input from the 187 submissions.[79]

It must be noted that some specific portions of the draft output document may raise some questions. For example, such portions include: the document's language on limiting military use of the internet; the rather strong language on limiting surveillance; the specific deadline imposed for the United States to relinquish its supervision of certain aspects of the internet domain name and addressing system; the absence for any call for new bodies or new mechanisms; and the rather strong endorsement of the Internet Governance Forum.

Thus it would not be surprising if the document was revised and if the final output document was significantly different from the leaked draft.

Since the NETmundial meeting is an informal meeting in which all stakeholders participate on an equal footing, it is my view that it should not make any decisions. Importance should therefore be placed on the final output document, which could provide valuable input to various decision-making entities, including technical standardization bodies and policy-making bodies such as national parliaments and intergovernmental organizations.

Richard Hill is the principal of Hill & Associates in Geneva, Switzerland. He has an extensive background in information systems, telecommunications, negotiation, mediation, and conflict management. Richard was the Secretary for the ITU-T Study Groups dealing with numbering and tariffing issues, network operations, and economic and policy issues; he was the Secretary for the preparatory process for the 2012 World Conference on International Telecommunications and headed the secretariat team dealing with substantive issues at the Conference. He has facilitated numerous complex international negotiations regarding sensitive policy matters. Richard holds a Ph.D. in Statistics from Harvard University and a B.S. in Mathematics from M.I.T. Prior to his studies in the US he obtained the Maturita' from the Liceo Scientifico A. Righi in Rome, Italy.

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79   Knowledge Commons Brasil, "Statement on NETmundial Outcome Document (Leaked by Wikileaks on 8 April 2014)," April 2014, http://www.knowledgecommons.in/brasil/en/internet-governance-meeting-in-brasil-23-24/statement-on-draft-netmundial-document-leaked-by-wikileaks-on-8-april-2014/.

Now Let's Hear From the Users: Human Rights and the Global Internet Public

By Ellery Biddle

Every essay in this collection assumes basic goals of upholding human rights and protecting openness on the global internet. In internet governance flow charts, we often see institutions such as ICANN and IETF at the top of the chain, typically followed by intergovernmental governance groups such as WIPO, a layer of national governments, companies, and then finally, members of the internet-using public, bearing the unapologetically wonky "end user" moniker. While institutions such as ICANN and the IETF have a tremendous impact on the core functionalities of the global internet, and hence the experience of all actors in this ecosystem, it is typically at the level of national legislation and corporate practice where we can most easily see policy determining the experiences of users.

One could argue that until recently, the global public had a somewhat balkanized understanding of what influence national governments have on the internet. Users in countries where censorship is pervasive and highly noticeable were aware of the boundaries set by national law within the online realm. Average users in other parts of the world were less cognizant. If there is one thing we can universally agree on about Edward Snowden, it is that the documents he leaked to the world brought most internet users into a state of active recognition about government power over the internet and role of companies within this field. This is a good thing. It is easy to lose sight of the general public's understanding and wants when one is immersed in the internet and human rights world—this has been an exciting year in that regard.

As the essays in this collection demonstrate, the Marco Civil process in Brazil and the broad range of responses to surveillance revelations in Germany suggest that under the right conditions, a concerned public can play a powerful role in exposing and demanding the need for governments to uphold their commitments to human rights.

But it is still difficult to understand precisely where the NETmundial meeting fits in the broader storyline. We know that documents leaked by Edward Snowden set off a chain of events (revelations of corporate and political spying in Brazil and Dilma Rousseff's subsequent lambasting of Barack Obama at the UN General Assembly[80])   that led to NETmundial. Curiously however, the two stated objectives of NETmundial, developing principles for international internet governance and a "roadmap" for the global governance ecosystem, do not sound like a means to a more privacy-protective global internet environment. There is glaring disconnect between the policy problem that triggered the response and the response itself.

It comes as no surprise that global internet governance debates tend to be somewhat removed from national-level context--if stakeholders truly sought to find practicable consensus on the myriad policy issues they face, the fights would be bitter and the results likely unfavorable for most parties involved. But it is also difficult to wrestle with this reality in a world in which national level policy and the actions of national governments indisputably present the foremost challenge to promoting and protecting human rights in the digital era. Despite their participation in global governance forums and their pledges to uphold human rights within the UN system, governments across all five continents maintain powerful regimes of censorship, surveillance, and persecution of political critics.

In his essay for this collection, Markus Kummer highlights the significance of the Tunis Agenda within global internet governance discussions and debates that have taken place since its drafting.[81] Developed at the original World Summit on the Information Society (WSIS), it is the key document of reference for the Internet Governance Forum (an annual meeting born

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80 Julian Borger, "Brazilian president: US surveillance a 'breach of international law'," *The Guardian*, September 24, 2013, http://www.theguardian.com/world/2013/sep/24/brazil-president-un-speech-nsa-surveillance.

81 "Tunis Agenda for the Information Society," World Summit on Information Society, International Telecommunication Union, November 18, 2005, https://www.itu.int/wsis/docs2/tunis/off/6rev1.html.

out of the WSIS) and provides critical protection for multistakeholderism and human rights interests in other UN forums such as the ITU and the UN Committee on Technology, Science and Development. It articulates strong principles and human rights norms to be applied to policymaking for the internet and establishes clear if general parameters for these policymaking processes. Most notably, it presents the concept of multistake-holder participation in internet governance not only as a favorable approach, but as one that would be necessary to uphold and preserve the unique, decentralized nature of the global internet.

It is bizarre, though rarely noted, that the Tunis agenda was developed in 2005, during the regime of Zine El Abidine Ben Ali.[82] Some of the most damaging evidence of human rights violations committed by the Ben Ali government comes from the period during which the WSIS meetings took place. For many digital and human rights activists, it is difficult to accept the legitimacy of the Tunis Agenda when censorship, surveillance, and persecution of government critics were hallmarks of the Tunisian government at that time, not to mention many other governments involved in its drafting.

Objectively speaking, the Tunis Agenda envisions a policy environment for the internet that most human rights advocates would agree is much stronger than the current status quo of global internet freedom. At the end of the day, if national governments can surveil, censor, or even imprison their critics with little consequence, what good are documents such as the Tunis Agenda or the countless outcomes drafted for UN meetings, often drafted before the meetings even take place?

NETmundial promises to carry many of the hallmarks of the global internet governance landscape described here. But it is somewhat comforting that the particular context and circumstances, both global and national, are unique. Despite powerful corporate and government interests that could tip the scales, when it comes to the internet there are proven, politically powerful forces of progressive policy thinking in Brazil.

This was most clearly demonstrated last month in March, when Brazil's Chamber of Deputies voted on and approved the country's landmark Marco Civil bill.

In stark contrast to Tunis, Baku, or Dubai, the NETmundial will be held in a country where there is a robust debate underway about human rights and the internet—a debate in which the public is not only deeply invested but has also become heavily influential.

Essays in this collection by Juliana Nolasco, Ronaldo Lemos, and Markus Beckedahl, all expound upon specific historical roots of public outrage over surveillance and censorship, helping us to understand the particular meaning of internet regulation to publics in post-dictatorial states. The recent memory of authoritarianism in Brazil and Germany has driven powerful currents of public distrust in government, alongside public support for strong, rights-protective policies pertaining to digital communications.

It is reasonable to argue that Dilma Rousseff's support for the Marco Civil and insistence on carrying the global internet governance debate forward was triggered not simply by the Snowden revelations, but by the political weight and public fury that this news carried. Rousseff was able to consolidate support for the Marco Civil within the government because of the unique political circumstances of the moment— the NSA surveillance programs revealed by Edward Snowden demanded a powerful response that legislators had to get behind. That Rousseff was able to make this about national sovereignty *and* the protection of civil liberties in Brazil, is a remarkable political achievement, if it holds. How this will play out in determining the actual rights and protections enjoyed by Brazilian internet users remains to be seen.

It is similarly unclear precisely how Marco Civil will figure into the NETmundial, or how its presumed passage will or will not affect other participating governments. It is, however, encouraging to see a high-profile global governance meeting happening in a country where a legitimate debate is taking place, and where civil society and the general public have had a real and impactful voice. Context for these events matters very much.

There is reason to believe that this meeting will open a new chapter for the global internet governance debate—that the unique, combined effects of the Snowden revelations and the opportunism of the Brazilian government and ICANN will set a new tone for the these discussions as they move forward in the coming years. What is less certain is whether

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82 Sami Ben Gharbia, "Chelsea Manning and the Arab Spring," *Medium*, Fall 2013, https://medium.com/republic-of-tunisia/1907fec77df1.

these governance mechanisms will one day serve to hold governments accountable for their actions at the national level. What is clear is that the public and civil society experts must continue to press for account-ability using all the tools we know— legal advocacy, technical research and investigation, and the simple undeniably powerful act of raising our voices.

Ellery Roberts Biddle is a researcher and advocate for free expression, access to information, and open structures for Internet governance. She is the editor of Global Voices Advocacy, a project of the Global Voices international citizen media network that reports on threats to online speech and supports efforts to improve Internet policy and practice worldwide. Prior to joining the staff of Global Voices, Ellery worked as a policy analyst with the Center for Democracy & Technology. She has conducted extensive research on blogging communities and the politics of online expression in Cuba, both as a graduate student at the University of Chicago's Center for Latin American Studies and at Harvard's Berkman Center for Internet and Society.